JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

8 July 2004 *

In Case T-48/00,

Corus UK Ltd, formerly British Steel plc, established in London (United Kingdom), represented by J. Pheasant and M. Readings, solicitors, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by M. Erhart and B. Doherty, then by M. Erhart and A. Whelan, acting as Agents, assisted by N. Khan, barrister, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003 L 140, p. 1), or, alternatively, a reduction in the amount of the fine imposed on the applicant,

* Language of the case: English.

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

composed of: N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,
Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 19, 20 and 21 March 2003,

gives the following

Judgment

Facts and procedure [1]

1 The present case concerns Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003 L 140, p. 1; 'the contested decision').

...

1 — The grounds of the present judgment relating to the background to the dispute are not reproduced. They are set out at paragraphs 2 to 33 of the judgment of the Court of First Instance in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501.

Procedure before the Court

34 By seven applications lodged at the Registry of the Court of First Instance between 28 February and 3 April 2000, Mannesmann, Corus, Dalmine, NKK, Nippon, Kawasaki and Sumitomo brought actions against the contested decision.

35 By order of 18 June 2000, the Court, after hearing the parties, decided to join the seven cases for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance. Following the joinder of the cases, the applicants in the seven cases were able to consult all the files relating to the present proceedings at the Court Registry. Certain measures of organisation of procedure were also adopted.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure. The parties presented oral argument and answered the questions put by the Court at the hearing on 19, 20 and 21 March 2003.

Forms of order sought

37 The applicant claims that the Court should:

— annul Article 2 of the contested decision;

— annul Article 1 of the contested decision;

— annul the fine imposed on it in respect of the infringement referred to in Article 1 of the contested decision;

— in the alternative, reduce the fine imposed on it in respect of the infringement referred to in Article 1 of the contested decision;

— order the Commission to repay the fine or, in the alternative, the amount by which it is reduced together with interest on the whole or, as the case may be, such amount by which it is reduced, from the date of payment by Corus to the date of repayment by the Commission;

— order the Commission to pay the applicant's costs in these proceedings;

— make all such other orders as are necessary to give effect to the judgment of the Court.

38 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The claim for annulment of Article 2 of the contested decision

The plea alleging non-existence of the infringement found in Article 2 of the contested decision

Arguments of the parties

39 Corus disputes the assertion that the contracts for the supply of plain-end seamless pipes which it concluded with Vallourec, Mannesmann and Dalmine constituted an infringement. It concluded those contracts for legitimate commercial reasons and negotiated them separately and independently. The Commission has failed to prove that it engaged in concertation.

40 The applicant claims that it retained ownership of Imperial, an undertaking which finished plain-end OCTG, until March 1994 with a view to selling it as an independent business. After the closure of its Clydesdale plant in April 1991 it no longer had an internal source of supply of the plain-end seamless pipes needed to keep Imperial active. In order to preserve the value of that business and to make it as attractive as possible to prospective purchasers, it was imperative for Corus to conclude supply arrangements with third parties, thus guaranteeing reliable supplies of high quality plain-end seamless pipes to meet in the long-term the demand for threaded OCTG from the oil companies operating on the United Kingdom continental shelf. The quality of the products was an essential factor owing to the risks associated with the use of the finished product, particularly in view of the climatic and geological conditions on the United Kingdom section of the North Sea continental shelf.

41 In support of that argument, Corus has produced a contract which it concluded with the oil company Conoco in 1992, together with a copy of the technical specification

annexed to that contract. The contract shows that Corus was required to meet specifications dictated by Conoco, particularly with regard to the quality of the plain-end pipes to be used in manufacturing its threaded OCTG. The quality control procedure even envisaged independent inspection of the steel mills manufacturing the plain-end pipes for Corus.

42 Corus also states that the three contracts which it concluded with Vallourec, Dalmine and Mannesmann, each for an initial term of five years and automatically renewable thereafter, which allegedly constituted the infringement found in Article 2 of the contested decision, cannot constitute a single agreement because they were signed on different dates, that is to say, 24 July 1991, 4 December 1991 and 9 August 1993 respectively.

