JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 September 2006 *

In Case T-322/01,

Roquette Frères SA, established in Lestrem (France), represented by O. Prost, D. Voillemot and A. Choffel, lawyers,

applicant,

v

Commission of the European Communities, represented initially by A. Bouquet, W. Wils, A. Whelan and F. Lelièvre, and subsequently by A. Bouquet, W. Wils and A. Whelan, acting as Agents, and by A. Condomines and J. Liygonie, lawyers,

defendant,

APPLICATION, firstly, for annulment of Articles 1 and 3 of Decision C(2001) 2931 final of 2 October 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium

* Language of the case: French

gluconate) in so far as they set the fine imposed on the applicant, secondly, for reduction of the amount of the fine and, thirdly, for repayment to the applicant of the amounts unlawfully imposed,

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

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

Registrar: I. Natsinas, Administrator,

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

gives the following

Judgment

Facts

1 Roquette Frères SA ('Roquette') is a company active in the chemical industry. It produces inter alia sodium gluconate.

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

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

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

5 On 18 February 1998, the Commission sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation

implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) to the main producers, importers, exporters and purchasers of sodium gluconate in Europe.

6 Following receipt of the request for information, Fujisawa approached the Commission and informed it that it had cooperated with the United States authorities in the course of the investigation described above and that it wished to cooperate with the Commission under the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). On 12 May 1998, following a meeting with the Commission on 1 April 1998, Fujisawa supplied a written statement and a file comprising a summary of the cartel's history and a number of documents.

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

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

9 On 2 March 1999, the Commission sent detailed requests for information to Glucona, Roquette and Jungbunzlauer. By letters of 14, 19 and 20 April 1999, those undertakings announced to the Commission their intention to cooperate and provided it with certain information concerning the cartel. On 25 October 1999, the Commission sent additional requests for information to ADM, Fujisawa, Glucona, Roquette and Jungbunzlauer.

10 On 17 May 2000, the Commission, on the basis of the information supplied to it, sent a statement of objections to Roquette and the other undertakings concerned for infringement of Article 81(1) EC and Article 53(1) of the Agreement on the EEA ('the EEA Agreement'). Roquette and all the other undertakings concerned submitted written observations in response to the Commission's objections. None of the parties requested an oral hearing, nor did they substantially contest the facts as set out in the statement of objections.

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

12 On 2 October 2001, the Commission adopted Decision C(2001) 2931 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium gluconate) ('the Decision'). The Decision was notified to Roquette by letter of 11 October 2001.

13 The Decision includes the following provisions:

'*Article 1*

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

The duration of the infringement was as follows:

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

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

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

...

Article 3

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

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

...'

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

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

16 In that context, as regards the gravity of the infringement, the Commission found, first, that, taking into account the nature of the infringement, its actual impact on the EEA sodium gluconate market and the size of the relevant geographic market, the undertakings concerned had committed a very serious infringement (recital 371 of the Decision).

17 Next, the Commission considered that it was necessary to take account of the actual economic capacity to cause significant damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, taking as its basis the relevant undertakings' worldwide turnover from the sale of sodium gluconate in 1995, the last year of the infringement, figures which were communicated by the undertakings concerned following requests from the Commission and on the basis of which the Commission calculated the respective market shares of those undertakings, the Commission divided the undertakings into two categories. In the first category, it placed the undertakings which, according to the data in its possession, held shares in the worldwide sodium gluconate market above 20%, namely Fujisawa (35.54%), Jungbunzlauer (24.75%) and Roquette (20.96%). The Commission set a starting amount of EUR 10 million for those undertakings. In the second category, it placed the undertakings which, according the data in its possession, held shares below 10% in the worldwide sodium gluconate market, namely Glucona (approximately 9.5%) and ADM (9.35%). The Commission

set the starting amount of the fine at EUR 5 million for those undertakings, that is to say, for Akzo and Avebe, which jointly owned Glucona, at EUR 2.5 million each (recital 385 of the Decision).

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

19 To take account of the duration of the infringement committed by each undertaking, the starting amount thus determined was increased by 10% per year, that is, an increase of 80% for Fujisawa, Akzo, Avebe and Roquette, of 70% for Jungbunzlauer and of 35% for ADM (recitals 389 to 392 of the Decision).

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

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

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

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

24 On 19 March 2002, the Commission withdrew the Decision in so far as it was adopted against Jungbunzlauer. On 29 September 2004, the Commission adopted a new decision C(2004) 3598 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium gluconate) ('the decision of 29 September 2004') against Jungbunzlauer and three other companies of the Jungbunzlauer group (Jungbunzlauer Ladenburg GmbH, Jungbunzlauer Holding AG and Jungbunzlauer Austria AG) imposing on them a fine of EUR 19.04 million for their participation in the cartel in the sodium gluconate sector. On 23 December 2004, the four addressees of this latter decision brought an action before the Court of First Instance against that decision. The application was lodged at the Court Registry under number T-492/04.

Procedure and forms of order sought by the parties

25 Roquette brought the present action by application lodged at the Registry of the Court of First Instance on 20 December 2001.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, put written questions to the parties to which they replied within the prescribed period.

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

28 Following the adoption of the decision of 29 September 2004 against, inter alia, Jungbunzlauer, Roquette requested, by letter of 2 February 2005, the adoption of measures of organisation of procedure under Article 64(4) of the Rules of Procedure of the Court of First Instance and, in the alternative, the adoption by the Court of First Instance of any appropriate measure such as reopening of the procedure or joinder of the cases. Under the general principle of sound administration of justice, the Court, without reopening the procedure, asked the Commission to express a view on Roquette's request. By letter of 7 March 2005, the Commission indicated that it considered that there was no need to accede to Roquette's requests.

29 Roquette claims that the Court should:

— annul Article 1 of the Decision in so far as the Court considers that, in its case, the infringement lasted from February 1987 to June 1995;

— annul Article 3 of the Decision in so far as it imposes on it a fine of EUR 10.8 million;

— in the exercise of its unlimited jurisdiction, reduce the amount of the fine imposed on it;

— order the Commission to repay to it the amount of the fine unlawfully imposed (principal and interest at the rate of 3.76%);

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the application;

— order Roquette to pay the costs.

Law

31 The pleas put forward by Roquette, all of which relate to the setting of the amount of the fine imposed on it, concern, firstly, the gravity of the infringement, secondly, the duration of the infringement, thirdly, the existence of attenuating circumstances, fourthly, its cooperation during the administrative procedure and, fifthly, the application of the *ne bis in idem* principle in the light of the fines which were imposed on it by the United States authorities.

I — *Gravity of the infringement*

A — *Introduction*

32 With regard to the Commission's assessment of the gravity of the infringement, Roquette raises three objections alleging, firstly, incorrect determination of the turnover to be taken into account, secondly, incorrect assessment of the actual impact of the cartel on the relevant market and, thirdly, failure to take into account Roquette's conduct.

33 Before ruling on the merits of those various objections, it is appropriate to draw attention to certain aspects of the assessment made by the Commission in its Decision regarding the gravity of the infringement.

34 It is clear from the Decision that, in assessing the gravity of the infringement, the Commission considered, firstly, that the undertakings concerned had committed an infringement which was very serious in the light of its nature, its actual impact on the EEA market for sodium gluconate and the size of the relevant geographic market, and which had affected the whole of the EEA (recitals 334 to 371 of the Decision).

35 Next, the Commission considered that it was necessary to apply 'differential treatment' to the undertakings concerned 'in order to take account of [their] actual economic capacity to cause significant damage to competition and to set the fine at a level which ensures it has sufficient deterrent effect'. In that regard, the Commission stated that it would take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition (recitals 378 and 379 of the Decision).

36 For the purpose of assessing those factors, the Commission chose to take as its basis the turnover achieved by the undertakings concerned from worldwide sales of sodium gluconate in the last year of the period of the infringement, namely 1995. In that regard, the Commission took the view that, 'given the global character of the [sodium gluconate] market, these figures g[a]ve the most appropriate picture of the participating undertakings' capacity to cause significant damage to other operators in the common market and/or the EEA' (recital 381 of the Decision). The Commission added that, in its view, that approach was supported by the fact that this was a global cartel, the object of which was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market. It considered, moreover, that the worldwide turnover of any given party to the cartel also gave an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated (recital 381 of the Decision).

37 On that basis, the Commission chose to define two categories of undertakings, namely, on the one hand, that constituted by the 'three major producers of sodium gluconate with worldwide market shares above 20%' and, on the other, that constituted by the undertakings 'which had significantly lower market shares in the worldwide sodium gluconate market (below 10%)' (recital 382 of the Decision). Accordingly, the Commission set a starting amount of EUR 10 million for the undertakings in the first category, comprising Fujisawa, Jungbunzlauer and Roquette, whose market shares were approximately 36%, 25% and 21% respectively, and a starting amount of EUR 5 million for the undertakings in the second category, namely Glucona and ADM, whose market shares were approximately 9% each. Since Glucona was owned jointly by Akzo and Avebe, the Commission therefore set a basic amount of EUR 2.5 million for each of those companies (recital 385 of the Decision).

38 Finally, in order to ensure that the fine had a sufficiently deterrent effect, on the one hand, and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, on the other, the

Commission adjusted that starting amount. Consequently, taking account of the size and worldwide resources of the undertakings concerned, the Commission applied a multiplier of 2.5 to the starting amount for ADM and Akzo and therefore set the amount of the fine, according to the gravity of the infringement, at EUR 12.5 million as regards ADM and EUR 6.25 million as regards Akzo (recital 388 of the Decision).

B — *Determination of turnover*

1. Arguments of the parties

39 Roquette claims, in essence, that the Commission did not determine correctly the turnover to be taken into account in calculating the basic amount of the fine. In Roquette's submission, that incorrect assessment by the Commission stems from the Commission's taking into account a turnover figure which includes the turnover of its 'mother liquor' whereas the Commission should have acknowledged that the sodium gluconate market taken into account for the cartel did not include 'mother liquors'.

40 After noting that 'mother liquors' were excluded from the scope of the Decision, Roquette points out that it is clear from its letter of 19 November 1999, from its reply of 3 May 1999 to the Commission's request for information of 2 March 1999 and from its observations of 25 July 2000 on the statement of objections that the sodium gluconate in liquid form which it produces corresponds only to 'mother liquor' resulting from its specific manufacturing process and, therefore, that it is distinct from that of its competitors. On that basis, it disputes that the Commission was unable to recognise that liquid gluconate, to which Roquette refers, corresponded to 'mother liquor' and not to sodium gluconate in liquid form as produced by its competitors. It also refers in that regard to the position adopted by the Commission in its defence, where it implicitly accepts that what Roquette calls 'mother liquor' is not exactly the same thing as sodium gluconate in liquid form.

41 Roquette disputes that the absence of any reference to 'mother liquor' in its replies of 3 May 1999 and 21 May 2001 to the requests for information of 2 March 1999 and 11 May 2001 can justify the Commission's failure to distinguish 'mother liquors' from sodium gluconates in liquid form. It points out that in replying to the requests for information it adhered to the formats laid down by the Commission, which did not distinguish 'liquid gluconates' from 'mother liquors'. Moreover, in Roquette's submission, the information given in its replies, including the turnover figures, had to be assessed in the light of the previous explanations indicating that its liquid gluconates were not products covered by the cartel. It also refers for that purpose to Fujisawa's submission of 12 May 1998 which acknowledges, in its view, that 'mother liquors' do not constitute a finished product and were not included in the cartel agreement. Finally, in Roquette's submission, the fact that the parties did not mention the exclusion of Roquette's liquid sodium gluconate from the cartel does not preclude all the third parties and the Commission from having acknowledged the exclusion of 'mother liquors' from the cartel. Consequently, in Roquette's view, the Commission could have known that what Roquette described as 'liquid gluconate' was in fact 'mother liquor'.

42 Roquette therefore claims that it could not have suspected the Commission's lack of understanding as to the nature of its liquid sodium gluconate and that, if the Commission considered the information in its possession was insufficient, the Commission lacked diligence in not requesting the necessary explanations with regard to the distinction between Roquette's 'liquid gluconate' and that of the other undertakings for the purpose of calculating turnover (Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 242). In Roquette's submission, greater diligence on the part of the Commission would have enabled it to obtain other documents evidencing the production of 'mother liquor' by Roquette. Finally, Roquette puts in evidence an affidavit given by its chairman and managing director confirming that Roquette's liquid sodium gluconate corresponded to 'mother liquor' and that Roquette did not produce any liquid sodium gluconates other than its 'mother liquor'.

43 In the alternative, Roquette submits that, according to the case-law, examination of the question of responsibility for the error in the calculation of the fine is irrelevant

and that, in view of the error, the fine must, in any event, be reduced accordingly (Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraphs 584 to 586).

44 Consequently, Roquette submits that its turnover to be taken into account in determining the amount of the fine should not have included the sales of its 'mother liquor'. However, the turnover taken into account in recital 48 of the Decision for the purpose of calculating the basic amount of the fine includes the turnover for Roquette's 'mother liquor'.

45 The consequence of that error of assessment on the part of the Commission is that Roquette's turnover for the product covered by the infringement is lower than that taken into account. Because of that error of assessment, the Commission acted in a manner contrary to its own rules and those of the Court of Justice on this subject, and to the principles of equality and proportionality. Consequently, Roquette should not be classed among the producers in the 'first category', whose market share is above 20% and the basic amount of whose fine is set at EUR 10 million, and the fine imposed by the Commission was too high.

46 Roquette also points out that, according to the case-law, turnover is an essential factor in assessing the weight of each undertaking participating in the cartel and that only turnover from the goods covered by the cartel may be taken into account as an indication of the scale of the infringement (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120; *Gruber + Weber* v *Commission*, cited in paragraph 42 above, paragraph 237; and Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707). It submits that maintaining the same fine after reducing the turnover as a result of excluding results relating to 'mother liquor' would infringe the principles of equal treatment and proportionality. Secondarily, it draws attention, in the light of the unlimited jurisdiction of the Court of First Instance, to the Court's independence from the Commission for the purpose of setting fines.

47 The Commission rejects all of Roquette's arguments. It submits that it had no means of knowing that Roquette's liquid sodium gluconate corresponded to 'mother liquor'. In the Commission's view, Roquette knowingly maintained ambiguity in that regard. The Commission refers, in support of that assertion, to Roquette's replies of 3 May 1999 and 21 May 2001 to its requests for information and to the commercial document annexed to Roquette's letter of 19 November 1999. The Commission points out that, in each of those documents, Roquette mentions liquid sodium gluconate without specifying whether it constitutes 'mother liquor'. Moreover, it cannot be concluded with certainty from the references in Roquette's letter of 19 November 1999 to liquid sodium gluconate and 'mother liquor' that Roquette did not market liquid sodium gluconate of a 'mother liquor' type. The Commission draws attention to the fact that Roquette knew that the requests for information were intended to assess the market affected by the cartel in order to be able to calculate the fines. The Commission therefore submits that it is hardly credible that Roquette, in replying to the requests for information, did not mention the nature of its liquid sodium gluconate because it was anxious to adhere to the form which had been sent to it and for fear of failing, by deviating from it, in its duty to cooperate. The Commission disputes the relevance of *Gruber + Weber* v *Commission*, cited in paragraph 42 above, relied on by Roquette, since, in this case, it was misled by Roquette. Finally, the Commission observes that none of the parties to the cartel agreement gave any indication, during the procedure, that Roquette's sodium gluconate in liquid form might have been excluded from the cartel.

