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

In Case T-28/99,

Sigma Tecnologie di rivestimento Srl, established in Lonato (Italy), represented by A. Pappalardo, M. Pappalardo and M. Merola, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

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

* Language of the case: Italian.

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2000,

gives the following

Judgment [1]

1 The applicant is a company governed by Italian law and operating in the district heating sector.

2 to 7 ...

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

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

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

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

11 Still according to the decision, all the producers agreed in 1994 to fix quotas for the whole of the European market. This European cartel involved a two-tier

structure. The 'directors' club', consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each undertaking in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, 'contact groups' consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 As regards the Italian market, the decision states that a contact group met in 1995 and 1996 and that projects were assigned to the participants on the basis of quotas fixed for each of them. The applicant joined that group with effect from the meeting of 12 April 1995. Following the Commission's investigations, the contract group held four further meetings, the last being held on 9 June 1996.

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

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of

the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

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

'*Article 1*

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

The duration of the infringements was as follows:

...

— in the case of Sigma from about April 1995 up to [at least March or April 1996],

The principal characteristics of the infringement consisted in:

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

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

— agreeing prices for the product and for individual projects,

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

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

...

Article 3

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

...

(i) Sigma Tecnologie di rivestimento S.r.L., a fine of ECU 400 000;

...'

16 to 22 ...

Substance

23 The applicant relies in essence on three pleas in law. The first plea alleges errors of fact in the application of Article 85(1) of the Treaty. The second plea alleges breach of the obligation to state reasons. The third plea alleges infringement of general principles and errors of assessment in setting the fine.

First plea in law, alleging errors of fact in the application of Article 85(1) of the Treaty

— Arguments of the parties

24 The applicant maintains that the decision is vitiated owing to the absence of evidence that it participated in all the agreements and concerted practices concluded at European level by the main producers of district heating pipes.

25 The Commission was incorrect to state in point 134 of the decision that 'it is not necessary, for the existence of an agreement, that every alleged participant participated in, gave its express consent to or was even aware of each and every individual aspect or manifestation of the cartel throughout its adherence to the common scheme'. An undertaking which did not participate in all the constituent elements of a global cartel can be held responsible for that global cartel only if it knew or must necessarily have known that the collusion in which it participated was part of an overall plan and that that overall plan included all the constituent elements of the cartel. Even though participation in a global cartel may therefore be partial, the knowledge of that cartel must cover all of its constituent elements.

26 There is no evidence in the file that the applicant knew, or must have known, that the infringement in which it participated formed part of an overall plan. Since the applicant operated exclusively on the Italian market, it had no reason to be interested in any illegal activities of other undertakings outside Italy. It was aware only of the fact that the main participants in the cartel were attempting to share the projects. There is no indication in any document that there was any reference

at the meetings in which the applicant participated to the existence of a plan for wider collusion or even that the meetings were described as 'meetings of the contact group'.

27 The documents in annexes 112 and 187 to the statement of objections do not show that the applicant knew that the meetings concerning the Italian market were part of a wider plan. Such a conclusion cannot be drawn from the minutes of the meeting of 12 May 1995 in annex 112 to the statement of objections, which state that Mr Molinari of Pan-Isovit informed the other undertakings that the sales manager of Pan-Isovit in Germany had been named 'coordinator of the Italian market'. That document does not indicate that Pan-Isovit stated that it was responsible for the German market. The interpretation that the appointment in question was internal to Pan-Isovit and concerned only the Italian market, and had no relevance to proving the global cartel, is supported by Pan-Isovit's reply of 17 June 1996 to the request for information of 13 March 1996. The fact that it was Mr Molinari who informed the other undertakings that the sales manager concerned had been named 'coordinator of the Italian market' leads, rather, to the assumption that the competitors were not aware of that appointment. In addition, Pan-Isovit's reply shows that the meetings concerning the Italian market were organised and conducted by ABB. As regards Mr Molinari's statement of 20 February 1997 (annex 187 to the statement of objections), it contains no indication that there was a coordinator for the Italian market, that the person concerned was an employee of Pan-Isovit and that Pan-Isovit was also responsible for the German market.

28 As regards the number of meetings which the applicant attended, the latter states in its reply that it referred in its application only to the meetings at which commercial matters were dealt with, since at other meetings technical matters were discussed. The fact that the applicant may possibly have participated in one or all the meetings to which the Commission refers is of no significance, since in any event they only related to the Italian market.