43 According to Corus, it was logical for it to divide its demand for plain-end pipes between three different suppliers. With more than three it would have been unable to meet the preferences of its customers. Customers usually insist on limiting the number of suppliers involved in the production of the pipes they order because the quality-control checks they carry out are very onerous, owing to the primary importance of product safety in their sector. Corus, on the other hand, needed to use a number of suppliers in order to protect itself against the adverse financial consequences of strikes or breakdowns at mills and to take account of the fact that demand for OCTG is highly volatile.

44 Moreover, OCTG products are in principle manufactured to order under long-term supply contracts. The five-year duration, with automatic renewal, of the supply contracts in this instance is therefore in no way unusual. In fact every order for tubes precisely specifies the quality and dimensions required, so that sales from stock are practically ruled out. Furthermore, Corus maintains that operators in the oil sector insist that the tubes they order be available within strict time-limits in line with their requirements, primarily because of the high costs of operating drilling platforms.

45 In the light of the abovementioned quality requirements, the Commission's observation, in recital 152 to the contested decision concerning structural overcapacity in the steel tubes sector at the time the supply contracts were concluded and in particular the possibility of importing tubes from Hungary, Poland, Czechoslovakia and Croatia, is irrelevant as tubes from those countries were not of satisfactory quality and, moreover, those countries were politically unstable at the time. As regards other potential supply sources, products from Latin America posed the same problem of quality as those produced in the Eastern European countries, whilst North America was ruled out because producers in that country had shown no interest in exporting their products. Transport costs and delivery times worked against Japanese imports, particularly as the cost of OCTG in Europe was relatively low. Corus's choice of three Community suppliers was therefore logical from a commercial point of view.

46 Corus rejects the Commission's argument in recital 152 to the contested decision that the fact that the supply contracts set a delivery time of five to six weeks and provided for no other penalty in the event of non-delivery than inclusion of the undelivered tonnage in the calculation of the annual tonnage to which the supplier was entitled meant that time-limits were of no great importance to Corus.

47 According to Corus, the volatility of demand for OCTG on the United Kingdom continental shelf meant that setting the amounts of plain-end pipes to be delivered by the three suppliers in terms of percentages rather than fixed quantities was the only practical way of meeting all its needs. That system was the only one which allowed account to be taken of over-supply or scarcity in the market for which the plain-end pipes were intended.

48 In addition, adopting a formula linking the prices paid by Corus for tubes to the prices of the OCTG which it sold allowed account to be taken of the significant price

fluctuation caused by that volatility in demand. In that connection, it would have been extremely difficult, commercially, to agree a fixed price with suppliers low enough for Corus to be confident that its downstream sales of OCTG would never become unprofitable. According to Corus, information on the quantities of OCTG it sold and the prices paid by its customers were not disclosed to its suppliers, despite the fact that that information was taken into account in the pricing formula. Only the price of plain-end pipes resulting from application of the formula was disclosed to the suppliers, and they, moreover, were entitled to have an independent auditor check that the formula was properly applied.

49 According to Corus, the Commission's argument that each of the supply contracts makes no sense when taken individually because they allocate a percentage of Corus's requirements to each of its suppliers is of no relevance. That argument certainly does not show that the supply contracts were the result of any concertation between the four European producers sanctioned in the contested decision. Corus concluded each contract in the light of the overall supply strategy which it had decided upon autonomously.

50 Corus states that its explanation of the commercial logic underlying the supply contracts in question provides an alternative explanation for its conduct, which places the Commission under an obligation to prove concertation between the four firms penalised otherwise than through reliance on the terms of those supply contracts (Opinion of Advocate General Darmon in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* (*Woodpulp II*) [1993] ECR I-1307, point 195). It observes, in that connection, that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct (judgment in *Woodpulp II*, paragraph 71).

51 Corus adds that, in any event, the argument advanced by the Commission in its defence that the clauses of the supply contracts examined in the preceding paragraphs restrict competition does not prove the specific infringement found in Article 2 of the contested decision. Even supposing those clauses were indeed anti-competitive, that circumstance could not in itself be proof of concertation between the four European firms with the aim of excluding the Japanese producers from the United Kingdom market.