48 In the alternative, the Commission points out that, even if Roquette's product in liquid form should be excluded for the purpose of calculating its turnover relating to sodium gluconate, that would not affect the starting amount of EUR 10 million set by the Commission for the fine.

49 The Commission states, in that regard, that the fine must be proportional to the gravity and duration of the infringement and not to the undertaking's turnover. The Guidelines require that gravity to be assessed according to the nature of the infringement, the impact of the infringement on the market, where this can be measured, and the size of the relevant geographic market. In addition, Section 1A of the Guidelines and the case-law acknowledge that the application of the principle of

equality may lead, in respect of the same conduct, to the application of differentiated amounts for the undertakings concerned, even though such differentiation may not be based on any arithmetical calculation (Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 90).

50 In this case, the Commission submits that, even if Roquette's market share were to be reduced from 20.96% to 17.4%, Roquette would still be one of the three major producers of sodium gluconate, for which a starting amount of EUR 10 million would have to be set. It would remain far ahead of ADM and Glucona's parent companies, which had a market share of less than 10% and on which a fine of EUR 5 million was imposed.

2. Findings of the Court

51 As a preliminary point, it must be observed that, as stated in recitals 34 and 38 of the Decision, it is established that the product in respect of which the infringement was committed is sodium gluconate, which includes solid sodium gluconate, liquid sodium gluconate and gluconic acid, to the exclusion of the product known as 'mother liquor'.

52 Moreover, it is clear from recitals 48 and 381 of the Decision that the turnover figures taken into consideration by the Commission are those taken from the responses of the parties to the cartel to the Commission's requests for information and that those turnover figures correspond to the figures derived from the worldwide sales of sodium gluconate of each of the cartel members during the final year of the infringement, namely 1995. Accordingly, on that basis, the Commission considered that, for 1995, Roquette's worldwide sodium gluconate turnover amounted to EUR 12 293 620 and its share of the world market, resulting from that, was estimated at 20.96% (recital 48 of the Decision).

53 In response to a written question put by the Court of First Instance, the Commission confirmed that the sum of EUR 12 293 620 was equivalent to 80 216 582 French francs (FRF), an amount which Roquette had disclosed to the Commission in its reply of 21 May 2001 to the request for information. It is clear from that reply of 21 May 2001 that the amount of FRF 80 216 582, representing Roquette's worldwide sodium gluconate turnover in 1995, corresponds to the total of Roquette's turnover figures for sodium gluconate in solid form (FRF 60 517 501), sodium gluconate in liquid form (FRF 16 029 382) and gluconic acid (FRF 3 669 699) in 1995.

54 Finally, in its reply, Roquette included as an annex an affidavit given by its chairman and managing director, according to which, in 1995 and beforehand, it marketed under the name 'liquid gluconate' only 'mother liquor'. The Commission did not dispute the accuracy of that statement either in its rejoinder or in its answers to the Court's written questions, or at the hearing.

55 Consequently, it is established that Roquette's turnover taken into account by the Commission included that realised through the sale of 'mother liquor' even though that product was not covered by the cartel. It follows that Roquette's turnover taken into account in determining the amount of the fine is incorrect. Roquette thus had imposed on it, by mistake, a fine the amount of which does not adequately reflect its position on the market for the product in respect of which the infringement was committed.

56 The consequences of that error will be assessed, after analysing the other pleas put forward by Roquette, in the context of the exercise by the Court of its unlimited jurisdiction.

C — *The actual impact of the cartel*

1. Preliminary observations

57 Roquette claims in essence that the Commission did not take into consideration the limited effect of the cartel in assessing its actual impact on the relevant market. The Commission therefore went against both its own practice and settled case-law, in breach of Article 15 of Regulation No 17 and of the principle of proportionality.

58 It is appropriate to recall in this connection the consistent case-law according to which the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case and its context; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up. (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 443).

59 In its Guidelines (first paragraph of Section 1A), the Commission stated that, in assessing the gravity of an infringement, it took into account, in addition to the specific nature of that infringement and the size of the relevant geographic market, the 'actual impact [of the infringement] on the market, where this can be measured'.

60 With regard to this case, it is apparent from recitals 334 to 388 of the Decision that the Commission did in fact take those three criteria into account in setting the

amount of the fine determined according to the gravity of the infringement. In particular, in that context, it considered that the cartel had had a 'real impact' on the sodium gluconate market (recital 371 of the Decision).

61 At recital 340 of the Decision, the Commission introduced its analysis as follows:

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

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

63 That being so, the Commission first analysed the implementation of the cartel (recitals 342 to 351 of the Decision). The Commission submits that various elements relating to what it considered to be the cornerstone of the cartel, namely the sales quotas, showed that the cartel had been implemented. Further, the Commission relied on the fact that '[t]he cartel was characterised by a continuous concern for the fixing of target and/or minimum prices' and added that, in its opinion, '[t]hese prices must have had an effect on the participants' behaviour, notwithstanding the fact that

they may not have been attained systematically by the cartel participants' (recital 348 of the Decision). The Commission concluded that 'the effectiveness of the implementation [of the cartel] could not be questioned' (recital 350 of the Decision).

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

'The price development as it is set out in the [graphs] found at Roquette during the investigation suggests that the goal pursued by the participants [in] the cartel was at least partly reached. The two [graphs] present the evolution of the price of sodium gluconate in [French francs (FRF)] in Europe from 1977 to 1995, and show that in 1985 the European sodium gluconate price plunged. It is likely that this movement resulted from the collapse of the earlier cartel and the subsequent increase in the use of production capacity. By the end of 1986, the price was around 50% lower than at the beginning of 1985. There is a strong probability that the enforcement of the new cartel agreements, from 1986 onwards, significantly contributed to the steep price increase of 1987-89, when the price doubled. After a decrease in price in 1989 that remained smaller than the one of 1985, the price remained until 1995 some 60% higher than in 1987.'

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

'(235) Two documents, found at Roquette's premises during the inspection, are self-explanatory and constitute evidence of the results achieved by the

sodium gluconate cartel. Among them is a [graph] presenting the average "European" price of sodium gluconate from 1977 until 1995.

(236) In a striking manner, [one of the graphs] shows that in 1981 and 1987, when respectively the "first" and "second" cartel agreements were enforced, prices rocketed. In 1985, the prices suddenly fell, which corresponds to the end of the "first" cartel, when Roquette pulled out of the agreement. Between 1987 and 1989, there was a steep price increase, during which the price of sodium gluconate was basically multiplied by two. From 1989 until 1995 it remained some 60% higher than in the slack of 1987. It should be noted that by contrast with the 1981-86 period, the price of sodium gluconate could be maintained at a significantly high price until 1995.'

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

'(359) ... The arguments developed by ADM do not demonstrate in any convincing manner that the implementation of the cartel agreement could not have played any role in the price fluctuations. Whilst the scenario proposed by ADM may occur in the absence of a cartel, it is also perfectly consistent with a cartel situation. The increase in capacity in the mid-1980s may have been both the cause and the result of the collapse of the first cartel (1981-85). As for the developments from 1987 onwards, they are fully consistent with the reactivation of the cartel over that period. Therefore, the fact that the price of sodium gluconate started to increase could not be exclusively explained in

terms of a purely competitive reaction, but must be interpreted in the light of the fact that the participants had agreed on "floor prices" and market-share allocation as well as a reporting and monitoring system. All this would have contributed to the success of the price increases.

...

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

...

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

67 In the light of that analysis, the various objections raised by Roquette as regards the evidence produced by the Commission to show that the cartel had an actual impact can be distinguished according to whether they relate to the inferences made by the Commission from the implementation of the cartel, to the factors taken into account by the Commission in demonstrating the implementation and effect of the

cartel or to the failure of the Commission to take into account other factors in assessing the actual impact of the cartel.

2. The objection that the Commission adopted an incorrect approach in demonstrating that the cartel had an actual impact on the market

(a) Arguments of the parties

68 In addition to its objections concerning the relevance of the factors taken into account by the Commission in demonstrating the implementation and effect of the cartel, Roquette objects that it is not possible for the Commission to prove the existence of an actual impact on the basis of inferences drawn from the implementation of the cartel.

69 In particular, Roquette objects, firstly, to the Commission's analysis in recitals 340 to 351 of the Decision where it asserts that, since the cartel was carefully implemented, it must have altered the normal pattern of behaviour and that effective implementation of agreements does not necessarily require that exactly the same prices and volumes be actually applied in the market, but that it is sufficient to move them in the direction of the target agreed upon. Secondly, Roquette objects to the inference drawn by the Commission, in recital 369 of the Decision, from the continual meetings of the parties over a long period notwithstanding the risks involved that there was an impact on the market.

70 The Commission disputes the validity of those arguments.

(b) Findings of the Court

71 First, it should be borne in mind that, under the first paragraph of Section 1A of the Guidelines, the Commission is to take account, inter alia, of '[the] actual impact [of the infringement] on the market, where this can be measured' when calculating the fine on the basis of the gravity of the infringement.

72 In that regard, it is necessary to analyse the exact meaning of the words 'where this [that is, the actual impact] can be measured'. In particular, it is a question of establishing whether those words mean that the Commission can take account of the actual impact of an infringement for the purpose of calculating fines only if, and in so far as, it is able to quantify that impact.

73 As the Commission has rightly submitted, consideration of the impact of a cartel on the market in question necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. When examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. Account must be taken of the objective fact that, because of the price cartel, the parties specifically waived their freedom to compete with one another on prices. Thus, the assessment of the influence of factors other than that voluntary decision of the parties to the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable.

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

75 Consequently, the actual impact of a cartel on the relevant market must be regarded as having been sufficiently demonstrated if the Commission is able to provide specific and credible indicia showing with reasonable probability that the cartel had an impact on the market.

76 In this instance, it follows from the summary of the Commission's analysis (see paragraphs 61 to 66 above) that the Commission relied on two items of evidence to find that the cartel had had an 'actual impact' on the market. Firstly, it referred to the fact that the cartel members had carefully implemented the cartel agreements (see, in particular, recital 340, reproduced in paragraph 61 above) which continued over a long period (recital 369 of the Decision, reproduced in paragraph 66 above). Secondly, the Commission took the view that the graphs found at Roquette's premises showed that the prices set by the cartel tallied to a certain extent with those actually charged on the market by the cartel members (recital 354 of the Decision, reproduced in paragraph 64 above).

77 It must be pointed out, first of all, that the Commission did not merely infer from the effective implementation of the cartel that there had been an actual impact on the sodium gluconate market. As is apparent from the extracts from the Decision cited above, the Commission sought as far as possible to examine the implementation of the cartel and its actual impact on the market separately, considering, in essence, that the implementation of a cartel is a necessary precondition for demonstrating its actual impact but that it is not a sufficient condition (see, to that effect, recital 341 of the Decision). It is true that, at recital 341 of the Decision, the Commission acknowledged that there was, 'understandably, some overlap between the factual elements used to reach conclusions on these two points' — the reason why the Commission did not always use, as Roquette submits, the appropriate terms in each of those parts of its analysis. However, the fact remains

that it cannot be complained that the Commission confused the implementation with the actual impact of the cartel. Furthermore, because it is a precondition for the actual impact of a cartel, the effective implementation of a cartel constitutes an initial indicator that the cartel has had an actual impact.

78 In addition, the Commission cannot be criticised for finding that, since the members of the cartel accounted for over 90% of the world market and 95% of the EEA market for sodium gluconate and devoted considerable efforts to organising, following up and monitoring the agreements of that cartel, its implementation amounted to a strong indication of effects on the market, especially since (see paragraph 167 below) the Commission did not confine itself to that analysis in the present case.

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

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

3. The objections concerning the factors taken into account by the Commission as proof of the implementation and effects of the cartel

(a) The different phases of the cartel

Arguments of the parties

81 In Roquette's submission, the Commission distinguished in the Decision between three phases in the implementation of the infringement, namely, the 'preparatory' phase (from May 1986 to April 1987), the 'operational' phase (from April 1987 to May 1990, when ADM joined the cartel) and the 'decline' phase (from May 1990 to June 1995). Roquette claims that that distinction is clearly based on the level of impact of the cartel on the market and that the Commission did not adequately assess the effects of the cartel during the first and final phases.

82 Roquette submits that, during the preparatory phase, there was no actual anti-competitive effect on the relevant market, because in that phase the parties only established contacts and agreed on the guiding principles of the cartel. Just as the Commission acknowledged in recital 106 of the Decision that the meeting in May 1986 had not had any effect and therefore that it did not have to be taken into account in assessing the effect of the cartel, Roquette submits that the meeting of 19 and 20 February 1987 did not have any effect and therefore that it also did not have to be taken into account by the Commission. In Roquette's view, at that meeting, only the principles of the cartel were agreed upon but not the practical details which were only agreed upon at the meeting of 11 and 12 April 1987. Consequently, the Commission should have taken into account the effects of the infringement only from April 1987 onwards and not from February 1987 onwards as it did.

83 In addition, Roquette submits that, in assessing the effects of the cartel on the market, the Commission failed to take into consideration the functional weaknesses of the cartel during the period of decline. Thus, the Commission did not take account of the fact that the compensation scheme was called in question because of the inability of ADM to meet the quotas which had been assigned to it when it joined the cartel, even though the Commission acknowledged those facts in recitals 100, 200 and 209 of the Decision. Nor did the Commission take account of the non-implementation of the principles agreed upon at the meetings, particularly as regards the disclosure of sales figures and the meeting of quotas by the parties. In particular, Roquette claims that the Commission did not take account of its refusal to participate in the external monitoring system, which allowed it freedom of action.

84 The Commission contends that those arguments should be rejected.

Findings of the Court

85 With regard to the failure to take into account the different periods of the cartel, it must first of all be observed that, contrary to Roquette's claims, the Commission did not establish the level of the cartel's impact by reference to each of the phases of the cartel. It is clear from recital 352 et seq. of the Decision that the Commission took into account the cartel's impact in respect of a single period covering the whole duration of the infringement.

86 In addition, as regards the absence of effects of the cartel during the preparatory period of the cartel, it is, admittedly, apparent from the Decision that, during the meeting in Amsterdam on 19 and 20 February 1987, Benckiser GmbH (which sold its sodium gluconate business to Jungbunzlauer in 1988), Fujisawa, Glucona and Roquette reached a general framework agreement, the details of which were to be

discussed at the next meeting, scheduled to be held in Vancouver two months later (recitals 108 and 109 of the Decision), and that, at the meeting in Vancouver on 11 and 12 April 1987, those same parties, together with Finnsugar, defined the principles governing the implementation of the cartel (recitals 112, 113, 115 and 116 of the Decision).

87 However, at the meeting in Amsterdam on 19 and 20 February 1987, it was agreed, as regards the principle that market shares should be fixed, frozen and observed on the basis of the actual sales figures of the previous one or two years, that 1986 sales figures were to be used as a reference (recital 108 of the Decision) and that market shares were to be allocated according to a certain sharing key. This latter aspect is apparent from a note from a Roquette representative of 3 March 1997, submitted to the Commission by Roquette during the administrative procedure. Consequently, at the meeting in Amsterdam on 19 and 20 February 1987, at the very least, certain practical details were agreed upon between the parties, enabling partial implementation of the agreement. Its implementation from that date is therefore beyond dispute, notwithstanding the various details provided subsequently.

88 With regard to the failure to take into account the reduction in the effects of the cartel during the period of decline, it is, admittedly, apparent from the Decision that ADM's failure to meet its quotas led to numerous conflicts between the various cartel members and to requests to abandon the compensation scheme (see, inter alia, recitals 100, 200 and 209 of the Decision). However, ADM's inability to meet its sales quota, even though the other parties to the cartel restricted their product supply, reduced still further the supply of sodium gluconate on the market, which did not lessen, but rather increased the effect of the cartel on the market.