29 Nor did the Commission refer in its decision to the particular circumstances in respect of which the applicant could be accused of participating in the global cartel, contrary to the approach taken to other undertakings also operating virtually exclusively on their respective national markets. Unlike Oy KWH Tech AB ('KWH'), the applicant was never part of the 'directors' club', in which collusion at European level took place. Unlike Brugg, the applicant did not participate in the Düsseldorf meeting of 24 May 1995. Last, unlike Ke Kelit Kunststoffwerk GmbH ('Ke Kelit'), the applicant has always maintained that it was not aware of a global plan.

30 Further evidence that the applicant was not involved in the overall plan lies in the fact that it did not participate in the activities of the trade association 'European District Heating Pipe Manufacturers Association' ('EuHP') either. That association was one of the main instruments of the global cartel, even though its members had drawn a distinction between the official meetings of the EuHP and the meetings concerning the illegal activities. Following the pressure brought to bear by the EuHP on numerous awarding bodies, membership of that association generally became a requirement for the purpose of submitting tenders and awarding contracts.

31 The Commission should have ensured, before imputing to the applicant the global cartel referred to in Article 1 of the decision, that the applicant was aware of all the constituent elements of the cartel set out in that article. The Commission has adduced no evidence that the applicant was, or must have been, aware of those constituent elements. Furthermore, the Commission accepted that the applicant was not aware of the campaign to eliminate Powerpipe, although that is one of the constituent elements of the global cartel of which the applicant must have been aware in order to be held responsible for the global cartel. Clearly, therefore, the applicant had no knowledge of the object of the infringement in question. The fact that it was not aware of the concerted action against

Powerpipe shows that its participation in the Italian contact group does not automatically mean that it was aware that a global cartel was operating in various European markets which were wholly outside the scope of its commercial interests.

32 The defendant contends that it adduced sufficient evidence to impute to the applicant participation in the global cartel.

33 For that purpose, there is no requirement for the applicant to have participated in, or to have been aware of, all the collusive elements of the cartel. It is sufficient that it was aware that its participation was part of a wider overall plan intended to restrict competition and including all the constituent elements of the cartel. The Commission clearly stated in the statement of objections that the applicant participated in the cartel at the level of its national market, in the knowledge that the meetings of the contact group for that market were part of a wider scheme, since the quotas allocated to it were fixed by the directors' club. That finding was not refuted by the applicant in its observations on the statement of objections, where it merely stated that it was not involved in the cartel, not that it was not aware of it.

34 The Commission maintains that there was no need to set out all the elements of the cartel of which the applicant may have been aware, since in any event it confined the applicant's participation to a single element of the cartel, namely the sharing of quotas for the Italian market alone, an element which is sufficient to impute to it responsibility for the global cartel. An undertaking which has participated in a single infringement by its own acts is also responsible, for the whole period of its participation, for the conduct engaged in by other undertakings, in so far as the undertaking in question was aware of the unlawful conduct of the other participants or could reasonable have foreseen it and was prepared to accept the risk.

35 It is sufficiently established that the applicant, in participating in the meetings relating to the Italian market, knew or in any event could have reasonably presumed that they were part of a wider overall plan. It follows from the annexes to the statement of objections that the applicant participated in more than four meetings held in order to fix quotas on the Italian market. The statement of Mr Molinari in annex 187 to the statement of objections shows that the applicant participated in the meetings knowingly precisely what their common object was. Furthermore, it is evident from annex 112 to the statement of objections that Pan-Isovit, the undertaking represented by Mr Molinari, the controller and coordinator of the cartel in Italy, was at the same time responsible for the German market. Since the meetings held for the purpose of sharing quotas in the Italian market were attended by representatives of the applicant's main competitors at European level, who stated that they were responsible for another market and at the same time coordinators of the Italian market, the applicant could not fail to be aware that the sharing of the quotas on the Italian market formed part of a wider global plan. The fact that it was ABB that acted as coordinator for the Italian market, and not Pan-Isovit, does not in any way alter that conclusion.