52 Furthermore, the documentary evidence relied on by the Commission in support of its argument, and in particular that mentioned in recitals 91 and 147 to the contested decision, does not support the existence of an agreement between Corus and the other European tube producers. The Commission itself was reluctant to rely fully on that evidence in its defence. According to Corus, the Commission's analysis of the evidence is incoherent in that it fails in particular to explain in what way and for what reasons the bilateral agreement between Corus and Vallourec supposedly evidenced by the notes dating from 1990 subsequently became a multilateral agreement between the four European producers. It maintains, in that connection, that the Commission is under an obligation to prove concertation between the four European producers which led them to conclude the contracts for the supply of plain-end pipes if Article 2 of the contested decision is not to be annulled.

53 Moreover, since the infringement found in Article 2 of the contested decision is attributed to Dalmine as from December 1991, Corus submits that evidence dating from 1993 has no relevance to the alleged transformation of the Fundamentals into the Fundamentals Improved. Corus also observes that the Commission took the view in the SO that the notes dating from 1990 evidenced an agreement between the four European producers, but that it abandoned that analysis in the contested decision.

54 Next, Corus considers some of the notes reviewed in recitals 78 to 81 to the contested decision and referred to again in recital 147, that is to say the note of 23

March 1990 reproduced at page 15622 of the Commission's file, entitled 'Réflexions concernant le renouvellement du contrat VAM' (hereinafter 'the Réflexions sur le contrat VAM'), the note of 2 May 1990, reproduced at page 15610 of the file, entitled 'Réflexions stratégiques concernant les relations de VLR' (hereinafter 'the Réflexions stratégiques note') and the note on the meeting of 24 July 1990. It makes no express comment, in that connection, on the undated note 'Entretien BSC', referred to in recital 62 to the contested decision and in point 56 of the statement of objections. Corus states that the 'Réflexions sur le contrat VAM' and 'Réflexions stratégiques' notes were drafted by employees of Vallourec and merely express the personal views of their authors. They thus wholly fail to prove the existence of an agreement between Vallourec and Corus. The Commission was mistaken to rely on the fact that those two notes propose, amongst other options, a course of action that matches the alleged agreement which it found in Article 2 of the contested decision. The author of the 'Réflexions sur le contrat VAM' note explicitly rejected that solution as scarcely practicable and suggested a different course of action that allowed Corus freedom to choose its sources of supplies of plain-end pipes.

55 As far as the note on the meeting of 24 July 1990 is concerned, Corus states that those of its employees who attended the meeting all retired in August 1997 and consequently it can give only a limited assessment of the document. The note does not make clear which of the remarks reflect the tenor of the meeting and which reflect the personal views of the author. Nor can it be deduced from that note that Corus and Vallourec agreed on any particular mode of conduct. Lastly, in so far as the Commission relies on that note to establish the existence of an agreement between the four European producers, Corus submits that there is no proof of further discussions involving Dalmine and Mannesmann.

56 As regards the fax from Corus to Vallourec headed 'BS cooperation agreement', a letter of 21 January 1993 and a 13-page confidential note annexed to it, dated 22 January 1993, reproduced at page 4626 of the Commission's file and analysed in recital 91 to the contested decision, Corus contends that they do not constitute evidence of any concertation. That fax was sent as part of negotiations entered into by Corus with Vallourec, Dalmine and Mannesmann in order to consider the

possibility of a coordinated rationalisation plan and does not constitute proof of illegal collusion. Corus emphasises in particular that the 'BS cooperation agreement' fax states that the national supervisory authorities should be consulted before any transaction is carried out.

57 The 'BS cooperation agreement' fax also shows that Corus was attempting to reduce its presence in the seamless tube market to a marginal level and that document cannot therefore prove offending conduct on its part, as the Commission contends. Corus no longer had any commercial interest in the supply contracts at issue after selling Imperial to Vallourec in March 1994.

58 As regards the document entitled 'Seamless Steel Tube System in Europe and Market Evolution' reproduced at page 2051 of the Commission's file (hereinafter 'the steel tube system document)' and analysed in recital 91 to the contested decision, Corus submits that this is an internal document of Dalmine's which does not prove that Corus participated in any talks amounting to illegal collusion.