89 In addition, as regards Roquette's claims concerning the failure of the parties to disclose their sales figures and to meet their quotas during the period of decline, it must be observed that Roquette has confined itself to citing in support of that argument its refusal to participate in the external monitoring system, leaving it freedom of action. However, according to settled case-law, the actual conduct which

an undertaking claims to have adopted is irrelevant for the purposes of evaluating the cartel's impact on the market, since the effects to be taken into account are those resulting from the infringement as a whole, in which it participated (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 150 and 152, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 160 and 167). Accordingly, the argument that the reduction in the effects of the cartel during the period of decline was not taken into account is also unfounded.

90 Finally, in any event, even if it is proved that the cartel was not implemented during the preparatory period and the period of decline, that cannot, in itself, prove that that cartel had no impact on the market. There is not necessarily a correlation between the impact of a cartel and its duration. Accordingly, it is perfectly possible that, where the effect of a cartel is non-existent for a long period but devastating for a short period, the effect of that cartel is as significant as that of a cartel which has some effect for its entire duration. Consequently, the fact that the cartel has no effect or only a limited effect for certain periods, even if proven, does not necessarily prove a lesser effect than that of a cartel considered over its entire duration.

91 In the light of the foregoing, Roquette's objections alleging failure to take into account the different periods of the cartel must be rejected.

(b) The objection regarding the failure to achieve the objectives of the cartel during the operational period

Introduction

92 Roquette also submits that the cartel had a limited real impact during its 'operational' phase (from April 1987 to May 1990), of which the Commission did not

take due account. In particular, Roquette cites the failure to take into account the limited effects of the cartel in view of the weaknesses of the monitoring system, the failure to achieve the objectives of the cartel, namely, the introduction of quotas, the fixing of prices and the allocation of customers.

93 It must be pointed out above all in this regard that the Commission does not seek, in this case, to prove the effect of the cartel on the basis of the full achievement of those objectives. The Commission takes the view that the exchanges of data between the parties, the detailed definition of market shares, the fixing of target and/or minimum prices and the allocation of customers to the cartel members at meetings prove, firstly, that the cartel was implemented. In the light of that implementation and of the development of prices on the sodium gluconate market, as it is evidenced, according to the Commission, by the graphs found at Roquette's premises, the Commission concludes that the first objective pursued by the cartel members, namely, the artificial maintenance of a high price for sodium gluconate, was at least partly achieved (recital 354 of the Decision).

94 It is therefore necessary to set out each of Roquette's objections regarding the failure to achieve the cartel's objectives in order to determine whether they are capable of calling in question the existence of implementation as demonstrated by the Commission. Since the implementation of a cartel is the prerequisite for that cartel to have an actual impact, the calling in question of the cartel's implementation makes it impossible to demonstrate that the cartel had an actual impact.

The monitoring system

— Arguments of the parties

95 Roquette claims that the monitoring system, deemed to be a key aspect of the effects of the cartel, was completely inadequate. This was acknowledged by the

Commission in recitals 93, 172, 195 and 214 of the Decision and pointed out by Roquette in its memorandum of cooperation of 22 July 1999 ('the memorandum of 22 July 1999'), which indicates that the members of the agreement were providing incorrect data. However, the Commission did not take into account that weakness of the monitoring system in its assessment of the gravity of the infringement.

96 The Commission contends that this argument should be rejected.

— Findings of the Court

97 As regards the monitoring systems, namely, initially, that provided through a Swiss fiduciary company, which collected statistical data on the cartel members, and that by which one of the cartel members collected data from the various cartel members and then distributed them to the other cartel members (recital 92 of the Decision), it is not disputed that they did not operate perfectly, with the result that the data recorded in those systems do not fully reflect the reality of the market.

98 However, none of the considerations relied on by Roquette serves to call in question the fact that data were submitted by the parties to the cartel under the monitoring system. In addition, the data submitted, even allowing for their approximate nature, must, at the very least, have had some relevance and, therefore, been of some use to the parties to the cartel. At no time did the parties stop submitting data to the monitoring system and they continued to meet to discuss them and to establish quotas on that basis.

99 Consequently, the Commission was entitled to conclude, in recital 344 of the Decision, that a monitoring system, even though imperfect, had been implemented by the parties.

Quotas

— Arguments of the parties

100 Roquette claims that the objective of introducing a system of sales quotas was largely neutralised by the weakness of the monitoring system. Indeed, recitals 181, 196, 200, 209 and 225 of the Decision demonstrate the fact that adherence to quotas was a continual source of difficulties. Moreover, throughout its cooperation with the Commission, Roquette drew its attention to non-adherence to quotas. Thus, it stated in its memorandum of 22 July 1999 that it had always produced and sold at the maximum of its industrial capacities — thereby excluding any idea of limiting production or sales — by following trends in demand. Roquette points out that the Commission did not dispute that fact, but that it did not take it into account in its analysis. It also stated that the sales quotas had been exceeded by certain cartel members, which casts doubt on the credibility of the Commission's assertions regarding the accuracy of the annual quantities allocated. Finally, Roquette submits that its analysis is confirmed by the fact that it considerably exceeded the quotas allocated, which is reflected in the loss of a major customer under the sanction imposed by the other cartel members.

101 Roquette disputes the Commission's reasoning which leads it to consider, on the basis of the small disparities between the agreed quotas and the actual sales volumes, that the quota system was 'effectively implemented' by the parties (recital 347 of the

Decision). In Roquette's view, such a conclusion cannot be drawn from the figures submitted by the parties in the context of the cartel, since it is clearly established that those figures were for the most part incorrect and since, in its case, the quota system had no impact on its sales policy. The ineffectiveness of the quota system is demonstrated by the powerlessness of the cartel members to oblige Roquette or ADM to adhere to their quotas. Finally, Roquette disputes that the Commission was entitled, in recital 347 of the Decision, to view the implementation of the quotas as resulting from their being 'defined with ... accuracy', since setting quotas with a compensation scheme reduces their strictness.

102 The Commission contends that those arguments should be rejected.

— Findings of the Court

103 With regard to the taking into account of the quotas by the Commission, Roquette submits, firstly, that the effectiveness of the quota system was largely neutralised by the weakness of the monitoring system. However, since, as stated above in paragraph 98, any weaknesses in the monitoring system were not such as to cast doubt on its implementation, they were also incapable of affecting the implementation, by virtue of that monitoring system, of a quota system.

104 Secondly, Roquette claims that the quotas were not adhered to by the parties. Although it may be true, as the Commission states in the Decision, that certain factors prove the non-adherence to quotas by certain operators, it must be pointed out that the parties continued to discuss those quotas and the adherence to them on

a regular basis. That proves satisfactorily that a quota system was elaborated between the parties and that it was at least partly implemented. If the discussions about the quotas were purely theoretical as Roquette asserts, the parties would not have taken the trouble to continue discussing those quotas.

105 In addition, it is apparent, and this is not disputed by Roquette, that certain parties disagreed over adherence to those quotas. Thus, reference is made to a conflict arising between the parties when Finnsugar's delegates announced their intention to increase their market share significantly (recital 125 of the Decision). The fact that Finnsugar made that declaration of intent and the reaction which it provoked constitute circumstantial evidence of the existence of a prior agreement on quotas and of an allocation of market shares. Likewise, the incentives designed to ensure that ADM met its quotas and Glucona's dissatisfaction following ADM's failure to fulfil those quotas indicate that Glucona felt bound by the quotas allocated to the parties by virtue of the cartel and, consequently, by its own quotas, which permits the assumption that it fulfilled them at a particular time (recital 193 of the Decision).

106 Thirdly, Roquette claims that the Commission was not entitled to rely on the figures submitted by the parties in the context of the cartel, since it is established that those figures were usually incorrect. Consequently, Roquette submits that the Commission could not prove the implementation of the cartel on the basis of the small disparity between the quotas and the actual sales volumes.

107 Although it is possible that certain parties to the cartel submitted incorrect figures which the other parties to the cartel assumed were correct, figures were definitely communicated between parties and market shares were calculated accurately and allocated between the parties. Those facts show that the cartel was implemented.

108 Fourthly, Roquette claims that the fact that neither it nor ADM could be compelled to meet their quotas proves that the compensation scheme did not work. In addition, Roquette submits that setting quotas with a compensation scheme is likely to reduce their strictness and that, consequently, the Commission cannot infer from the mere implementation of the quotas that they were defined accurately by the parties.

109 It must be noted, in that regard, that the compensation scheme consisted in increasing or decreasing, on an annual basis of the difference between the annual quota allocated to an undertaking and its actual sales, the quotas allocated to that undertaking the following year. Thus, an undertaking which in one year exceeded the annual quota allocated to it would see its annual quota for the following year reduced by the difference between its quota and its actual sales in the previous year, and vice versa (recital 99 of the Decision).

110 However, the fact that ADM and Roquette could never be compelled to adhere to their quotas does not necessarily prove that the compensation scheme was not implemented. The fact that ADM, compared with the other cartel members, accumulated quota surpluses, due to the fact that it failed to meet its quota, a cause of dissatisfaction for Glucona (recital 193 of the Decision), proves that ADM's failure to meet quotas was penalised and that the compensation scheme worked. Moreover, it cannot be inferred from the fact that a compensation scheme is such as to mitigate the strictness of quotas that it was drawn up in a greater or lesser degree of detail. The degree of detail made apparent by the Commission related, in any event, only to the establishment of the quotas as such. Finally, the argument has no factual basis, in so far as, in this case, the strictness of the quotas is not mitigated by the compensation scheme; the compensation scheme makes it possible only to defer the penalty for non-adherence to quotas. In addition, Roquette itself points out that a party could not abuse that compensation scheme since, as is clear from the memorandum of 22 July 1999, its non-adherence to the quotas caused it to lose Glucona, a major customer for the sodium gluconate market, under the penalty imposed by the other cartel members.

111 The Commission has therefore established that a quota system was implemented.

Prices

— Arguments of the parties

112 Roquette also submits that the fixing of floor and/or target prices never really worked in practice. Recitals 199 and 209 of the Decision and the memorandum of 22 July 1999 prove the non-adherence to floor and/or target prices by the parties. The assertion in recital 219 of the Decision that floor and/or target prices were adhered to was demonstrated only as regards Glucona.

113 Roquette further submits that the Commission did not take account of the data with which it provided it showing that the differences between the prices fixed by the parties and the prices charged by it were very significant and that its prices were consistently below the target and/or minimum prices. To illustrate those points, Roquette reproduces in its application, in the form of tables, the list of its main customers in Europe and the prices charged by it from 1989 to 1994.

114 Roquette maintains, moreover, that, throughout the memorandum of 22 July 1999, it drew the Commission's attention to the fact that the target price fixed by the parties was purely theoretical.

115 Moreover, Roquette submits that the Commission's argument that the implementation of the price agreements is demonstrated when the prices applied move towards the level agreed upon (recital 348 of the Decision) is valid in this case only with regard to target prices and not with regard to minimum prices.

116 The Commission contends that those arguments should be rejected.

— Findings of the Court

117 As regards the non-functioning of the system of floor and/or target prices, it is not disputed that the parties mentioned certain cases where agreed prices were not being applied (see, inter alia, recitals 199 and 209 of the Decision).

118 However, it cannot be inferred from this that those target and/or minimum prices were never implemented. Thus, as Roquette acknowledges, it is clear from recital 219 of the Decision that Glucona adhered to target prices.

119 In addition, contrary to what is maintained by Roquette, that recital is not the only one proving the application by certain parties of the prices agreed upon. Thus, it is clear from recital 204 of the Decision that an internal note circulated at Jungbunzlauer proves that the latter applied the floor price agreed upon at a cartel meeting.

120 The Commission has therefore established to a reasonable standard that the prices fixed by the parties were not purely theoretical and that the parties implemented price agreements, even if not systematically.

121 That conclusion is not called in question by the fact, assuming it to be established, that Roquette never adhered to the price-fixing arrangements as adopted by the cartel and that its actual price deviated systematically and significantly from the target price. As stated above in paragraph 89, when examining the Commission's classification of the gravity of the infringement, the Court is not required to examine the individual conduct of the undertakings, since the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the infringement as a whole, in which it participated.

122 Finally, Roquette submits that the Commission's position that effective implementation of the agreement on target prices and sales volumes does not necessarily require that exactly the same prices and volumes be actually applied in the market, but that, when the parties set their prices in order to move them in the direction of the level agreed upon, that is sufficient to demonstrate implementation of the cartel (recital 348 of the Decision), is not valid in the present case. It submits that that position adopted by the Commission is relevant only in relation to target prices and not in relation to minimum prices. In this case, however, there were only minimum prices. In this regard, it is sufficient to observe that Roquette has still failed to demonstrate in what respect such a position should differ in the case of minimum prices.

123 Accordingly, the Commission was entitled to find that a cartel on sodium gluconate prices was implemented by the parties.

Allocation of customers

— Arguments of the parties

124 Roquette claims that it never participated in the arrangements relating to customers and that it maintained its achievements in terms of market volume, which proves the ineffectiveness of the customer exchange system and therefore calls in question the effect of the cartel.

125 The Commission does not put forward any specific arguments in this regard.

— Findings of the Court

126 With regard to Roquette's claims concerning the ineffectiveness of the customer exchange system, it must be observed that Roquette bases this argument solely on its non-participation in that exchange.

127 Such a circumstance does not give grounds for disputing the implementation of the exchange of customers between the other parties to the cartel, as that is clear from the record of the meeting of 9 August 1989 in Zurich (recital 137 of the Decision) and the handwritten notes taken by Roquette at the meetings of 28 November 1989 in Hakone and 10 and 11 June 1991 in Geneva (recitals 148 and 177 of the Decision).

128 In any event, as stated above in paragraph 89, at this stage of the analysis of the gravity of the infringement, account must be taken only of the effects resulting from the infringement as a whole and not of the particular conduct of one of the participants in the infringement. Since Roquette's objections relate only to its conduct, that argument cannot be accepted at this stage of the analysis.

129 Accordingly, the Commission was entitled to find that an exchange of customers had been implemented between the parties.

130 On all the foregoing grounds, it must be held that the Commission did not err in finding that the cartel had been implemented by the parties.

(c) The objections concerning the taking into account of the effects of the cartel on the basis of the graphs found at Roquette's premises

Arguments of the parties

131 In Roquette's view, in demonstrating the effect of the cartel, the Commission relies exclusively on the graphs found at its premises. However, according to Roquette, those graphs do not apply to all the operators and the Commission wrongly drew general conclusions about the cartel from its own particular situation. Moreover, the data set out in those graphs found are completely at variance with the customer prices with which Roquette provided the Commission in the course of its cooperation with it, which demonstrates the non-application of the prices laid down by the cartel. Those graphs indicate, moreover, for the period commencing in 1989 — the key period of the cartel — strong fluctuations and a downward trend,

which is nevertheless inconsistent with a successfully implemented cartel. According to Roquette, the Commission also admitted in its defence that it did not know whether those graphs corresponded to Roquette's prices or to the prices of all the cartel members for sodium gluconate. Those doubts confirm the Commission's lack of diligence in not seeking further clarification of the meaning of those graphs.

132 The Commission contends that those arguments should be rejected.

Findings of the Court

133 In addition to inferring from the cartel's implementation that it had an actual effect (see paragraph 63 above), the Commission contends that the cartel had a 'real impact' on the basis of the plausible correlation between, on the one hand, the implementation of the cartel and, on the other, the price development as evidenced by the two graphs found at Roquette's premises.