36 Nor is there any reason to believe that the applicant distanced itself from the object of the meetings in which it participated in the knowledge that the quotas for the Italian market were fixed at a higher level. On the contrary, in the absence of any objection to the quotas allocated to it, the applicant's presence at the meetings gave its competitors the impression that it would take account of those quotas in determining the policy it intended to follow on the market and thus supported the common purposes which emerged at those meetings.

37 As regards the role of the EuHP, the applicant's argument is based on a misunderstanding of the scope of the infringement found in the operative part of the decision. Article 1 of the operative part of the decision shows that the participation of the EuHP is not regarded as a constituent element of the cartel. Although the EuHP's activities do indeed constitute one of the aspects of the cartel, participation in the EuHP cannot be equated with participation in the cartel.

38 Contrary to what the applicant claims, it cannot be inferred from the fact that it was not aware of the concerted action against Powerpipe that it was not involved in the object of the infringement in question. The boycotting of Powerpipe was only one of the many elements of the infringement identified in point 147 of the decision. There was in any event no need, for the purpose of determining the applicant's responsibility, for it to have been aware of that element.

39 Furthermore, the fact that an undertaking did not participate in all the constituent elements of a cartel, or that it played a minor role in the aspects in which it did participate, must be taken into consideration in assessing the gravity of the infringement and, as the case may be, in setting the fine. In the present case, the decision stated at a number of points that the applicant's participation in the cartel was confined to the Italian market, but none the less did not call into question the principle of the single infringement. The minor role played by the applicant was duly taken into account in setting the fine, which was reduced by two thirds.

— Findings of the Court

40 It is settled case-law that an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 203).

41 In that context, the Commission accused the applicant, in the decision, of having participated in the cartel covering the whole common market, as described in the first paragraph of Article 1 of the decision.

42 Second, the Commission stated in point 124 of the decision that the applicant's participation was confined to the 'arrangements on the Italian market' and that it regularly participated in the meetings devoted to the Italian market and also in the allocation of projects, although it may have been regarded as a 'nuisance' and may not have been invited to all those meetings. At the same place, the Commission accepted that the applicant had no knowledge of the campaign to eliminate Powerpipe.

43 The sharing of the Italian market by the fixing of quotas and the allocation of projects is apparent from the consistent statements of ABB (ABB's replies of 4 June 1996 and 13 August 1996 to the request for information of 13 March 1996) and Mr Molinari (annex 187 to the statement of objections), which are confirmed by the minutes of the meeting of 12 May 1995 (annex 112 to the statement of objections), and also from the reference to quotas for the Italian market in annex 64 to the statement of objections and from the table relating to the sharing of projects in the Italian market in annex 188 to the statement of objections. Since the applicant accepts that it participated, at least, in the meetings of 12 April, 12 May and 9 June 1995 and 27 February 1996, it must be concluded that the Commission properly established the allegations in points 85, 86 and 124 of the decision concerning the applicant's participation in an agreement on the Italian market.

44 However, the Commission did not show that the applicant, when participating in the agreement on the Italian market, was aware of the anti-competitive conduct at European level of the other undertakings, or that it could reasonably have foreseen such conduct.

45 The mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global cartel. It is only if the undertaking knew or should have known when it participated in the cartel that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel.

46 First, it is common ground that the applicant, unlike other undertakings participating in the cartel on the Italian market, was not represented in the directors' club and did not operate in the district heating sector in markets other than the Italian market. Furthermore, it is also common ground that within the Italian cartel the other participants did not involve the applicant in all their activities, since the applicant was not invited to all their meetings. In particular, the applicant did not participate in the first meeting, on 21 March 1995, at which, in the words of the Commission in point 85 of the decision, several large projects were allocated to other undertakings present on the Italian market. In those circumstances, the fact that the undertakings participating in the allocation of projects on the Italian market were merely applying quotas allocated to them by the directors' club does not necessarily lead to the conclusion that the applicant was or must have been aware that the Italian agreement was part of a European cartel.

47 Nor has the Commission adduced any evidence capable of supporting its assumption that the applicant was or must have been aware that the Italian agreement was part of a European cartel. It cannot be inferred from the fact that the applicant was informed, when it envisaged seeking to join the EuHP, of anti-competitive activities by undertakings within the EuHP that it was aware of the general cartel as described in Article 1 of the decision, in the absence of specific evidence of the object of the activities of which the applicant was informed. Since the Commission's only suspicion of an infringement of the Community competition rules related to cooperation in regard to quality standards, that is the only information which the applicant might credibly have

obtained. That element was not identified by the Commission in Article 1 of the decision as an aspect of the cartel.