59 The Commission claims, first, that paragraph 71 of the judgment in *Woodpulp II*, paragraph 50 above, on which Corus relies, is relevant only where the Commission relies solely on evidence of parallel conduct to prove a concerted practice. In the present case, on the other hand, the terms of the supply agreements themselves explicitly reflect the parties' intention to ensure that Corus remained a domestic producer for the purposes of the Fundamentals. That view is also supported by a body of written evidence.

60 Moreover, the argument that the three contracts for the supply of plain-end pipes were each negotiated separately and independently is belied by the fact that each contract allocates a fixed percentage of the tubes purchased by Corus to each supplier.

61 Furthermore, Corus's argument that it was able to conclude supply contracts only with Community producers is not very plausible. Similarly, its arguments concerning the importance of delivery times are contradicted by the terms of its own contracts. As regards the arguments relating to the importance of product quality, they are contradicted by the fact that Corus itself proposed to purchase plain ends from non-Community producers, as noted in the contested decision (recital 78).

62 The Commission adds that the contested decision mentions, in recital 152, structural overcapacity, including overcapacity within the Community, so that Corus's arguments as to the unsatisfactory quality of the tubes offered by Eastern European producers are irrelevant.

63 In any event, the arguments which Corus advances to prove that it was logical for it to deal with the three Community producers are ineffective since the fact is that Corus and those producers agreed to treat Corus's business as common property to be shared amongst them by means of restrictive supply contracts that constituted the illegal collusion.

64 The Commission argues that, even if Corus could demonstrate that there were commercial advantages to be obtained from allocating a percentage of its purchases of plain-end pipes to each of the three suppliers, the clause in each contract providing for such allocation is still a restriction of competition, as it noted in recital 153 to the contested decision.

65 In any event, it is not true that the apportioning of its purchasing requirements was the only means by which Corus could be certain all of its variable requirements for plain-end pipes would be met. The Commission maintains that concluding a number of framework agreements fixing unit prices with suppliers would have enabled it to achieve the same commercial objective.

66 As regards the clauses of the supply contracts fixing the price of plain-end pipes by reference to the resale prices obtained by Corus for threaded pipes, the Commission submits that any manufacturer that buys a product for resale after finishing bears the risk of a fall in prices on the finished-products market. Corus does not explain the reasons for which it was necessary to eliminate that risk in this case. According to the Commission, Corus likewise does not explain why the suppliers of plain-end pipes should have agreed to share that commercial risk.

67 As regards the fact, set out in recital 153 to the contested decision, that the use of a formula for setting the price of plain-end pipes implied an exchange of commercial information that ought, according to case-law, to have remained confidential (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 403, and Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629), Corus's argument in defence of its use of that formula is unconvincing. So far as concerns the quantity of threaded pipes sold by Corus, the Commission notes that it was easy for the suppliers to calculate Corus's total sales of those products since each of them was supplying a fixed percentage of Corus's needs.

68 As regards the evidence dating from 1990 and 1993 mentioned in recitals 78 to 81 to the contested decision, the Commission maintains first that it is relied on in those recitals not in order to show any firm agreement but in order to reveal the intentions underlying the conclusion of the supply contracts, intentions on which the Commission directly relies in order to prove the infringement found in Article 2 of the contested decision.

69 So far as concerns Corus's arguments that the contested decision does not clearly explain how the agreement between Corus and Vallourec was subsequently changed into an agreement concluded between four parties, the Commission observes first that it was within the context of the wider agreement found in Article 1 of the contested decision, providing for compliance with the 'Fundamentals', to which the four European producers concerned had been parties since 1990, that the second agreement was drawn up. Thus, in 1990 Corus and Vallourec concluded the agreement described in Article 2 of the contested decision and envisaged, from the outset, that Dalmine and Mannesmann would be persuaded to participate in it. The Commission states that Dalmine and Mannesmann must have joined in the second agreement before signing the supply contracts but that, in the absence of evidence of the exact date on which they did so, it found that they had participated in that infringement only from the date of signature of those contracts. It is therefore clear, in any event, that Corus and Vallourec, at least, were parties to the agreement as from 1990. Moreover, the four parties met in 1993 and from that date they were all parties to the agreement.