134 In that regard, it is apparent that the two graphs found by the Commission at Roquette's premises, the first headed 'Sodium gluconate — European price development' and the second headed 'European price development of sodium gluconate', record a price development. Those graphs show, on the ordinate, the prices expressed in FRF/kg and, on the abscissa, the years, covering the period from 1977 to 1995 as regards the first graph, and from 1979 to 1992 as regards the second graph.

135 On the first graph, it is apparent that, from 1985 to the beginning of 1987, the price decreases, from over FRF 8.5/kg to a little over FRF 4.5/kg. From 1987 to the

beginning of 1989, that same price increases, from a little over FRF 4.5/kg to a little over FRF 8/kg. From 1989 to 1991, that price decreases again, from a little over FRF 8/kg to a little under FRF 7/kg, then increases again from 1991 onwards to around FRF 7.5/kg and stabilises at that level until 1994. The second graph shows a similar price development over the period from 1986 to 1992.

136 On the basis of those graphs, it can be observed that the application of the agreements establishing the new cartel from 1986 coincides with a strong increase (doubling) in the price between 1987 and 1989, compared with the price at the beginning of 1985.

137 Roquette claims, however, that *the prices shown on those graphs correspond to its prices and not to market prices.* Although it is true that those graphs do not state in any way whether the prices are Roquette's prices or those on the sodium gluconate market as a whole, it must however be observed that, during the administrative procedure (recitals 355 to 362 of the Decision), other parties to the cartel referred to those graphs in their arguments concerning the rise in prices between 1987 and 1989. Thus, ADM claims that this reflects a mechanical return to pre-1987 levels. Akzo cites exchange rate fluctuations (recital 357 of the Decision).

138 The fact that the other cartel members try to justify the price development shown on those graphs indicates that those other cartel members consider that those sodium gluconate prices also correspond to the prices charged by them and not only to those charged by Roquette. As it is not disputed that the cartel members together hold a market share above 90%, the Commission was entitled to use those graphs as its basis in demonstrating the effect of the cartel on the sodium gluconate market.

139 Roquette further submits that the prices shown on those graphs do not correspond to its prices as evidenced by the data with which it provided the Commission in the course of its cooperation with it.

140 It must however be observed that the data provided by Roquette in the course of its cooperation with the Commission do not always cover the period from 1987 to 1989. The comparison made by Roquette between floor prices and average actual prices, as set out in the application on the basis of those data, covers only the period from 1989 to October 1994, thus omitting the period during which, according to the graphs found, the rise in prices was most significant, namely from the beginning of 1987 to mid-1989. Moreover, it is apparent from Roquette's letter of 12 October 1999 accompanying some of its data that the document setting out those data records the development of Roquette's selling prices for sodium gluconate between 1988 and 1997 in relation to a number of customers representing approximately one third of its worldwide sales.

141 Finally, in any event, it must be remembered that the actual conduct which an undertaking claims to have adopted is irrelevant for the purpose of assessing the impact of the cartel on the market, since only the effects resulting from the infringement must be taken into account (see paragraph 89 above). The Commission was therefore not required to examine, in determining the impact of the cartel on the sodium gluconate market, Roquette's individual conduct, since the effects to be taken into account in setting the general level of the fines were those resulting from the infringement as a whole, in which it had participated.

142 As regards Roquette's argument that the fluctuations and downward trend observed from 1989 onwards on the graphs found, that is, during the key period of the cartel, do not characterise an agreement which is being successfully implemented, it must be noted that, although the two graphs show a fall during the period from 1989 to 1991, that fall in prices is followed by a rise in prices until 1992. In addition,

according to one of the two graphs, that rise until 1992 is followed by relative price stability until 1995. It is therefore not possible to cite a general downward trend.

143 In addition, the fact that the cartel's prices experienced fluctuations in the course of the cartel does not prove that the cartel had no effect.

144 Consequently, Roquette's objections to the effect that, in the light of the graphs found at its premises, the cartel had no actual impact must be rejected.

4. The objections alleging that the Commission failed to take into account other factors in its assessment of the effect of the cartel

(a) The objection alleging failure to take into account the specific characteristics of the market

Arguments of the parties

145 Roquette further submits that the Commission should have taken into account the characteristics of the product in question, namely, its extremely limited share in the users' manufacturing costs, the very small size of the market and the extremely significant power of the customers.

146 The Commission contends that those arguments should be rejected.

Findings of the Court

147 With regard to taking into account the limited size of the market, the value of the product and buyer power, it must first of all be borne in mind that, under Article 15(2) of Regulation No 17, the amount of the fine is to be determined on the basis of the gravity of the infringement and of its duration. In addition, under the Guidelines, the starting amount of the fine is to be determined according to the gravity of the infringement, taking account of its nature, its actual impact on the market and the size of the geographic market.

148 That legal framework does not therefore expressly require the Commission to take account of the limited size of the product market, the value of that product and buyer power.

149 However, according to the case-law, in assessing the gravity of an infringement the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (*Musique diffusion française and Others* v *Commission*, cited in paragraph 46 above, paragraph 120). Those factors evidencing the gravity of an infringement may possibly include, where appropriate, the value of the product in respect of which the infringement was committed, the size of the market for the product in question and buyer power.

150 Consequently, although market size, product value and customer power may constitute factors to be taken into account in establishing the gravity of the infringement, their importance varies according to the particular circumstances of the infringement concerned.

151 In this case, the infringement concerns inter alia a price cartel which, by its very nature, is very serious. In addition, the undertakings which are parties to the cartel together supplied more than 90% of the world market and 95% of the European market (recital 9 of the Decision). Finally, it is clear that sodium gluconate is a raw material used in a number of very varied finished products, thus affecting numerous markets (recitals 6 and 8 of the Decision). In that context, the small size of the market in question, the restricted value of the product and buyer power, assuming those factors are established, are of only lesser importance compared with all the other factors evidencing the gravity of the infringement.

152 In any event, it must be borne in mind that the Commission considered that the infringement had to be regarded as very serious within the meaning of the Guidelines which, in such cases, provide that the Commission is 'likely' to impose a starting amount in excess of EUR 20 million. However, in this case, it is clear from recital 385 of the Decision that the Commission set a starting amount of only EUR 10 million for the undertakings in the first category and of EUR 5 million for those in the second category, which is equivalent to half, or even a quarter, of the amount which, under the Guidelines, it was 'likely' to impose for very serious infringements.

153 That determination of the starting amount of the fine confirms that, as it stated in recital 377 of the Decision with regard to the size of the market, the Commission had regard, inter alia, to those factors.

154 For those reasons, Roquette's objections concerning failure to take into account the limited size of the market, the low value of the product in question and buyer power must be rejected.

(b) Failure to take into account the buyers' opinions

Arguments of the parties

155 Roquette submits that the Commission failed to take account of the opinion of buyers who accounted for most of the demand in the sector when setting the fine. In Roquette's view, if the Commission questioned the buyers about the impact of the cartel, it was because it considered that the information provided by the investigation was 'necessary' in order to establish that impact. However, in the light of the Commission's conclusions set out in recital 368 of the Decision, the buyers' opinion attesting to the cartel's lack of effects was not taken into account.

156 In Roquette's view, the users' replies to the Commission's questionnaire prove that no increase in the price of sodium gluconate was noticed during the period covered by the investigation, namely, from 1989 to October 1994. On the contrary, certain buyers noticed a decrease in that price. In addition, none of the buyers considered that they had encountered a refusal to sell sodium gluconate. Finally, only two buyers considered that competition on the market was not intense; nine buyers considered that competition was normal and five buyers stated that they were unable to comment.

157 In the alternative, Roquette argues that the relatively neutral replies of the buyers are due to the fact that, in the market in question, as is the case with many raw material markets, significant price differences do not exist. In addition, it claims that there are competitors which carry significant weight on each of the sodium gluconate markets.

158 The Commission contends that this line of argument should be rejected.

Findings of the Court

159 As regards Roquette's arguments concerning the taking into account of the buyers' opinions, it must be noted that the Commission expressed the view, in recital 368 of the Decision, firstly, that the buyers' replies to the request for information were inconclusive as to the cartel's effects and, secondly, that the buyers' replies to the question regarding the existence of significant price increases since 1 January 1992 were in line with the graphs found at Roquette's premises, which show that in 1992 prices decreased slightly before stabilising.

160 Next, it must be pointed out that, in view of the questions included in the questionnaire, the replies of the buyers in question relate only to the period subsequent to 1 January 1992. Consequently, even if they were well founded, Roquette's objections would not give grounds for calling in question the Commission's assessment of the cartel's effects prior to 1 January 1992.

161 Finally, it must also be remembered, as stated in paragraph 135 above, that it is apparent from one of the graphs found at Roquette's premises that, from 1992 onwards, the price of sodium gluconate decreased slightly, thereafter stabilising until 1995.

162 In this case, it is clear from the replies of the buyers questioned that a large majority of them considered that there was normal or not very intense competition on the sodium gluconate market. Those considerations are not however such as to invalidate the assessments relating to the development of sodium gluconate prices after 1992, as shown by one of the graphs found at Roquette's premises. Indeed, normal or not very intense competition may be reflected in a decrease followed by relative stability in market prices, as evidenced by one of the graphs found at Roquette's premises for the period subsequent to 1992. However, that still does not demonstrate that those prices correspond to the prices which would have prevailed on a competitive market. Indeed, that decrease, followed by a relative stabilisation, was preceded by a substantial price increase recorded from the time of implementation of the cartel.

163 Consequently, the Commission was entitled to conclude that the buyers' replies were in line with the graphs found at Roquette's premises and that it could not draw any specific conclusions as to the cartel's effects.

164 That conclusion is not called in question by Roquette's other arguments in this regard.

165 Accordingly, the fact that the buyers were of the view that there had not been any refusal to sell does not necessarily support the conclusion that there was effective competition. Quite apart from the fact that a refusal to sell is a criminal offence in certain national legal systems, while such a refusal may be strongly indicative of a market on which competition is inadequate, its absence does not necessarily prove that a market is fully competitive.

166 Roquette's arguments regarding the weight carried by competitors on the market in question and the fact that, as with many raw material markets, this market does not display significant price differences, cannot be accepted either. Roquette has still

failed to demonstrate in what respect those factors actually served to restrict the cartel's effect as evidenced by the graphs found at Roquette's premises.

167 Finally, Roquette's argument that the Commission's questioning of the buyers, pursuant to Article 11 of Regulation No 17, implies that their answers were necessary in order to establish the impact of the cartel cannot be accepted in this case. That argument implies that the Commission did not take account of the buyers' replies. However, as stated above, the buyers' replies do not invalidate the Commission's conclusions drawn on the basis of the graphs found at Roquette's premises and must therefore be held to have been duly taken into account.

168 In that regard, it is also important to point out that, although Article 11 of Regulation No 17 provides that the Commission may obtain all necessary information from undertakings in carrying out the duties assigned to it, the fact that the Commission decides to obtain certain information from undertakings does not in any way prejudge the relevance of that information for the purpose of demonstrating the effect of the infringement.

169 For the foregoing reasons, Roquette's arguments founded on failure to take into account the buyers' replies must be rejected.

(c) Failure to take into account the atmosphere of mistrust

Arguments of the parties

170 Roquette submits that the Commission did not take into account, in its assessment of the amount of the fines, the atmosphere of general mistrust which affected the

working of the cartel and therefore limited its effect on the market. In Roquette's view, that atmosphere of general mistrust is however clearly apparent from recitals 100, 187 to 197, 208, 214, 216, 225, 227 and 232 of the Decision.

171 The Commission contends that those arguments should be rejected.

Findings of the Court

172 As regards the alleged failure to take into account the atmosphere of mistrust, it must first be pointed out that secret cartels are often, by their very nature, a feature of an atmosphere of mistrust.

173 In this case, since the participants in the cartel are former competitors, which were capable, on the basis of a unilateral decision, of regaining their freedom, and in view of the potentially competitive nature of the participants in the cartel and the economic interests at stake, in the light, in particular, of the fact that it was a matter of sharing a restricted market among producers which, in some cases, had production overcapacities, it can reasonably be assumed that the cartel was conducted in an atmosphere of mistrust.

174 However, the existence of an atmosphere of mistrust does not necessarily affect the actual impact of the cartel. In this case, Roquette has still failed to demonstrate that that atmosphere of mistrust compromised the cartel's impact as established by the Commission in the Decision.

175 Consequently, Roquette's argument alleging failure to take into account an atmosphere of mistrust must be rejected.

176 For all the foregoing reasons, it must be concluded that Roquette's arguments do not call in question the fact that the cartel had an actual impact as established by the Commission in the Decision.

D — *Limitation of the effects of the cartel by Roquette*

(a) Arguments of the parties

177 As regards the gravity of the infringement, Roquette further submits that the Commission did not take into consideration its conduct, which served to limit the anti-competitive effects of the cartel. The Commission's failure to take that factor into account gives rise to infringement of Article 15 of Regulation No 17 and to breach of the principle of proportionality and the principle of equal treatment.

178 The Commission contends that this argument should be rejected.

(b) Findings of the Court

179 Roquette's argument relating to the incorrect assessment of the gravity of the infringement and based on its own conduct during the cartel must be rejected. It is

sufficient, in this regard, to recall the case-law cited in paragraph 89 above, according to which, in ruling on the taking into account of the effects of the infringement, the Court of First Instance is not required to examine the individual conduct of the undertakings, since the effects to be taken into account in determining the general level of the fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the infringement as a whole, in which it participated.

II — *Duration of the infringement*

A — *Arguments of the parties*

180 Roquette submits, in essence, that the Commission infringed Article 15 of Regulation No 17 and the principles of equal treatment and proportionality by assessing the duration of Roquette's infringement at eight years and two months instead of seven years and seven months.

181 Unlike the Commission, which determines that the infringement ended, in Roquette's case, in June 1995, Roquette submits that it terminated its participation in the cartel in May 1994, when it stopped submitting its market statistics, or, in the alternative, in October 1994, when it declared its refusal to continue the cartel at a meeting in London.

182 In support of that position, Roquette relies, firstly, on a series of documents showing that the cartel ended before June 1995. Thus, it points out that, in a memorandum dated 23 April 1999, Jungbunzlauer expresses the view that, 'from May 1994, there were no more market statistics' and that, '[w]ith Roquette's statement, on 4 October 1994 in London, that it would no longer be observing any of those agreements, they lapsed'. In addition, according to Roquette, Fujisawa stated in a document dated

12 March 1998, concerning the system of exchanging statistical data, that 'an end [had been] put to that system at some point by the end of 1993 or the beginning of 1994', whereas the Commission acknowledges, in recital 91 of the Decision, the fundamental importance of those data exchanges. Roquette also relies on its letter of 22 July 1999 to the Commission and the documents used during the proceedings before the United States authorities, in the course of which it recalls stating that the October 1994 meeting had put an end to the cartel. Finally, Roquette refers to recitals 226 to 229 of the Decision, in which the Commission explains that the growth in the market was much slower than expected, which led to a progressive deterioration in relations between the parties, which reached its peak at the October 1994 meeting.