48 Furthermore, the Commission did not repeat in the decision its assertion on page 59 of the statement of objections that the applicant, like Ke Kelit, knew that the meetings of the contact group for its market were part of a wider scheme, although that assertion was repeated in point 124 of the decision in regard to Ke Kelit.

49 Last, it does not follow from the abovementioned statements of ABB, from Mr Molinari's statement of 20 February 1997 or from the documents, referred to above, in annexes 64, 112 and 188 to the statement of objections, that the applicant, in participating in the allocation of projects on the Italian market, was aware that that cooperation was part of a cartel going beyond the Italian market. In that regard, the reference in the minutes of the meeting of 12 May 1995 to the fact that Mr Molinari of Pan-Isovit informed the other undertakings that the sales manager of Pan-Isovit in Germany had been appointed 'coordinator of the Italian market' (annex 112 to the statement of objections) is not in itself capable of establishing a link between participation in the Italian agreement and the existence of a wider cartel. Irrespective of whether Pan-Isovit acted as coordinator of the cartel on the Italian market, there is no reference in those minutes to cooperation between competitors on the European market or to cooperation on other national markets.

50 Clearly, the defendant cannot rely, in order to prove that the applicant participated in the European cartel, on the fact that it never distanced itself from the use of quotas on the Italian market.

51 It follows from all the foregoing that the Commission has failed to adduce evidence sufficiently precise and consistent to found the firm conviction that the applicant knew or should have known that by participating in the agreement on the Italian market it was joining the European cartel.

52 Accordingly, the decision must be annulled in so far as the applicant is alleged, in addition to participating in an agreement on the Italian market, to have participated in the cartel covering the whole of the common market.

53 to 60 ...

Third plea in law, alleging infringement of general principles and errors of assessment in setting the fine

Infringement of the principles of proportionality and equal treatment

— Arguments of the parties

61 The applicant maintains that the Commission exceeded the limits of its discretion in setting a fine that was disproportionate to the applicant's size and to its role in the cartel.

62 First, the Commission was wrong to consider that the applicant could be held responsible for the general cartel even though it did not participate in all the restrictive practices other than the system of quotas on the Italian market and was not aware of them. Although it is true that the Commission reduced the applicant's fine by two thirds in order to take account of its minor role and the fact that its participation was confined to the national market, the original assumption was that it participated in the general cartel.

63 Next, the applicant disputes the way in which the Commission fixed a starting point for the calculation of the fine ('the starting point') of ECU 1 million for the applicant and also for KWH, Brugg and Ke Kelit because of their relatively minor position in the district heating market. The Commission could not treat the applicant in the same way as KWH, Brugg and Ke Kelit without ascertaining whether the impact of the starting point, in terms of turnover, was similar. The applicant disputes the method of setting a starting point at a certain absolute amount rather than as a percentage of turnover. Moreover, the Commission should have taken into account the fact that the applicant's turnover on the products concerned was relatively small by comparison with its turnover on its sales as a whole.

64 In addition, the Commission relied on the applicant's turnover on all pre-insulated pipes, whereas the inquiry was solely concerned with pre-insulated pipes for district heating, to the exclusion of flexible pipes. In the relevant sector, its turnover was approximately 60% of the total turnover on pre-insulated pipes taken into consideration by the Commission. Thus, the starting point and the eventual fine represented, respectively, approximately 50% and 18% of its 1997 turnover in the pre-insulated pipes market.

65 In that regard, the applicant observes that, in applying Article 15 of Regulation No 17, the Commission has always sought to limit the final amount to 10% of

turnover on the market to which the infringement relates. The fine has exceeded the limited of 10% of turnover on the relevant product only where it would not otherwise have had the deterrent effect desired by the Commission. Thus, the Commission stated in the statement of objections that, in calculating the fine to be imposed on each undertaking, it would take into account its turnover in the district heating sector and 'if appropriate, [its] total turnover, in order to take account of the size and economic power of the undertaking in question and to achieve the necessary deterrent effect'. Similarly, in the press release accompanying the adoption of the decision, the member of the Commission responsible for competition policy stated, in regard to 'large industrial groups which take part in secret cartels', that they 'cannot expect that files will be limited to 10% of their turnover in the sector concerned'.