70 As regards the argument that the alleged restrictions on competition contained in the clauses of the supply contracts are not the same as those which constitute the infringement found in Article 2 of the contested decision, the Commission states that those restrictions represent only the written part of the agreement, and that the other part was not incorporated in a document.

Findings of the Court

71 First, the Court must reject Corus's argument based on the fact that it provided an explanation of the commercial logic underlying the supply contracts referred to in Article 2 of the contested decision which casts the facts established by the Commission in a different light and thus allows another, plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the Community competition rules had been infringed (Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 16;

Woodpulp II, cited in paragraph 50 above, paragraphs 126 and 127; Joined Cases T-305/94, T-307/94, T-313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschaapij and Others* v *Commission ('PVC II')* [1999] ECR II-931, paragraph 725). Therefore, the contention that it is incumbent on the Commission, in this case, to prove the existence of an agreement between undertakings as referred to in Article 2 of the contested decision, otherwise than by reference to the supply contracts, is without merit.

72 It must be pointed out that the case-law on which Corus relies in that connection relates to a situation in which the Commission relies solely on the conduct of the undertakings concerned on the market in inferring the existence of an infringement (see, to that effect, *PVC II*, paragraphs 727 and 728). In particular, the rule of evidence referred to in paragraph 71 of *Woodpulp II* is relevant only in a situation in which the Commission relies exclusively on the existence of parallel conduct to prove the existence of a concerted practice. That is not the case here, since the infringement found derives from the terms of the supply contracts themselves, which constitute an infringement of the Community competition rules (see recital 110 et seq. to the contested decision) and the Commission also relies on a body of additional written evidence to support its view (see recital 78 et seq. to the contested decision).

73 Thus, even if Corus had succeeded in showing that the conclusion of the three supply contracts with Vallourec, Dalmine and Mannesmann was objectively consonant with its commercial interests, that fact would not in any way undermine the Commission's thesis that those agreements were illegal. Indeed, anti-competitive practices are very often in the individual commercial interests of undertakings, at least in the short term.

74 The object and effect of the supply contracts are described by the Commission in recital 111 to the contested decision in the following terms:

'The object of these contracts was the supply of plain ends to the leader of the North Sea OCTG market, and their purpose was to maintain a domestic producer in the United Kingdom with a view to securing respect for the Fundamentals in the Europe-Japan Club. The main object and effect of the contracts was to share between [Mannesmann], Vallourec and Dalmine (Vallourec from 1994) all the requirements of their competitor, [Corus]. The contracts made the purchase prices of the plain ends dependent on the prices of the pipes and tubes threaded by [Corus]. They also contained a restriction on [Corus]'s freedom of supply (on Vallourec's from 1994) and forced it to communicate to its competitors the selling prices applied and the quantities sold. In addition, [Mannesmann], Vallourec (until February 1994) and Dalmine undertook to supply a competitor ([Corus], then Vallourec from March 1994) with quantities not known in advance.'

75 The terms of the supply contracts before the Court confirm, in essence, the factual information relied on in recital 111 to the contested decision and in recitals 78 to 82 and 153 thereto. They provide, in particular, for the apportionment of Corus's requirements of plain-end pipes between the other three European producers (40% for Vallourec, 30% for Dalmine and 30% for Mannesmann) and for the setting of the price paid by Corus for plain-end pipes in accordance with a mathematical formula which takes account of the price which it received for its threaded pipes.

76 In the light of those findings, it need merely be pointed out that the object and effect of the supply contracts was to substitute a negotiated apportionment of the profits to be obtained from sales of threaded pipes available on the United Kingdom market for the risks of competition, at least between the four European producers (see, by analogy, with respect to concerted practices, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/94 *Cimenteries CBR and Others* v *Commission ('Cement')* [2000] ECR II-491, paragraph 3150).

77 In each of the supply contracts, Corus bound its competitors in such a way that any effective competition on their part on its domestic market, and any prospect of such competition, disappeared.