183 Secondly, Roquette submits that the June 1995 meeting in Anaheim amounted only to an 'abortive attempt' to start up a new cartel. It bases that conclusion on the contrast between the frequency of exchanges of statistics and regularity of meetings before May 1994 and June 1994 respectively, and the absence of exchanges of statistics between May 1994 and June 1995 and of meetings between October 1994 and June 1995. That analysis is confirmed by the distinction drawn by the Commission between the 'first' cartel, between 1981 and 1985, and the 'second' cartel, from 1987 onwards. The first meeting of the second cartel was not regarded by the Commission as the continuation of the first cartel, but as an attempt to create a second cartel. In addition, that conclusion is confirmed by the fact that the June 1995 meeting did not, in Roquette's view, lead to anything, as is shown by a document handed over to the United States authorities and given to the Commission by Roquette. Finally, Roquette points out that the mere fact that the parties discussed 'compensation' or 'production targets' at that June 1995 meeting does not prove continuity with the earlier cartel.

184 Consequently, the real duration of the infringement, in Roquette's case, is seven years and seven months.

185 Having regard to the method of calculation adopted by the Commission, which consists in increasing the starting amount of fines, on the basis of the gravity of the infringement, at the rate of 10% per year, Roquette submits that the increase should not be 80%, but 70%.

186 In addition, the last year of the infringement is, in Roquette's view, 1994 and not 1995. In so far as the Commission takes the last year of the infringement as the basis for calculating the fines (recital 381 of the Decision), the 1994 turnover, namely FRF 62 204 098 (excluding 'mother liquor'), should be taken into account in determining the basic amount, and not the 1995 turnover, amounting to FRF 64 187 200.

187 In the alternative, Roquette submits that, even if the cartel had ended in June 1995, the Commission should not have taken into account the turnover for the whole of 1995. In Roquette's view, only the turnover for the first six months of 1995 should have been taken into account in establishing Roquette's weight within the cartel.

188 The Commission contends that these arguments should be rejected.

B — *Findings of the Court*

189 As regards the claimed termination of Roquette's participation in the cartel in May 1994 or, in the alternative, at the meeting of 4 October 1994, it should be noted that, in recitals 81 to 90 of the Decision, the Commission points out that the constituent elements of the cartel included a complex mechanism aimed at sharing markets, fixing prices and exchanging information on customers. However, the mere fact,

assuming it is established, that Roquette stopped, in May 1994 or following the meeting of 4 October 1994, sending its sales figures to the other cartel members does not, in itself, prove that the cartel had ceased to exist or that Roquette had ceased to belong to it.

190 On the contrary, it is apparent from recitals 220 to 228 of the Decision, which are not contested by Roquette, that it continued to participate in several meetings of the cartel, namely those of 26 and 27 June 1994 in Atlanta, 31 August and 1 September 1994 in Zurich and 4 October 1994 in London.

191 Thus, as regards the meeting held in Atlanta on 26 and 27 June 1994, it is apparent from the Decision, and not contested by Roquette, that 'the discussions that took place were similar to those held during the previous months, and dealt with the negative evolution of the market, prices and quantities'.

192 As regards the meeting held in London on 4 October 1994, it is apparent from the Decision that a conflict broke out on that occasion between the cartel members on the allocation of sales quotas for sodium gluconate. That conflict indicates, contrary to what Roquette seeks to show, that the cartel members had at the very least the intention of continuing to seek a compromise on sales quantities. The fact that it is apparent from Roquette's reply to the statement of objections of 25 July 2000, as quoted in recital 229 of the Decision, that, during that meeting of 4 October 1994, Roquette 'declared its intention of putting an end to cartel meetings' cannot prove the end of Roquette's participation in the cartel. Viewed in context, that stance taken by Roquette at that meeting means at the very most that it set about making efforts to distance itself from the cartel. Similarly, the circumstance that Roquette's representative left the room early during that meeting does not mean that Roquette distanced itself publicly from the content of that meeting. Against the background of

the conflict between the parties at that meeting, such conduct could properly be regarded by the Commission as a strategy for obtaining more concessions on the part of the other cartel members rather than an act marking the end of Roquette's participation in the cartel.

193 Consequently, the Commission was entitled to consider that Roquette had not terminated its participation in the cartel in May 1994 or at the meeting of 4 October 1994.

194 As regards the nature of the meeting held from 3 to 5 June 1995 in Anaheim, it must be observed, firstly, that Roquette does not dispute, as the Commission noted in recital 232 of the Decision, that, during that meeting, at which all the cartel members were present, the participants discussed the 1994 sodium gluconate sales volumes. In particular, the Commission pointed out, and Roquette did not contest this fact, that, according to ADM, Jungbunzlauer had asked it to 'bring ADM's total 1994 sodium gluconate sales figures' (recital 232 of the Decision).

195 It should be noted that that way of behaving coincided, in the main, with the consistent practice within the cartel aimed at ensuring adherence to allocated sales quotas and which, as is apparent from recitals 92 and 93 of the Decision, consisted in the cartel members communicating, before each meeting, their sales figures to Jungbunzlauer, which would aggregate them and hand them out during the meetings.

196 Secondly, Roquette does not dispute the Commission's description of events in recital 232 of the Decision, according to which, at that meeting, a new system for exchanging information on sales volumes was proposed. That system was intended to establish, anonymously, that is to say, in such a way that none of the members would know the others' figures, the total size of the sodium gluconate market, as

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

197 With regard to that aspect, it must be held that the Commission was entitled to take the view that it constituted a new attempt by the cartel members to 'restore order on the market' and to continue their anti-competitive practices implemented over the preceding years, aimed at keeping control of the market through joint action, although, where appropriate, in different forms and by different methods. The circumstance that the cartel members tried to set up an 'anonymous' system for exchanging information, as described above, could reasonably be interpreted by the Commission as being a natural consequence of the conduct of the undertakings in the cartel which, as is apparent inter alia from recital 93 of the Decision, was characterised by 'growing mutual mistrust', but which nevertheless had the objective of sharing the market. From that point of view, the Commission could properly take the view that, by setting up a new system for exchanging information, the cartel members showed that there 'was still a firm intent to work out a solution to carry on with anti-competitive arrangements' (recital 322 of the Decision) and to 'keep control of the market through joint action' (recital 232 of the Decision).

198 Thirdly, the fact that the period which elapsed between the meeting of 4 October 1994 and that of June 1995 was longer than that separating the previous meetings underlines, at most, the profound conflict which existed between the cartel members, but is not such as to invalidate the Commission's conclusion that, at the June 1995 meeting, they made a new attempt to maintain the anti-competitive practices.

199 Fourthly, the brief note taken by Roquette at that meeting and which the Commission cited in recitals 233 and 322 of the Decision ('6.95 Anaheim: Discussion: compensation: 44 000 MT worldwide production target: price') may reasonably be regarded as confirming the view put forward by the Commission, even if it is true that, taken individually and out of context, that note gives only a vague idea of the content of the discussions held during the meeting of 3, 4 and 5 June 1995.

200 Fifthly, the statement by a Roquette employee, attached to Roquette's letter of 22 July 1999, according to which that meeting 'led to nothing and served no purpose at all', which is consistent with Jungbunzlauer's statement in its letter of 30 April 1999, is irrelevant, since it confirms that that meeting did not modify the functioning of a single continuing infringement (recital 254 of the Decision). Thus, that letter does not show the absence of any intention on the part of the cartel members to maintain their offending conduct, even in different forms and by different methods.

201 In that respect, it should be borne in mind that for the purpose of examining the application of Article 81(1) EC to an agreement or concerted practice, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342; *Commission* v *Anic Partecipazioni*, cited in paragraph 89 above, paragraph 99; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 178; Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 87).

202 Consequently, the Commission was entitled to find that the cartel lasted until June 1995.

III — *Attenuating circumstances*

A — *Arguments of the parties*

203 Roquette submits in essence that, even if the Commission did not make errors in regard to the assessment of the gravity of the infringement, it should have taken into account in its assessment of the amount of the fine, as attenuating circumstances, Roquette's exclusively passive or 'follow-my-leader' role in the infringement, the non-implementation of the cartel's restrictive practices by Roquette and its 'role as a brake' on the infringement. Roquette refers in this connection to the arguments put forward by it concerning the gravity of the infringement.

204 In Roquette's view, those omissions constitute a breach of the Guidelines and contravene the principles established by the case-law (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 173, and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraphs 230 and 231).

205 In its reply, Roquette makes clear that, as regards the attenuating circumstances which were not taken into account by the Commission, it is referring to the evidence of its 'role as a brake' in the cartel. In particular, it refers, firstly, to the fact that it initiated the exclusion of 'mother liquors'. Secondly, it states that the operation of the monitoring system, which was the cornerstone of the cartel, was weakened by its refusal to exchange information in a sufficiently frequent manner. Thirdly, it submits that its refusal to finance the external monitoring system had the effect of impeding the smooth operation of the cartel since the reliability of the data submitted by the parties to the cartel was impossible to verify, which created the opportunity to disregard the terms of the cartel and caused an atmosphere of

mistrust to set in, which led to the dismantling of the cartel. Fourthly, it refers to the fact that it always operated an independent sales policy, as shown by the fact that its prices almost never corresponded to the floor or target prices fixed within the cartel. Fifthly and finally, it submits that it was the first to put an end to the cartel.

206 The Commission contends that those arguments should be rejected.

B — *Findings of the Court*

207 It is apparent from the application that Roquette claims that the Commission refused to grant it the benefit of the attenuating circumstances arising from its exclusively passive and 'follow-my-leader' role in the infringement, from its non-implementation of the restrictive practices and from 'its role as a brake' in relation to the infringement. In this connection, Roquette refers in general to the matters already set out in the pleas relating to the gravity of the infringement, stating that, in so far as those matters were not taken into account in determining the basic amount, they naturally find their place in the context of the assessment of attenuating circumstances.

208 With regard to those arguments, it should be recalled that, under Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, the application must inter alia contain a summary of the pleas in law on which it is based. In addition, in accordance with the case-law, irrespective of any question of terminology, that summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, even without further information. It is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and

intelligibly in the application itself, so as to guarantee legal certainty and sound administration of justice (see, to that effect, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 31, and the order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49).

209 In this case, the general reference to the matters set out in the pleas relating to the gravity of the infringement, in order to demonstrate the existence of the attenuating circumstances relied on, does not enable the Court to determine precisely the scope of the plea alleging attenuating circumstances. Although it is possible that the basic legal and factual particulars relied on by Roquette are set out in the application, it is nevertheless important for the applicant to present them coherently and intelligibly. In particular, it is not the task of the Court to search through all the matters relied on in support of a first plea in order to ascertain whether those matters could also be used in support of a second plea and, in this instance, which matters could be used for which type of attenuating circumstance. The fact that the Commission made a special point of attempting, despite the flagrant vagueness of this plea, to identify any of the applicant's arguments relied on in the context of its reasoning relating to the plea regarding the gravity of the infringement which could, where appropriate, be reiterated in support of the plea alleging attenuating circumstances, and to reply to them in that context, does not alter that conclusion. Indeed, that position adopted by the Commission amounts merely to a hypothesis as to the exact scope of the plea raised by Roquette. It does not serve to determine with certainty the exact scope of Roquette's plea based on the existence of attenuating circumstances.

210 For that reason, the pleas relating to errors made by the Commission in its analysis of the attenuating circumstances must be rejected as inadmissible under Article 44(1)(c) and (d) of the Rules of Procedure.

IV — *Roquette's cooperation during the administrative procedure*

A — *Introduction*

211 In Roquette's view, the Commission also made errors of assessment in applying the Leniency Notice.

212 Roquette submits that the Commission should have granted it a 50 to 75% reduction in the fine, pursuant to Section C of the Leniency Notice, instead of a 40% reduction in the amount of the fine, pursuant to Section D of that notice.

213 Roquette argues, in support of that position, that the Commission's assessment of the nature and content of the evidence provided by it is incorrect for two reasons. Firstly, and contrary to what the Commission maintained in the Decision, it was the first and only cartel member to provide it with evidence which was decisive for the purpose of drawing up the Decision. Roquette submits, secondly, that the Commission was wrong to relativise the importance of its cooperation during the administrative procedure by stating that it was only in its reply to the Commission's formal request for information of 2 March 1999 under Article 11(1) of Regulation No 17 that it had disclosed the documents concerned.

214 It therefore requests the Court, by virtue of its unlimited jurisdiction in regard to fines, to review that assessment (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111).

B — *The argument that Roquette was the first and only cartel member to provide the Commission with evidence decisive for drawing up the Decision*

1. General points

215 Roquette maintains that the Commission was wrong to take the view, in recital 415 of the Decision, that 'Fujisawa was the first of the cartel members to adduce evidence of the cartel's existence'. Roquette puts forward two objections in that regard. Firstly, it asserts that the information obtained by the Commission before its cooperation with Roquette was insufficient to prove the existence of a cartel. Secondly, in Roquette's view, it was only because of its own cooperation with the Commission that the latter obtained evidence which was decisive for drawing up the Decision. Those arguments are preceded by general considerations regarding the rules which the Commission was required to apply in this case in assessing the parties' cooperation during the administrative procedure.

2. General considerations regarding the rules applicable in this case to the assessment of the parties' cooperation during the administrative procedure

(a) Arguments of the parties

216 In Roquette's view, in the particular circumstances of this case, the Commission should have assessed the extent of the reduction in the amount of the fine granted on this ground not, first and foremost, on the basis of the order in which the parties

cooperated during the administrative procedure, but, above all, on the basis of the content and added value of the evidence adduced by those parties for the purpose of drawing up the objections set out in the Decision.

217 In terms of those particular circumstances of this case, Roquette maintains that it was only after obtaining the information regarding the investigations carried out in the United States that the Commission opened its own investigation which resulted in the adoption of the Decision. Roquette points out that it is apparent from recital 53 of the Decision that, in March 1997, the United States Department of Justice informed the Commission of the investigation being carried out into the sodium gluconate market. Similarly, it is apparent that the Commission was informed, in October 1997, that Akzo, Avebe and Glucona had admitted to participating in an international cartel relating to that product, aimed at fixing prices and allocating market shares 'in the United States and elsewhere' and that, in December 1997 and February 1998 respectively, Roquette and Fujisawa had admitted to the same conduct. Even if, in the Decision, the Commission had not indicated precisely the nature of the information which it held by virtue of the proceedings opened in the United States, it would nevertheless be reasonable to assume that the Commission had available to it at least the various press releases, dating from 24 September and 17 December 1997 and relating to the outcome of the investigations carried out in the United States, press releases to which the public had access via the internet.

218 Roquette infers from this that when, as is apparent from recital 54 of the Decision, 'during winter 1997-98', the Commission sent, under Article 11 of Regulation No 17, its first requests for information 'to the main producers, traders and customers of sodium gluconate in Europe', it was informed of the existence of a cartel on the sodium gluconate market on a worldwide level, of the identity of the participants, of the fact that each of those participants had admitted the infringement before the United States authorities and of the fact that the infringement had ceased since June 1995.

219 However, in such particular circumstances, it is not appropriate to grant the maximum reduction to the party which was the first to cooperate with the Commission, but to that which provided the relevant information and documents

and therefore genuinely enabled the Commission to establish the infringement with less difficulty.

220 Moreover, that position corresponds to the approach which the Commission itself set out in a draft new notice on reduction of fines, published in July 2001 ('the draft new notice'), and, since its publication in 2002, in its new notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the new notice'). The Commission should therefore have followed that new policy in this case. In support of this line of argument, Roquette relies, in its reply, firstly, on the legal nature of such a notice, which creates legitimate expectations on the part of the undertakings concerned and, secondly, the general principle of criminal law that the most favourable criminal statute should be applied (*in mitius* retroactivity) (Case C-230/97 *Awoyemi* [1998] ECR I-6781 and Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc and Others) (OJ 1999 L 76, p. 1)).