66 Contrary to what the Commission claims, the reduction of the fine by two thirds, under 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 new guidelines' or 'the guidelines'), in recognition, as a mitigating circumstance, of the marginal role which the applicant payed in the infringement, is inadequate. Once the fine had been set in accordance with the criteria set out in points 1 to 4 of the guidelines, and having regard to the marginal role played by some undertakings by comparison with others, the Commission was still required to ascertain that those criteria were consistent with the turnover of each of them. Thus, the Commission reduced the fine to be imposed on some undertakings, having established that the fine exceeded the maximum amount of 10% of turnover, in order not to exceed the limit. None the less, it failed to take account of the fact that the fine imposed on the applicant was far in excess of the limit of 10% of its turnover on the relevant market. Under point 5(b) of the guidelines, such an adjustment could still be made independently of, and therefore after, the assessment of the gravity of the infringement.

67 The applicant further maintains, in its reply, that even if it has to be accepted that the Commission is under no obligation to take into account the relationship between total turnover and turnover on the relevant products, that does not affect

the validity of the principle that the Commission is required to state precisely its reasons, in a specific case, for departing from the practice of taking turnover in the relevant market into account. In the present case, the reasoning followed in ABB's case, namely that, in order to ensure that the fine had a deterrent effect, the Commission could not confine itself to turnover in the relevant market, cannot apply to a small producer like the applicant, whose role in the cartel was marginal.

68 Next, the applicant complains that the Commission chose the same starting point for it as it did for Brugg, Ke Kelit and KWH, on the ground that '[t]hese four undertakings are relatively minor in terms of their position in the district heating pipe market'. The Commission thus failed to differentiate the applicant's responsibility from that of the other three undertakings and thus infringed the principle of equal treatment.

69 Brugg was active mainly on the German market, which at the time represented 40% of the European market, while the Italian market, on which the applicant operated, represented only 6.65% of the European market. Even on the assumption that the applicant obtained 10% of the Italian market, that would have corresponded to only 0.65% of the European market, whereas both Brugg and KWH had a 2% share of the European market. Consequently, the influence which the applicant could have on the European market was not comparable to that which undertakings of the size of Brugg and KWH were able to exercise. From the aspect of the duration of the infringement, finally, the applicant's position is different from Ke Kelit's.

70 The applicant maintains that when fixing the starting point, the Commission must take account of the applicant's position on the market, of the possibility that it will seriously affect competition and of the duration of the infringement. The Commission cannot claim that it took account of the differences between the market positions of the four undertakings referred to above solely because it took account of the fact that the duration of their participation in the infringement was different in each case.

71 The defendant contends, first, that although it imputed to the applicant responsibility for the general cartel, it always confined the applicant's active participation to the Italian market and a limited duration and, for those reasons, reduced its fine by two thirds.

72 As regards the argument that it fixed the same starting point for the undertakings in the fourth category without ascertaining whether such a starting point was proportionate to their turnover, the Commission observes that the fine was calculated in accordance with the method set out in the guidelines. According to that new method, fines do not represent a percentage of the total turnover of the undertakings concerned, but are calculated on the basis of an absolute amount chosen to reflect the overall gravity of the infringement. The Commission did take account of the size on the European market of the undertakings concerned by comparison with ABB, by dividing them into four categories. In imposing on all the undertakings in the fourth category a starting point of ECU 1 million, which would subsequently be weighted to reflect the duration of their participation, the Commission imposed the same financial burden on all the undertakings. That could have a different impact on each undertaking only where the application of that amount jeopardised the survival of one of them, which in any event is unlikely having regard to the upper limit laid down in Article 15(2) of Regulation No 17.

73 Furthermore, the Commission is under no legal obligation, in fixing the amount of the fine, to take account of an undertaking's turnover in the relevant market. The Commission must take into consideration a range of factors, which may include total turnover or the part of turnover relating to the market in which the infringement occurred. An undertaking's turnover is not necessarily linked to its role in the infringement and to the profits which it may derive therefrom.

74 Similarly, although the calculation method described in the statement of objections expressly mentioned the possibility that turnover in the relevant

market would be taken into account, it did not state that that would be the only reference criterion used by the Commission. Nor did the applicant, in its observations on the statement of objections, express any view on the method which the Commission proposed to follow in imposing fines.