78 Corus strengthened its position on its domestic market, at the cost of sacrificing its freedom of supply, because three of its potential competitors in the United Kingdom threaded pipes market linked themselves to it in such a way that they would see their sales of plain-end pipes decrease if Corus's sales of threaded pipes were to fall. Moreover, the profit margin achieved on the sales of plain-end pipes which the three suppliers committed themselves to making would also decrease in the event of a fall in the price obtained by Corus for its threaded pipes. In those circumstances, it was practically inconceivable that those three producers would seek to compete effectively with Corus in the United Kingdom threaded pipe market, particularly on prices (see recital 153 to the contested decision).

79 Conversely, by agreeing to enter into such contracts, each of Corus's Community competitors secured for itself an indirect participation in the latter's domestic market and also a share of the resultant profits. In order to obtain those advantages, they in effect waived the opportunity of selling threaded pipes on the United Kingdom market and, particularly following signature of the third contract on 9 August 1993, granting the remaining 30% to Mannesmann, waived the opportunity of supplying a larger proportion of plain-end pipes to Corus than that granted to each of them in advance. Moreover, they accepted the onerous, and thus commercially abnormal, obligation of supplying their competitor, Corus, with quantities of pipes which were defined in advance solely by reference to the sales of threaded pipes achieved by the latter.

80 It must be pointed out that if the supply contracts had not existed, the three European producers other than Corus would in the normal course, in the absence of the Fundamentals, have had a real or at least potential commercial interest in competing with Corus in the United Kingdom threaded pipe market and in competing among themselves for the supply of plain-end pipes to Corus.

81 It should also be noted that each of the supply contracts was concluded for an initial term of five years, a relatively long period, which confirms and reinforces the anti-competitive nature of those contracts.

82 Moreover, as the Commission observes, the formula for setting the price of plain-end pipes included in each of the three supply contracts involved an illicit exchange of commercial information (see recital 153 to the contested decision, and also recital 111) which had to remain confidential if the independence of the commercial policy of the competing undertakings was not to be compromised (see, to that effect, *Thyssen Stahl* v *Commission*, paragraph 403, and *British Steel* v *Commission*, paragraph 383 et seq., both cited in paragraph 67 above).

83 Corus's argument that the information concerning the quantities of pipes which it sold and the prices paid by its customers was not disclosed to its suppliers cannot exonerate it in the circumstances of this case.

84 As regards the quantities of threaded pipes sold by Corus, it must be pointed out that the suppliers could easily calculate them since each of them supplied, in principle, a fixed percentage of its requirements.

85 As far as prices are concerned, it is true that Corus did not disclose the prices it received for its threaded pipes to the other contracting parties as such. Consequently, the assertion in recital 111 to the contested decision that the supply contracts 'forced [Corus] to communicate to its competitors the selling prices applied' exaggerates the scope of the contractual obligations in that regard. However, the Commission correctly observed in recital 153 to the contested decision and before the Court that the prices of threaded pipes bore a mathematical relationship to the prices paid for plain-end pipes, so that the three suppliers concerned received precise indications regarding the direction, timing and extent of any fluctuation in the prices of the threaded pipes sold by Corus.

86 It must be pointed out not only that the disclosure of that information to competitors infringes Article 81(1) EC but also that the nature of that infringement is in essence the same, regardless of whether that disclosure concerned the prices of the threaded pipes themselves or only information concerning price fluctuations. In those circumstances, it must be held that the inaccuracy noted in the foregoing paragraph is insignificant in the wider context of the infringement found in Article 2 of the contested decision and that, consequently, it has no impact on the finding that an infringement was committed.

87 As regards Corus's more general argument that the restrictions of competition noted in the foregoing paragraphs are not those which constitute the specific infringement found by the Commission in Article 2 of the contested decision, it must be pointed out that those restrictions are clearly set out in the recitals to the contested decision describing that infringement, in particular in recital 111 which is quoted in full in paragraph 74 above. In so far as Article 2(1) of the contested decision indicates that the supply contracts were concluded 'in the context of the infringement mentioned in Article 1', it clearly shows that it was the conclusion of those anti-competitive contracts that in itself constitutes the infringement found in Article 2.