221 The Commission submits that Roquette is not entitled to rely on the draft new notice. The Commission disputes the admissibility of Roquette's plea that the application of the new notice is justified by the principle of the application of the most favourable criminal statute. It regards this plea as inadmissible since it was raised for the first time at the stage of the reply. In the alternative, the Commission submits in essence that Roquette contradicts itself by complaining, on the one hand, that the Commission did not apply the Leniency Notice correctly and by seeking, on the other, retroactive application of the new notice, which replaced the Leniency Notice.

(b) Findings of the Court

222 In its Leniency Notice, the Commission defined the circumstances in which undertakings cooperating with it during its investigation into a cartel may be

exempted from the fine or may be granted reductions in the fine which would otherwise have been imposed upon them (see Section A(3) of the Leniency Notice).

223 The Leniency Notice is an instance of the exercise of the Commission's discretion and requires only a self-imposed limitation of the Commission's power in accordance with the principle of equal treatment (see, to that effect, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89). Moreover, as is expressly mentioned in Section D(3) of that notice, the latter created legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission. In the light of the respect for the principle of equal treatment and of the legitimate expectations which undertakings wishing to cooperate with the Commission were entitled to derive from that notice, the Commission was therefore obliged to comply with it when assessing Roquette's cooperation in the context of the determination of the amount of the fine imposed on it.

224 Roquette is therefore wrong to maintain that, in this case, the Commission should have applied the rules laid down, not in the Leniency Notice, but in the draft new notice or the new notice itself. As regards the draft new notice, even though that document was published in July 2001, that is to say, before the adoption of the Decision, Roquette does not dispute that the Commission published that document with the sole aim of giving the interested parties the opportunity to submit their observations on it. As regards the new notice, that document was published only after the adoption of the Decision. Neither the draft new notice nor the new notice itself could therefore entail any self-imposed limitation on the exercise of the Commission's discretion in the present case (see, to that effect, Case T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305, paragraph 121, and Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495, paragraph 142).

225 Consequently, Roquette is wrong in invoking the principle of legitimate expectations and, even assuming that such a general principle exists in Community law, that of the application of the most favourable criminal statute in order to maintain that the Commission should have applied the draft new notice or the new notice, or even the principles enshrined in those documents, to this case.

226 Next, it does admittedly appear, as Roquette points out, that, in contrast to certain other investigations carried out by the Commission in the past, it already had, in this case, certain information as to the existence of a worldwide cartel on the sodium gluconate market and as to the identity of some of its participants before opening its own investigation pursuant to Regulation No 17, as is apparent from recital 53 of the Decision.

227 However, that circumstance cannot entail an obligation for the Commission to disregard the rules governing cooperation by undertakings which it has laid down in its Leniency Notice.

228 Finally, it should be pointed out that Roquette does not dispute that Fujisawa was the first member of the cartel to disclose its existence and to inform the Commission of the identity of its participants and the object of the infringement. Roquette also acknowledges that the Leniency Notice lays down the principle that only the undertaking which 'is the first to adduce decisive evidence of the cartel's existence' can obtain a very substantial (at least 75%) or substantial (50 to 75%) reduction in the amount of the fine that would have been imposed on it if it had not cooperated (see Section B(b) and Section C of the Leniency Notice).

229 In this case, it was only after receiving the information from Fujisawa that the Commission undertook an investigation, ordered by decision, of the undertakings

involved, within the meaning of Section B(a) of that notice. The information received as to the investigation carried out in the United States cannot, therefore, within the meaning of that provision, have prevented the application of the treatment provided for in Section B of that notice to Fujisawa.

230 Consequently, contrary to what Roquette maintains, the Commission correctly applied to this case the rules which it had laid down in its Leniency Notice of 1996.

3. The objection that the information obtained by the Commission before Roquette's cooperation was insufficient to prove the existence of a cartel

(a) Arguments of the parties

231 Roquette submits that the information obtained by the Commission before its own cooperation with it did not constitute irrefutable proof of the content of the cartel and of its operation.

232 Firstly, Roquette submits that, prior to its cooperation with the Commission, the information held by the latter did not go beyond the information which it had already obtained from the United States authorities or which was publicly available. That information indicated only that Akzo, Avebe, Glucona, Roquette and Fujisawa had met from August 1993 to June 1995 in order, inter alia, to agree on the price of sodium gluconate and the allocation of market shares.

233 Secondly, in Roquette's view, that information was insufficient to prove the existence of a cartel, in so far as it consisted, in the main, of mere statements. The only documentary evidence adduced consisted of travel tickets. The Commission found it necessary to send requests for information and to undertake investigations on the premises of the parties, since it was not satisfied with the information obtained through the United States authorities and with the first evidence adduced by Fujisawa on 12 May 1998 and ADM on 21 January 1999.

234 The Commission submits that Fujisawa was the first company to adduce decisive evidence of the cartel's existence.

(b) Findings of the Court

235 By claiming that the information obtained by the Commission before its own cooperation with it was insufficient to prove the existence of a cartel, Roquette seeks in essence to show that the Commission was wrong to take the view that Fujisawa had been 'the first to adduce decisive evidence of the cartel's existence' within the meaning of Section C read in conjunction with Section B(b) of the Leniency Notice.

236 Section C of the Leniency Notice, 'Substantial reduction in a fine', provides:

'Enterprises which both satisfy the conditions set out in Section B, points (b) to (e), and disclose the secret cartel after the Commission has undertaken an investigation

ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision will benefit from a reduction of 50% to 75% of the fine.'

237 The conditions set out in Section B(b) to (e), to which Section C refers, apply to an undertaking which:

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

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

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

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

238 It is clear from those provisions, first, that, contrary to what Roquette maintains, in order to benefit from a reduction in the amount of the fine pursuant to Section B or C of the Leniency Notice, the latter does not require the party which discloses the cartel to have provided the Commission with 'irrefutable proof of the content of the cartel and of its operation'.

239 According to the Leniency Notice, the condition laid down by Section B(b) is already fulfilled where the undertaking which discloses the secret cartel is the 'first' to adduce 'decisive evidence of the cartel's existence'.

240 The circumstance that, after the disclosure of the cartel by a party, the Commission sends requests for information and undertakes investigations on the premises of the other parties does not therefore demonstrate in the least that the information provided by the member of the cartel which disclosed it was insufficient in the light of Section B or C of the Leniency Notice.

241 Next, in so far as Roquette asserts, in essence, that the information provided by Fujisawa did not go beyond that which the Commission had received or, at least, should have received from the United States authorities, it should be remembered that, even if that assertion is correct, the principle of the Community's autonomous competence in relation to competition law implies that the Commission is not automatically bound by evidence produced by authorities of third States when it is obtaining evidence to enable it to take a decision on the basis of Article 81 EC.

242 Finally, in any event, it must be stated that, contrary to what Roquette maintains, the information provided by Fujisawa went beyond that contained in the press releases of the United States authorities, submitted to the Court by Roquette. It is clear that, firstly, those press releases did not include the names of all the members involved in the cartel. Secondly, those press releases confined themselves to giving summary descriptions of the various agreements concluded. However, as the Commission rightly pointed out in recital 415 of the Decision, Fujisawa, in its letter of 12 May 1998 disclosing the existence of the cartel, noted the identities of the cartel members and provided a description of the main agreements reached between them,

specifying the period for which they had been concluded, the mechanisms for the implementation and operation of the cartel and a list, albeit incomplete, of cartel meetings, together with a summary of the content of some of those meetings.

243 Moreover, it must be observed that it is apparent from recital 414 of the Decision that, by applying Section B of the Leniency Notice to Fujisawa, the Commission did, to a certain extent, take account of the fact that, when Fujisawa disclosed the cartel, 'it already knew about the [United States] Department of Justice investigation into the sodium gluconate market and that Akzo, Avebe and Glucona had pleaded guilty to participating in an international conspiracy to fix the price and to allocate market shares "in the United States and elsewhere"'.

244 It follows from the foregoing that Roquette is wrong in claiming that Fujisawa was not the first cartel member to provide the Commission with decisive evidence of the cartel's existence, within the meaning of Section B(b) of the Leniency Notice. Accordingly, Roquette's first objection, alleging that the information obtained by the Commission before its cooperation was insufficient, must be rejected.

4. The objection that only the evidence adduced by Roquette was decisive for drawing up the Decision

(a) Arguments of the parties

245 Roquette claims that it was because of its own cooperation during the administrative procedure that the Commission obtained the information set out in the statement of objections and, subsequently, in the Decision.

246 Firstly, as regards the statement of objections, Roquette submits that, of a total of 13 annexes, 10 contained documents handed over voluntarily by the parties, of which 8 were handed over by it. Moreover, in the part setting out the cartel story, reference is made, on almost every page, to handwritten notes provided by Roquette.

247 Secondly, as regards the Decision itself, Roquette submits that two factors demonstrate the decisive nature of the information provided by it. First, it was thanks to Roquette's information that the Commission was able to ascertain the basic principles of organisation, the system of exchanging information on customers, the implementation of the agreements and the description of matters covered by the meetings held between February 1987 and June 1995. Second, the Decision reveals a certain contrast in terms of precision between the descriptions which it contains, depending on whether they are based on information provided by Roquette or whether they cannot be based on any information provided by Roquette.

248 As regards the decisive nature of Roquette's information, this is clear, so far as concerns the basic principles of organisation, from the footnotes to the section of the Decision dealing with those basic principles. Of 12 references, 8 are taken from evidence provided by Roquette. Recital 83 of the Decision, describing the system of quota allocation, refers, inter alia, to Roquette's handwritten notes produced in the course of its cooperation with the Commission. In recital 88 of the Decision, the Commission bases its information exclusively on the documents provided by Roquette to explain how the system worked as regards the fixing of floor and/or target prices.

249 As regards the establishment by the Commission of the system of customer information exchange, the decisive nature of the information provided by Roquette is apparent from recital 90 and footnotes 46 and 47 to the Decision. The Commission cites in those passages exclusively information produced by Roquette in the course of its cooperation.

250 As regards the case made for implementation of the agreements and, in particular, for the existence of a system of monitoring, it seems, according to Roquette, that the Commission uses, without expressly saying so, the evidence produced by Roquette (recital 172 of the Decision).

251 Finally, as regards the description by the Commission of matters covered by the meetings between the parties to the cartel from February 1987 to June 1995, the handwritten notes provided by Roquette are decisive. That is acknowledged by the Commission in recital 121 of the Decision, which states that '[t]he content of each meeting becomes more precisely known over the period 1989-90, as the companies' declarations are supported by contemporaneous material'. That contemporaneous material corresponds to Roquette's meeting notes taken from the Gothenburg meeting of 11 May 1989 until the Zurich meeting of 3 September 1991. Those notes provided by Roquette, together with the explanations concerning them (see the memorandum of 22 July 1999), enabled the Commission to understand how the cartel worked, the matters debated between the participants and the role played by each participant, and to decipher the codes which were used by the undertakings to refer to each of them. Those handwritten notes are, in the case of certain meetings, the only documents which the Commission had available to it in order to outline what took place at those meetings (see the meetings mentioned in recitals 131, 132 to 138 and 139 to 149 of the Decision, as well as the visit of a Fujisawa representative to Roquette's factory on 22 January 1990, the meeting between Jungbunzlauer and Roquette on 2 February 1990, the meeting of 21 and 22 May 1990 in Zurich, the meeting of 10 and 11 June 1991 in Geneva, the meeting of 24 July 1991 in Zurich and, finally, the meeting of 2 and 3 September 1991 in Zurich). Roquette's handwritten notes also enabled the Commission to establish the anti-competitive

nature of the talks which took place between, on the one hand, ADM and, on the other, Glucona and the other European producers (recital 155 of the Decision).

252 The decisive role of Roquette's contributions is also demonstrated, in its view, by the fact that, of 175 references made by the Commission, in the footnotes to the Decision, to documents and statements of the undertakings concerned, nearly half were obtained as a result of its cooperation. Moreover, all the tangible evidence enabling the matters covered by and details of the cartel to be proved was provided by Roquette. The Commission actually acknowledges this in recital 426 of the Decision, noting that 'Roquette is the only cartel member to have provided documents that record the events and conclusions of the cartel meetings'.

253 Roquette cites, moreover, the absence in the Decision of precise descriptions of the content of meetings for which the Commission did not have Roquette's handwritten notes, as compared with those for which the Commission was able to rely on such information.

254 Thus, for the period preceding the first meeting recorded by Roquette's notes, the Commission confines itself to vague and imprecise descriptions (see recital 121 of the Decision, where the Commission refers to 'an important number of multilateral cartel meetings' which took place 'between April 1987 and May 1990' and the descriptions of meetings in recitals 122 to 128 of the Decision).

255 The inadequacy of the evidence in the Commission's possession is also apparent from the descriptions of events subsequent to or not covered by the handwritten notes produced by Roquette. The latter points to numerous contradictions and refers to recitals 129 and 164 of the Decision. In addition, as demonstrated by recitals 201 and 214 of the Decision, Roquette's documents and statements concerning that period of the cartel were of great help to the Commission.

256 Roquette submits that it was the only party to have provided so much evidence of such great probative value, including documentary evidence, documents dating from the period of the infringement and documents directly connected with the conduct of the undertakings. It therefore submits that, in accordance with the case-law (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021) and the draft new notice, the Commission should have taken more account of the decisive nature of the information provided for the purpose of assessing the reduction in the amount of the fine.

257 In its reply, Roquette submits that the decisive nature of the information it provided cannot be affected by the evidence provided by Fujisawa. In Roquette's view, by disclosing the existence of the cartel, the identity of its participants and the object of the infringement, Fujisawa merely produced information which the Commission already knew via the United States authorities' internet site. In addition, the bulk of the documents provided by Fujisawa are merely notes of travel expenses relating to the various places where cartel meetings were held. The information provided by Roquette goes well beyond that.

258 The Commission disputes the relevance of those considerations and points out that it took full account of Roquette's cooperation by granting it a 40% reduction in the amount of the fine, in accordance with Section D of the Leniency Notice.

(b) Findings of the Court

259 First of all, it must be borne in mind that Roquette was not the first cartel member to inform the Commission about the cartel. Fujisawa was the first to provide the Commission with decisive evidence of the continuation of an infringement involving the informer itself (see paragraph 244 above). Only if Roquette had been the first cartel member to inform the Commission about the cartel by providing decisive evidence would the Commission have been able, provided that all the other conditions were met, to grant it, as it claims, a more substantial reduction pursuant to Section B or C of the Leniency Notice.

260 In this case, the Commission granted Roquette a reduction in the amount of the fine pursuant to Section D of the Leniency Notice. In so doing, as the Commission rightly points out, it took full account of Roquette's cooperation.

261 Accordingly, the objection to the effect that only the evidence provided by Roquette was decisive for drawing up the Decision must be rejected.

262 Roquette's argument that the Commission should have granted it, at the very least, the maximum reduction provided for under Section D of that notice overlaps with Roquette's objection to the Commission's assessment of the importance of its cooperation, resulting in a 40% reduction in the amount of the fine which it would otherwise have incurred. Consequently, those two arguments will be considered together below.