75 The limit of 10% of turnover laid down in Article 15(2) of Regulation No 17 applies to an undertaking's total turnover, not to its turnover in the sector in which the infringement was committed. Unlike what occurred in the case of the other undertakings, where the final amount of the fine was reduced because it would otherwise have exceeded the maximum amount of 10% of total turnover, the final fine imposed on the applicant, ECU 400 000, was significantly below that maximum amount.

76 The argument that the Commission was required to state its reasons for departing in a specific case from its practice of taking turnover in the relevant market into account was first raised in the reply and must therefore be declared inadmissible. In any event, even if the Court should consider that argument, in reality no such practice on the part of the Commission exists. Although, in some specific cases, the Commission may have taken turnover in the market in which the infringement was committed as the starting point for calculating the amount of fines, that was not the only criterion used and it cannot therefore be claimed that a practice to that effect existed.

77 Nor was the Commission required to differentiate between the starting points for the undertakings in the fourth category to reflect their size or their different positions on the market. According to the guidelines, the Commission may, when fixing the starting point for undertakings in one category, apply a weighting within that category where there are significant differences between the size of the undertakings concerned. In the present case, however, it cannot be claimed that the undertakings in the fourth category differ in size to such a degree as to justify a fresh weighting of the fine.

78 As regards the duration of the infringement, the Commission altered the starting point of the fine by increasing the fines imposed on Brugg and Ke Kelit to reflect the fact that the former had participated in the cartel for 20 months and the latter for 15 months.

— Findings of the Court

79 In the present case, the Commission considered that the present infringement constituted a very serious infringement for which the likely fine would be at least ECU 20 million (point 165 of the decision). According to point 166 of the decision, the Commission then differentiated that amount by taking account of the actual economic capacity of the offending undertakings to cause significant damage to competition and of the need to ensure that the fines were sufficiently deterrent.

80 According to point 181 of the decision, in order to determine the starting point for calculating the amount of the fine, the Commission accepted, both for the fine to be imposed on the applicant and for those to be imposed on Brugg, Ke Kelit and KWH, that those undertakings are relatively minor in terms of their position in the district heating market by comparison with the other undertakings, that their participation must be characterised as very serious infringement of Article 85 but that their fines must be adjusted to take account of the specific impact of their conduct and their size compared with ABB. The Commission chose a starting point of ECU 1 million and stated that for those four undertakings, given the gravity of the infringement, the starting point thus adjusted could not be less than that amount.

81 In that regard, since the Commission did not establish that the applicant participated in a cartel covering the whole common market, and since it could

therefore hold it responsible only for participating in the agreement on the Italian market, it was not entitled to impose on the applicant a fine based on its participation in a very serous infringement constituted by that cartel.

82 Accordingly, the decision must be annulled in so far as it imposes on the applicant a fine calculated to reflect its participation in the cartel covering the whole common market.

83 Contrary to what the applicant claims, however, it cannot be argued that the Commission should have calculated the amount of its fine on the basis of a percentage of its turnover in respect of the relevant product.

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

85 In that regard, it is settled case-law that the gravity of the infringements must be established in accordance with numerous factors, such as, *inter alia*, the particular circumstances of the case, its context and the deterrent nature of the fines, although no binding or exhaustive list of criteria which must necessarily be taken into account has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and judgments in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33, and Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 163).

86 The criteria for assessing the gravity of the infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance which is disproportionate in relation to the other factors (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 121, Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176).

87 It follows from the case-law that the Commission is entitled to calculate a fine according to the gravity of the infringement and without taking account of the various turnover figures of the undertakings concerned. Thus, the Community judicature has upheld the lawfulness of a calculation method whereby the Commission first determines the overall amount of the fines to be imposed and then divides that total among the undertakings concerned according to their activities in the sector concerned (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 48 to 53) or according to the level of their participation, their role in the cartel and their size on the market, calculated on the basis of average market share during a reference period.

88 Since the Commission is not required to calculate the amount of the fine to be imposed on an undertaking on the basis of its turnover on the relevant product, it cannot, contrary to what the applicant claims, be criticised for having failed to state its reasons for not making use of that factor in calculating the fine to be imposed on the applicant.

89 Furthermore, the Commission did not state in the statement of objections that it would calculate the amount of the fine to be imposed on the applicant solely on its turnover on the relevant product. In the statement of objections, the Commission referred to turnover in the district heating sector, both for the applicant and for the other undertakings concerned, as one of a range of factors which it would take into account in assessing the fines to be imposed on the undertakings concerned, including, *inter alia*, the role played by each of them in the anti-competitive practices, all the substantial differences as regards the duration of their participation, their importance in the district heating sector, their turnover in the district heating sector, their total turnover, if appropriate, in order to take account of the level and economic power of the undertaking in question and to ensure a sufficiently deterrent effect and, last, all the mitigating circumstances.

90 It must again be emphasised that, in adopting the calculation method set out in the guidelines, the Commission did not deprive itself of the possibility of taking due account of turnover in the relevant market.

91 The applicant is also incorrect to maintain that the Commission should take into consideration its turnover on the relevant market in the light of the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17. It is settled case-law that the turnover referred to in Article 15(2) of Regulation No 17 must be understood as referring to the total turnover of the undertaking concerned, which alone gives an approximate indication of its size and influence on the market (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 119, Case T-144/89 *Cockerill-Sambre* v *Commission* [1995] ECR II-947, paragraph 98, and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 160). Provided that it complies with the limit laid down in Article 15(2) of Regulation No 17, the Commission may set the fine on the basis of the turnover of its choice, in terms of geographical area and relevant products.

92 In that context, the applicant cannot rely on the fact that, for certain undertakings, the starting point taken by the Commission resulted in fines which

had to be reduced in order to take account of the limit of 10% of turnover laid down in Article 15 of Regulation No 17, while such a reduction was not necessary in the applicant's case. That difference in treatment is the direct consequence of the maximum limit placed on fines by Regulation No 17, the legality of which has not been called into question and which clearly applies only where the fine envisaged exceeds 10% of the turnover of the undertaking concerned.

93 Even if the Commission erred in finding that the applicant had participated in the cartel covering the whole of the common market, it none the less correctly proved that the applicant had participated in the agreement on the Italian market.

94 Having regard to the applicant's limited role in the Italian agreement and the relatively small size of the Italian market, the Court, in the exercise of its unlimited jurisdiction within the meaning of Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, decides that, in order to reflect the gravity of the infringement, the starting point for calculating the fine to be imposed on the applicant, expressed in euro pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), should be EUR 300 000.

95 As regards the duration of the infringement, a further factor to be taken into consideration in fixing the basic amount of a fine, it is sufficient to note that the applicant does not challenge the Commission's determination of the period of its participation in the anti-competitive activities, which did not result in any increase in its starting point. Accordingly, the basic amount of the fine to be imposed on the applicant should be fixed at EUR 300 000.

Incorrect assessment of the aggravating circumstances

— Arguments of the parties

96 The applicant maintains that by increasing the basic amount of its fine on the ground that it continued the infringement for nine months after the investigations, which were carried out in June 1995, the Commission failed to consider that, since no investigation was carried out at the applicant's registered office, it was not aware in June 1995 that the Commission was conducting an inquiry. It was only in July 1996, when the first request for information was sent to the applicant pursuant to Article 11 of Regulation No 17, that it became aware of the situation, i.e. at a time when the infringement had already ceased.

97 That conclusion is not called into question by the passage in annex 187 to the statement of objections, in which it is stated that at a meeting on 9 June 1995 a new meeting was arranged for 5 July, a meeting which did not take place owing to the Commission's action. Since the statement in question was made by a former employee of Pan-Isovit and not by the applicant, it cannot be inferred from those remarks, which are not supported by any other evidence, that the applicant was informed that the procedure had been opened.

98 Furthermore, if the reason for cancelling the meeting of 5 July 1995 was connected with the Commission's action, there is no evidence in the file that such justification was communicated to the applicant. A more plausible view is that the undertakings most heavily involved wished to keep the applicant in ignorance of facts which were not of direct concern to it, since the applicant, not being a member of the directors' club, was no longer invited to all the meetings held in Italy after 12 April 1995 and was never told what was happening.

99 In applying the increase of 20% to all the 'producers', without distinction, the Commission infringed the principle of equal treatment or at least left itself open to a charge of failure to state reasons, since it should have stated why it considered that all the 'producers' had specific knowledge of the action taken by the Commission.