C — *The objection that Commission wrongly alleges that Roquette produced the documents concerned only in its response to the request for information*

1. Arguments of the parties

263 Roquette claims that it was in order to characterise its conduct as covered by Section D of the Leniency Notice that the Commission claimed that the relevant documents had been made available to it only in reply to the formal request for information of 2 March 1999, based on Article 11(1) of Regulation No 17. However, according to Roquette, the formal request for information of 2 March 1999 contained questions which prompted self-incrimination and constituted an infringement of the rights of the defence, justifying the right to refrain from answering those questions and the fact that, accordingly, it answered those questions only in the course of its cooperation with the Commission. Having regard to the non-factual nature of the questions put and to the information which the Commission already had, Roquette submits that the purpose of those questions was to oblige it to admit to its participation in the cartel. That constitutes an infringement of the rights of the defence (Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraphs 66, 67, 71, 73 and 78), the counterpart of which is the right to refrain from answering such questions. In Roquette's submission, it ensues from that potential infringement of the rights of the defence that its answers to the questions put by the Commission were given only after it decided to cooperate with the Commission.

264 The Commission contends that the formal request for information of 2 March 1999 was submitted under Article 11(5) of Regulation No 17 and that none of the questions in that request for information was such as to oblige Roquette to admit to its participation in an illegal agreement. Moreover, the Commission submits that, if the questions sought to elicit admissions, Roquette was entitled to refuse to answer them. The Commission submits that, since Roquette did not refuse to answer the questions, the answers which it provided were not admissions and were given in connection with a request for information and not in connection with the Leniency Notice.

2. Findings of the Court

265 It must be pointed out, first of all, that, contrary to what Roquette maintains, it was not in order to characterise its conduct as covered by Section D of the Leniency Notice that the Commission took the view that the relevant documents had been made available to it only in the response to the formal request for information of 2 March 1999 pursuant to Article 11(1) of Regulation No 17. It is clear from recital 426 of the Decision that it was only for the purpose of fixing the percentage of the reduction in the amount of the fine, in the context of the discretion which it is allowed by Section D of that notice, that the Commission took account of that factor.

266 Secondly, it must be observed, without there being any need to examine whether, as Roquette maintains, certain questions set out by the Commission in its requests for information infringed the rights of the defence, that, as Roquette itself points out, it chose freely to answer the questions put, in the course of its cooperation with the Commission. Roquette could, if necessary, have refrained from answering those questions, at the risk, admittedly, of not having a reduction in the fine applied to it on the basis of the Leniency Notice. That being the case, it must be held that Roquette's answers are not necessarily evidence of its spontaneous cooperation in the context of the procedure in question, since Roquette provided its information only in response to a request for information, and not on its own initiative. Roquette cannot therefore complain that the Commission took account, in fixing the percentage of the reduction in the amount of the fine, of the fact that it had cooperated only in response to the request for information which the Commission had sent to it.

267 Finally, as regards the claim that the Commission should have granted Roquette, at the very least, the maximum reduction provided for under Section D of the Leniency Notice, the Court finds that, in the light of all the foregoing considerations and, in particular, of the fact that Roquette provided its information only in response to a request for information, a reduction of 40% in the amount of the fine is appropriate.

268 Consequently, this second objection, to the effect that the Commission wrongly asserted that Roquette had produced the documents concerned only in its response to the request for information, must be rejected.

269 In the light of all the foregoing, the pleas alleging errors made by the Commission in the assessment of Roquette's cooperation during the administrative procedure must be rejected in their entirety. In the absence of any illegality in the assessment of Roquette's cooperation during the administrative procedure, there is no need to amend the Decision in that respect.

V — *Breach of the* ne bis in idem *principle*

A — *Arguments of the parties*

270 In its last plea, Roquette alleges, in essence, breach of the *ne bis in idem* principle and of the principle of proportionality, in the light of the fact that the Commission

did not take account of the fact that the United States competition authorities had also penalised Roquette for its participation in the same cartel.

271 In support of this last plea, Roquette makes reference to the judgment of the Court of Justice in Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, which states that 'it 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'.

272 However, in Roquette's submission, both in the proceeding conducted by the United States competition authorities and in that conducted by the Commission, not only are the types of cartel and the perpetrators the same, but the implementation of the cartel and conduct of the parties are also identical.

273 In demonstrating the identity of subject-matter between the proceedings before the European and United States competition authorities, namely a global anti-competitive cartel, Roquette refers to the plea agreement which it concluded. That agreement proves that the fine imposed in the United States is based not only on Roquette's conduct in the United States, but also on its conduct on the European market by the fact that that conduct reflects the operation of the cartel on a worldwide level. The agreement in question states that '[t]he main conditions of that cartel were to allocate market shares between major undertakings producing sodium gluconate in the United States and elsewhere, and to fix and maintain the price of

sodium gluconate sold in the United States and elsewhere'. Thus, in Roquette's view, the fine imposed in the United States not only penalises the effects of its conduct on the United States market, but also relates to its participation in the implementation of the cartel at worldwide level and therefore, inter alia, at a European level.

274 Roquette submits that the geographical definition of the cartel at worldwide level also ensues from the objectives of the cartel, such as the exchange of customer information and the allocation of sales quotas at worldwide level, as well as the holding of meetings across the world.

275 Finally, in assessing the amount of the fine, both the United States competition authorities and the Commission took into account Roquette's worldwide turnover. The fact that that turnover was taken into account twice in penalising the same conduct is, in Roquette's submission, contrary to the *ne bis in idem* principle and the principle of proportionality.

276 The Commission submits that Roquette's plea should be rejected.

B — *Findings of the Court*

277 It is clear from case-law that the *ne bis in idem* principle, enshrined also in Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, 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; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P

Limburgse Vinyl Maatschappij and Others v *Commission* [2002] ECR I-8375, paragraph 59; and *Boehringer* v *Commission*, cited in paragraph 271 above, paragraph 3).

278 Under the *ne bis in idem* principle, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal interest. The application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338).

279 The case-law has thus accepted the possibility of concurrent sanctions, one Community, the other national, resulting from two parallel procedures pursuing different ends, the acceptability thereof deriving from the special system of sharing jurisdiction between the Community and the Member States with regard to cartels. However, a general requirement of natural justice implies that, when fixing the amount of a fine, the Commission must take account of penalties which have already been borne by the same undertaking for the same conduct, where they have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory (Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 11; *Boehringer* v *Commission*, cited in paragraph 271 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).

280 In so far as Roquette claims that, by imposing on it a fine for its participation in a cartel already penalised by the United States authorities, the Commission infringed the *ne bis in idem* principle, under which a second penalty may not be imposed on the same person for the same prohibited conduct, it must be recalled that the Community judicature has accepted that an undertaking may properly be the subject of two parallel procedures for the same unlawful conduct and therefore of a twofold penalty, one imposed by the competent authority of the Member State in

question, the other by the Community, in so far as those procedures pursue different ends and there is not identity between the provisions infringed (*Wilhelm and Others*, cited in paragraph 279 above, paragraph 11; *Tréfileurope* v *Commission*, cited in paragraph 279 above, paragraph 191; and *Sotralentz* v *Commission*, cited in paragraph 279 above, paragraph 29).

281 It follows that the *ne bis in idem* principle cannot, a fortiori, apply in circumstances such as those of this case, where the proceedings conducted and penalties imposed by the Commission, on the one hand, and by the United States authorities, on the other, clearly do not pursue the same objectives. Whereas, in the former, it is a question of preserving undistorted competition on the territory of the European Union or in the EEA, the protection sought, in the latter, concerns the American market (see, to that effect, Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraphs 52 and 53, and Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 103 to 106). The condition of unity of the legal interest protected, which is necessary for the application of the *ne bis in idem* principle, is therefore lacking.

282 Moreover, it must be pointed out that Roquette neither invokes nor demonstrates the existence of a principle of law or a rule or convention of public international law prohibiting authorities or courts of different States from prosecuting or convicting a person on the basis of identical facts producing effects on their territory or within their jurisdiction. In the absence of proof of the existence of such a rule or convention binding the Community or third States, such as the United States, and providing for such a prohibition, the Commission cannot be bound by it.

283 It follows that Roquette's argument alleging breach of the *ne bis in idem* principle on the ground that the cartel in question has also been the subject of convictions outside Community territory or that the Commission took into account in the

Decision Roquette's worldwide turnover, which had already been taken into account by the United States authorities in setting fines, must be rejected.

284 In so far as Roquette alleges that the Commission failed to have regard to the judgment in *Boehringer* v *Commission*, cited in paragraph 271 above, according to which the Commission is obliged to set a penalty imposed by the authorities of a third State against another penalty if the actions of the applicant undertaking complained of by the Commission, on the one hand, and by those authorities, on the other, are identical, it must be remembered that, in paragraph 3 of that judgment, the Court held as follows:

'... it 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.'

285 Roquette draws from that passage the contrary inference that the Commission was obliged to take into account the penalties which had been imposed on it by the United States authorities for its participation in the global sodium gluconate cartel, which is of the same type, results in the same implementation and relates to identical conduct by the parties, as regards both the object and the location, as that covered by the Commission in its Decision imposing on it a fine of EUR 10.8 million.

286 It must, however, be observed, firstly, that it is clear from that passage of the judgment in *Boehringer* v *Commission*, cited in paragraph 271 above, that the Court of Justice, far from having decided the question whether the Commission is under a duty to set a penalty imposed by the authorities of a third State against another penalty where the actions of an undertaking complained of by the Commission and the American authorities are identical, made identity of the actions complained of by the Commission and the authorities of a third State a prerequisite for consideration of the abovementioned question.

287 Secondly, it must be pointed out that 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 in paragraph 279 above, paragraph 11, and the Opinion of Advocate General Mayras in *Boehringer* v *Commission*, cited in paragraph 271 above, ECR 1293, at 1301 to 1303).

288 However, such a situation clearly does not arise in the present case. Consequently, in the absence of any claim that there is an express provision of an agreement or treaty which lays down an obligation for the Commission, when setting the amount of the fine, to take account of penalties already imposed on the same undertaking for the same conduct by authorities or courts of a third State, such as the United States, Roquette cannot legitimately complain that the Commission failed to comply, in this case, with that supposed obligation.

289 In any event, even if it must be considered, on the basis of the judgment in *Boehringer* v *Commission*, cited in paragraph 271 above, that natural justice requires the Commission to take account of penalties imposed by the authorities of third States where an undertaking's conduct complained of by the Commission is identical to that same undertaking's conduct complained of by an authority of a third State, the fact remains that Roquette has still failed to show that, in this case, the United States authorities acted against the application or effects of the cartel other than those concerning their territory.

290 With regard to Roquette's conviction in the United States, it is apparent from the plea agreement concluded between the United States Department of Justice and Roquette, as submitted to the United States District Court for the Northern District

Court of California, that Roquette was sentenced to a fine of 2.5 million United States dollars (USD). Although that agreement refers to the fact that the object of the sodium gluconate cartel was to eliminate competition by fixing and maintaining prices and by allocating market shares 'in the United States and elsewhere' for sodium gluconate, it is by no means established that that plea agreement ratified by an American court was directed against the application or effects of the cartel other than those occurring in that country (see, to that effect, *Boehringer* v *Commission*, cited in paragraph 271 above, paragraph 6) and, in particular, those established in the EEA, which, moreover, manifestly encroached upon the territorial jurisdiction of the Commission. Furthermore, it is indisputable that the Commission carried out its own investigation (recitals 54 to 64 of the Decision) and undertook its own assessment of the evidence submitted to it.

291 In those circumstances, the objection alleging that the Commission infringed a supposed obligation to set penalties imposed previously by the authorities of third States against other penalties and the objection raised incidentally by Roquette, alleging a breach of the principle of proportionality stemming from that infringement, must be rejected.

292 In the light of the foregoing, only the objection alleging incorrect determination of the turnover to be taken into account in the calculation of the starting amount of Roquette's fine can be accepted. It is therefore for the Court to determine, by virtue of its unlimited jurisdiction, the consequences of that error.

The exercise of unlimited jurisdiction

293 The Court considers, first of all, on the basis of its unlimited jurisdiction, that, even if the error of taking into account Roquette's turnover in respect of 'mother liquor'

in determining the starting amount of its fine (see paragraph 55 above) is attributable to Roquette, that circumstance cannot justify taking that wrong turnover into account when determining the starting amount of the fine (see, to that effect, *Aristrain* v *Commission*, cited in paragraph 43 above, paragraph 586).

294 It follows that the worldwide turnover to be taken into account in determining the starting amount of Roquette's fine is EUR 9 820 600 instead of EUR 12 293 620 and that its market share was 17.4% and not 20.96%.

295 As regards the consequences of that reduction, the Court recalls that, where undertakings which have infringed Article 81(1) EC are divided into groups for the purpose of setting the amounts of the fines, the thresholds for each of the groups thus identified must be coherent and objectively justified (see, to that effect, Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 298; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 416; and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1541).

296 In this case, the division of the cartel members into two categories was justified in the Decision by the relative importance of the undertakings in the market concerned, expressed in turnover and market shares. On that basis, Jungbunzlauer, Fujisawa and Roquette were placed in the first category on the ground that they were the three major producers of sodium gluconate with worldwide market shares above 20%. Glucona and ADM, whose market shares in the market in question were below 10%, were placed in the second category (recitals 380 and 382 of the Decision).

297 The Court considers that the relative importance of the undertakings in question, expressed in turnover and market shares, constitutes an appropriate criterion for

dividing them into different categories. The application of that criterion must, however, comply with the principles of proportionality and equal treatment.

298 In the light of those considerations of principle, the Court is of the view that, because of the error in taking into account Roquette's relevant turnover, Roquette cannot remain in the first category. The Court finds it contrary to the principles of equal treatment and proportionality that, in this case, Roquette, whose market share is 17.4% and turnover EUR 9 820 600 after correction, should have applied to it, following the division into categories of the various undertakings in question on the basis of the criterion of their relative importance, the same starting amount of EUR 10 million as Fujisawa, whose market share is 37.1% after correction of Roquette's market share, and turnover EUR 20 843 500, whereas ADM, whose market share is 9.7% after correction of Roquette's market share, and turnover EUR 5 485 810, should have imposed on it a starting amount of EUR 5 million.

299 That conclusion is not affected by the arguments put forward by the Commission that the fine was not calculated on the basis of turnover. Although the amount of the fine was not set directly on the basis of the turnover of the undertakings in question, that turnover nevertheless defines the starting amount of the fine, which is decisive for setting the final amount of the fine. Nor is that conclusion affected by the Commission's argument that the undertakings were divided into categories on the basis of their position as the major producers and not on the basis of their market share above or below 20%. Firstly, the Commission wrongly submits that, in its Decision, the two categories result solely from the application of the criterion of the three major producers (see paragraph 296 above) and, secondly, classification on the basis of that sole criterion cannot, in this case, be justified in the light of the principles of proportionality and equal treatment. As for the judgment in *Acerinox* v *Commission*, cited in paragraph 49 above, referred to by the Commission, the Court

considers that it cannot usefully be relied on, in this specific case, in so far as the market shares of the undertakings in question in the case which gave rise to that judgment were not very disparate, since they were all between 11 and 18% whereas, in this case, the market shares were between 9.1 and 37.1% after correction of Roquette's turnover.

300 In the light of the foregoing, the Court considers, by virtue of its unlimited jurisdiction, that Roquette must be placed in an intermediate category between the first and second categories defined by the Commission, for which the starting amount is set at EUR 7.5 million. Applying the method used and other factors taken into account by the Commission in this case, Roquette's fine should therefore have amounted to EUR 8.1 million.

301 However, the Court considers that, although Roquette's responsibility for the error in question cannot prevent the Court from correcting that error and its consequences (see paragraph 293 above), it cannot be inferred from this that the question of responsibility can in no circumstances be taken into account in the exercise, by the Court, of its unlimited jurisdiction in assessing the consequences of that error.

302 In that regard, the Court observes that, in its letter of 19 November 1999 to the Commission, Roquette drew attention to the ambiguity of the concept of liquid sodium gluconate. In that letter, Roquette stated that 'the term "liquid" sodium gluconate refer[red] either to "mother liquor" obtained as a by-product during the crystallisation of "solid" sodium gluconate, or to the redissolution of "solid" sodium gluconate'.

303 Secondly, it is apparent from that same letter that Roquette defined the particular nature of its liquid sodium gluconate in the following terms:

'... Roquette also wishes to draw attention to the particular nature of its "liquid" sodium gluconate product as compared with that of its competitors: Roquette has a technique for crystallising "solid" sodium gluconate, the particular feature of which is that, as a result of only a single crystallising operation, it supplies "mother liquor" ("liquid" sodium gluconate):

— in very large quantity;

— of marketable quality,

— and at low production cost.

By contrast, to Roquette's knowledge, its competitors' manufacturing processes generate only a small quantity of "mother liquor", as a result of several crystallising operations, which is of lesser quality and is not or only marginally marketable in the industrial sector. The "liquid" sodium gluconate of Roquette's competitors is therefore more in the nature of a redissolved "solid" sodium gluconate, that is, a product with a much higher production cost.

Roquette's manufacturing process is a business secret, as is the "liquid" sodium gluconate which results from it, which, in any event at the material time, was not known to its competitors. That detail is very important, in so far as it is because of that particular feature of its manufacturing process that Roquette has always been

opposed to the meetings arranged with its competitors being extended to cover "liquid" sodium gluconate, despite their insistence.'

304 In its letter of 3 May 1999, Roquette states that the meetings mentioned in the annex to that letter related 'so far as concerns Roquette, only to (solid) crystallised sodium gluconate, and not to liquid sodium gluconate'. In its reply of 25 July 2000 to the statement of objections, Roquette also states that, 'as a result of its sodium gluconate production process, [it] produces a large quantity of liquid gluconate (or "mother liquor")' and that it 'has always been opposed to liquid gluconate being covered by the quotas and, more generally, by the rules adopted at the meetings'.

305 In addition, in Fujisawa's statement of cooperation of 12 May 1998, it expresses the view that 'mother liquors' did not constitute a finished product and were therefore not included within the scope of the cartel.

306 Finally, in its letters of 3 May 1999 and 21 May 2001, Roquette provided the Commission with turnover figures under the description 'liquid sodium gluconate', in response to the requests for information of 2 March 1999 and 11 May 2001.

307 In the light of the foregoing, the Court observes that the explanations given to the Commission by Roquette in its letter of 19 November 1999 do not facilitate an understanding of the equivalence between Roquette's sodium gluconate and 'mother liquor'. In that letter, Roquette does, admittedly, point out that the concept of 'liquid' sodium gluconate can refer either to 'mother liquor', obtained as a by-product during the crystallisation of 'solid' sodium gluconate, or to the redissolution of 'solid' sodium gluconate, and that it has a technique for crystallising 'solid' sodium gluconate, the particular feature of which is that, as a result of only a single

crystallising operation, it provides 'mother liquor' in very large quantity, of marketable quality and at a low production cost, but it is nevertheless by no means clear that Roquette's liquid product mentioned under the description 'liquid sodium gluconate' corresponds exclusively to 'mother liquor'.

308 Likewise, the fact that Roquette told the Commission, in its letters of 3 May 1999 and 25 July 2000, that the cartel meetings had covered, so far as concerned Roquette, only (solid) crystallised sodium gluconate and not liquid sodium gluconate, or that it has always been opposed to liquid sodium gluconate falling under the rules adopted at the meetings, does not indicate clearly that the liquid sodium gluconate produced by Roquette constituted exclusively 'mother liquor'.

309 In the absence of clarification regarding the full equivalence between Roquette's liquid sodium gluconate and 'mother liquor', the Commission was entitled to take the view that Roquette produced, in addition to 'mother liquor', liquid sodium gluconate similar to that of its competitors. Consequently, the Commission was entitled to ask Roquette to provide its turnover figures for, inter alia, its liquid sodium gluconate.

310 In addition, in its replies of 3 May 1999 and 21 May 2001 to the Commission's requests for information concerning, inter alia, its turnover figures for liquid sodium gluconate, Roquette did not specifically state that its liquid sodium gluconate corresponded exclusively to 'mother liquor'. The fact, relied on by Roquette, that the Commission asked it to adhere strictly to the format of the requests for information did not in any way prevent it from ensuring that it did not mislead the Commission and from making clear that its turnover for liquid sodium gluconate corresponded exclusively to its turnover for 'mother liquor'. That conclusion is applicable a fortiori since, having regard to the methods of production and marketing of liquid sodium gluconate employed by Roquette, it must have known that there was a risk of confusion on the part of the Commission.

311 Moreover, since Roquette could be regarded as a large undertaking, it is reasonable to presume that it had legal and economic knowledge and infrastructures which enabled it to be aware that those turnover figures could be used in calculating the amount of the fine which would be imposed on it.

312 Consequently, the Commission was entitled to rely, for the purpose of calculating the fine, on the turnover figure communicated by Roquette under the heading 'liquid sodium gluconate'. Fujisawa's statement in its memorandum of cooperation of 12 May 1998, that 'mother liquors' were not finished products and were not included within the scope of the cartel, merely confirmed the latter's scope. Contrary to what Roquette maintains, that statement is irrelevant to the question of whether the Commission should have known that Roquette's liquid sodium gluconate corresponded to 'mother liquor'.

313 It is therefore clear that, during the administrative procedure and, more particularly, in reply to the Commission's precise questions, Roquette committed gross negligence in omitting to inform it in a sufficiently clear and unequivocal manner of the equivalence between its liquid sodium gluconate and 'mother liquor'.

314 The Court observes in particular that Roquette communicated its turnover figures in such an incorrect manner in response to the Commission's request for information of 11 May 2001 made pursuant to Article 11 of Regulation No 17, in which the Commission drew the attention of the addressees of that request to Article 15 of Regulation No 17. Under that provision, the Commission could by decision impose a fine of from EUR 100 to EUR 5 000 on an undertaking where, negligently, it supplied incorrect information in response to a request for information, as provided for in Article 11 of Regulation No 17.

315 The Court finds, therefore, in the light of Roquette's serious negligence, that it is its duty, by virtue of its unlimited jurisdiction, to increase the amount of the fine by EUR 5 000.

316 Accordingly, the Court finds that Roquette's fine must amount to EUR 8 105 000.

The requests for measures of organisation of procedure

317 Following the withdrawal, as regards Jungbunzlauer, of the Decision imposing on it a fine of EUR 20.4 million for its participation in the cartel in the sodium gluconate sector and the adoption, on 29 September 2004, of a decision taken against Jungbunzlauer and three other companies of the Jungbunzlauer group, imposing on them a fine of EUR 19.04 million for their participation in the cartel in the sodium gluconate sector, Roquette submits that it was faced with a new fact justifying a new plea and measures of organisation of procedure.

318 Roquette submits, in essence, that, since the decision of 29 September 2004 imposes on Jungbunzlauer and three other companies of the Jungbunzlauer group a fine lower in amount than that which had been imposed on Jungbunzlauer in the Decision, Jungbunzlauer was offered a 'second chance' to defend itself and to put forward new arguments. Roquette submits that it was not given a 'second chance'. It therefore puts forward a new plea, alleging breach of the principle of sound administration, the principle of equal treatment and the principle of respect for the rights of the defence.

319 In order to take account of that new fact, Roquette claims that, as part of a measure of organisation of procedure adopted under Article 64(4) of the Rules of Procedure, the Commission should be asked to express a view on the new plea put forward by Roquette and that the Decision should be declared invalid in the light of that new fact. In the alternative, Roquette claims that the Court should adopt any other appropriate measure which it is authorised to adopt under its Rules of Procedure, such as reopening of the proceedings or joinder.

320 The Commission contests each of those claims made by Roquette.

321 The Court recalls that it follows from both the purpose and subject-matter of measures of organisation of procedure, as set out in Article 64(1) and (2) of the Rules of Procedure, that they form part of the various stages of the procedure before the Court, the conduct of which they are intended to facilitate. It follows that, after the hearing has taken place, a party may ask for measures of organisation of procedure only if the Court decides to reopen the oral procedure (Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraphs 102 and 103).

322 Consequently, notwithstanding the structuring of Roquette's claims, it is first necessary to rule on the appropriateness of reopening the oral procedure in this case.

323 As has been acknowledged by the case-law, the Court of First Instance is required to accede to a request to reopen the oral procedure for the purpose of taking into account new facts alleged only if the party concerned wishes to place before it facts which may have a decisive influence on the outcome of the case and which it was unable to put forward before the close of the oral procedure (Case C-200/92 P *ICI* v

Commission [1999] ECR I-4399, paragraphs 60 and 61, and Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraph 53).

324 In that regard, the Court observes that the dispute in this case concerns the lawfulness of the Decision adopted by the Commission against Roquette. Roquette seeks the annulment of the Decision in so far as it imposes on it a fine of EUR 10.8 million. In addition, the Court notes that the decision of 29 September 2004 manifestly post-dates the Decision.

325 As has been acknowledged by case-law, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraphs 7 and 8, and Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119). Consequently, elements post-dating the adoption of the Community measure cannot be taken into account in assessing the legality of that measure (see, to that effect, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 102, and the case-law cited in that paragraph). Indeed, the legality of a decision must, in principle, be examined on the basis of the elements of fact and of law mentioned by the parties during the administrative procedure and/or set out in that decision. Otherwise, the parallelism between the (earlier) administrative procedure and the (subsequent) judicial review proceedings, which is based on identity of facts and law, would be compromised.

326 Consequently, since the new fact on which Roquette relies clearly post-dates the adoption of the Decision, that fact cannot affect its validity (see, to that effect, Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, paragraph 37). The decision of 29 September 2004 adopted against Jungbunzlauer and three of its subsidiaries does not therefore constitute a new fact which may have a decisive

influence on the outcome of the case. There is therefore no need to reopen the procedure on that basis.

327 That conclusion is not affected by the fact that Roquette also claims that the Decision should be amended. The Court may, admittedly, by virtue of its unlimited jurisdiction, take into consideration additional information which was not mentioned in the contested decision when assessing the amount of the fine in the light of the objections raised by the applicant (see, to that effect, Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 61). However, having regard to the principle of legal certainty, that possibility must, in principle, be limited to taking into account information pre-dating the contested decision and which the Commission could have known at the time when it adopted that decision. A different approach would lead the Court to assume the role of the administration in assessing a question which the latter has not yet been required to examine, which would amount to encroaching on its powers and, more generally, to infringing the system of division of powers and the institutional balance between the judiciary and the administration. The adoption of the decision of 29 September 2004 is not capable of justifying an exception to those principles. Roquette has by no means shown that that decision is in any way exceptional. Consequently, in so far as the decision of 29 September 2004 post-dates the Decision and is not capable of justifying a derogation from the principle that only new information pre-dating the Decision may be taken into account, the request to reopen the procedure and, therefore, the requests for the adoption of measures of organisation of procedure must be rejected.

328 The fact that the Court, in the course of examining the contested decision, cannot take account of the subsequent facts in question does not, however, in any way restrict the opportunity for the applicant to assert its rights before the Commission. There is nothing to prevent the applicant from formally requesting the Commission to reopen the administrative procedure with a view to revising its original decision

and, if necessary, from bringing an action before the Court of First Instance against a negative response by the Commission to that request.

329 For the sake of completeness, the Court holds that, even if the adoption of the decision of 29 September 2004 is capable of justifying an exception to the prohibition on taking into account additional information post-dating the contested decision, in this case, the condition that that new factor must be capable of exerting a decisive influence on the outcome of the case in order to justify reopening the procedure (see the case-law cited in paragraph 323 above) is not satisfied.

330 The adoption of the decision of 29 September 2004 can in no circumstances constitute a breach of the principles of sound administration, respect for the rights of the defence and equal treatment, as claimed by Roquette.

331 As regards the alleged breach of the principle of sound administration, it is sufficient to note that the adoption of a new decision against Jungbunzlauer and three other companies of the Jungbunzlauer group cannot have affected the requirement of sound administration by which the Commission was under a duty to be guided in the adoption of the Decision against Roquette. If there were any breach of the principle of sound administration in the light of the adoption of the decision of 29 September 2004, only Jungbunzlauer could rely on it. Roquette is in this way appropriating a plea which it was solely for Jungbunzlauer to put forward, where appropriate, in order to pursue a grievance of its own. Accordingly, such a plea cannot on any account succeed.

332 Similarly, as regards the alleged breach of its rights as a defendant in the light of the adoption of a new decision against Jungbunzlauer, Roquette is merely alleging on its own behalf damage purportedly suffered by a third party. It must be borne in mind

in this regard that, in order for the right to be heard to be respected, the undertaking concerned must be in a position to make known its views on the truth and relevance of the facts, complaints and circumstances alleged by the Commission against it (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2003] ECR II-5761, paragraphs 32 and 33). In this case, no evidence has been submitted that the decision of 29 September 2004 affected the Decision adopted against Roquette. Roquette has failed to provide the slightest evidence that, following the adoption of the decision of 29 September 2004, certain new facts were alleged against it, altering the Decision in regard to it. For those reasons, the adoption of the decision of 29 September 2004 does not in any way infringe, in this case, Roquette's rights as a defendant.

333 Finally, as regards breach of the principle of equal treatment in the light of the fact that Jungbunzlauer had the opportunity to express its view for a second time on the conduct alleged against it, whereas that was not so in Roquette's case, it must be remembered that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are annulled or withdrawn (*ICI* v *Commission*, cited in paragraph 323 above, paragraph 69). Accordingly, a decision imposing a fine on a party is presumed to be lawful and produces legal effects from its adoption. By contrary inference, the withdrawal of a decision imposing a fine results in the elimination of the legal effects of that decision.

334 It follows that the Decision, in so far as it originally concerned Jungbunzlauer, and the new decision of 29 September 2004, adopted against Jungbunzlauer and three other undertakings of the Jungbunzlauer group, did not lead to an opportunity for Jungbunzlauer to express its view 'for a second time' on the conduct alleged against it. Jungbunzlauer was required to express its view on a new decision which followed upon the withdrawal of the first decision and rendered the latter non-existent. The Court therefore finds that the adoption of the decision of 29 September 2004 was not capable of resulting in a breach of the principle of equal treatment in regard to Roquette.

335 Consequently, Roquette's request to reopen the procedure and, therefore, the requests for the adoption of measures of organisation of procedure must also be rejected on those grounds.

336 As regards Roquette's request for the present case to be joined to Case T-492/04 *Jungbunzlauer and Others* v *Commission*, the Court finds that that request must also be rejected since the present case is ready for judgment.

Costs

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

338 In this case, the Commission has failed only as regards the taking into account of the turnover relating to Roquette's sodium gluconate in the calculation of the amount of Roquette's fine. However, it was only because of Roquette's gross negligence that the Commission took into account an incorrect turnover figure. Roquette has therefore failed in all the claims put forward by it.

339 In such circumstances, the Court will make an equitable assessment of the case in holding that Roquette is to bear its own costs in their entirety and pay the costs incurred by the Commission in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Sets the fine imposed on Roquette Frères SA at EUR 8 105 000;**

2. **Amends Decision C(2001) 2931 final of 2 October 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium gluconate) in so far as it conflicts with paragraph 1 above;**

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

4. **Orders Roquette Frères SA to pay the costs in their entirety.**

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon J. Azizi

Registrar President

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