100 The defendant contends that there was nothing to prevent it from regarding the continuation of the infringement as an aggravating circumstance. The only relevant factor, apart from the fact that the infringement continued for a certain number of months, was the fact that the undertakings did not bring the infringement to an end immediately the Commission had carried out its investigations, i.e. after 29 June 1995.

101 The applicant's assertion that it became aware of the investigations only after several months and did not learn of them, at least officially, until 9 July 1996 is contradicted by annex 187 to the statement of objections. The applicant must have know by its presence at the meeting of 9 June 1995 in Zurich that the Commission was carrying out investigations.

— Findings of the Court

102 In order to determine whether the deliberate continuation of the agreement on the Italian market constituted an aggravating circumstance, it is necessary to ascertain whether the undertaking in question continued the infringement in the knowledge that it was the subject of a Commission inquiry.

103 It is common ground that on 28 June 1995 the Commission carried out investigations at the premises of the majority of the undertakings present in the district heating sector, but not at the applicant's premises.

104 The only evidence adduced by the Commission to show that the applicant, when continuing the infringement, was aware that the Commission was in the process of conducting an inquiry is the passage in Mr Molinari's statement of 20 February 1997, in annex 187 to the statement of objections, in which Mr Molinari stated that at the meeting of 9 June 1995, at which the applicant was present, 'a new meeting [had been] arranged in Milan for 5 July', but that 'that meeting [had not taken place] because of the intervention of the Commission's anti-trust department'.

105 Although the applicant admits, first, that it took part on 9 June 1995 in a meeting at which it was decided to hold the next meeting on 5 July 1995 and, second, that that meeting did not take place, it none the less denies having been informed that that meeting had been cancelled because of the investigations carried out by the Commission within certain undertakings.

106 Without there being any need to adjudicate on the credibility of Mr Molinari's statement, it is sufficient to observe that it does not in any way follow from that statement that the other undertakings informed the applicant that the Commission was conducting an inquiry. Contrary to what the Commission claims, the reasons why the meeting of 5 July 1995 could not take place cannot have been communicated to the applicant at the meeting of 9 June 1995, since it follows from Mr Molinari's statement, first, that it was at the meeting of 9 June 1995 that the meeting of 5 July 1995 was arranged and, second, that the decision to cancel the latter meeting was taken at a later date. Since it is established that the applicant, in the context of the Italian agreement, was not always informed by the other participants about their activities, it cannot be assumed, without any

evidence capable of supporting the assumption, that the applicant must have inferred solely from the fact that the meeting of 5 July 1995 did not take place that its activities within the agreement were the subject of a Commission inquiry.

107 Consequently, the decision must be annulled in so far as the basic amount of the fine to be imposed on the applicant was increased by 20% because the infringement was intentionally continued.

108 to 128 ...

Conclusion

129 It follows from the foregoing considerations that the decision must be annulled in so far as the applicant is alleged not only to have participated in an agreement on the Italian market but also to have participated in an agreement covering the whole of the common market. As held in paragraph 95 above, the basic amount for calculating the fine to be imposed on the applicant, to reflect the gravity and the duration of its infringement, must be set at EUR 300 000.

130 Since no aggravating or mitigating circumstance can be made out in the applicant's case, and since it is not disputed that the applicant is not entitled to have its fine reduced pursuant to the notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), the fine imposed by Article 3(i) of the decision must be reduced to EUR 300 000.

Costs

131 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may order that the costs be shared or that each party bear its own costs if the parties fail on one or more heads. In the present case, since each of the parties has failed in part, the Court the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear its own costs and to pay one third of the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/3.5/691/E.4: — Pre-Insulated Pipe Cartel) in so far as it finds that the applicant infringed Article 85(1) of the Treaty not only by participating in an infringement of that provision in the Italian market but also by participating in a cartel covering the whole of the common market;**

2. Annuls Article 3(i) of the decision in so far as it imposes on the applicant a fine calculated on the basis of its participation in the cartel covering the whole of the common market and in the light of its intentional continuation of the infringement;

3. Reduces the fine imposed on the applicant by Article 3(i) of the decision to EUR 300 000;

4. Dismisses the remainder of the application;

5. Orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

6. Orders the Commission to bear two thirds of its own costs.

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung
Registrar

P. Mengozzi
President