88 In any event, the accuracy of that analysis is confirmed by the fact that, in Article 2(2) of the contested decision, the Commission relates the duration of the infringement found against each of the European producers to the period for which the contract or contracts to which they were parties, respectively, were maintained in force.

89 Moreover, those findings also suffice to reject Corus's argument that the Commission has not demonstrated that the four European producers engaged in concertation in the manner described in the contested decision. Whatever the true degree of the concertation engaged in by the four European producers, it must be pointed out that each of them signed one — and Corus signed all three — of the supply contracts, restricting competition and forming part of the infringement of Article 81(1) EC found in Article 2 of the contested decision.

90 In those circumstances, it was superfluous for the Commission to rely on a body of evidence going beyond the supply contracts in order to demonstrate the existence of the infringement found in Article 2 of the contested decision. It is not therefore necessary in this case to examine all the arguments raised by the applicant in that connection in dealing with the present plea.

91 However, in the context of the present plea and in so far as the degree of concertation engaged in by the four Community producers in relation to the infringement found in Article 2 of the contested decision is relevant to the examination of certain other pleas, it is appropriate to analyse a number of documents in the Commission's file in this case in order to assess Corus's objection that the three supply contracts at issue were concluded on different dates and that the Commission could not therefore infer that there was a single infringement involving the four European producers.

92 In that connection, the 'Réflexions sur le contrat VAM' document dated 23 March 1990 is particularly relevant. Under the heading 'Scénario II', Mr Verluca envisages the possibility of 'getting the Japanese not to intervene in [the United Kingdom] market and having the problem settled between Europeans'. He goes on: '[i]n that case, plain ends would in effect be shared between [Mannesmann], [Vallourec] and Dalmine'. In the next paragraph he observes that 'it would probably be of interest to link [Vallourec]'s sales to both the price and the volume of VAM sold by [Corus]'. Given that the latter proposition precisely reflects the essential terms of the contract concluded between Vallourec and Corus 16 months later, it is clear that that strategy was in fact adopted by Vallourec and that the said contract was signed in order to implement it.

93 There must also be rejected Corus's argument that the strengthening of the aspect of the Fundamentals concerning respect for the European domestic markets by the Japanese producers is not the course of action, among the three possibilities envisaged in the 'Réflexions stratégiques' and 'Réflexions sur le contrat VAM' notes, for which Mr Verluca opted in the conclusions thereof. It can be clearly inferred from the wording of those two notes that their author preferred that course of action

and rejected it only reluctantly, on the ground that it was not workable. In particular, according to the Réflexions stratégiques note, 'the most advantageous solution for [Vallourec]' lay in the possibility of 'the Europeans persuading the Japanese to respect the UK as regards Buttress and Premium'. Mr Verluca does not reject that course of action in that note on the ground that he 'unfortunately [does] not believe that that solution ... can work'. Thus, given that that course of action was implemented as from 1991, the provisional rejection of that stratagem in those notes is of no importance.

94 Moreover, the fact that a practically identical contract was subsequently signed between Corus, on the one hand, and, on the other, Vallourec and then Dalmine, and, finally, Mannesmann, so that Corus's requirements for plain-end pipes were effectively shared among those three companies as from 1993, as Mr Verluca had envisaged, confirms that those three contracts must have been concluded with a view to pursuing a common European strategy. As the Commission points out, Vallourec first conceived that strategy and concluded a supply contract with Corus at the initial stage. Subsequently, Dalmine and Mannesmann joined them, as is evidenced by the fact that each of those two companies concluded a supply contract with Corus.

95 In the light of the foregoing, it must be concluded that the Commission was right to consider, in the contested decision, that the supply contracts constituted the infringement found in Article 2 of the contested decision and therefore established its existence to the requisite legal standard. It should also be stated, for all relevant purposes, that the additional evidence relied on by the Commission confirms the correctness of its view that those contracts formed part of a wider joint policy.

96 Accordingly, the present plea must be rejected.

The plea alleging breach of the rights of the defence resulting from differences between the statement of objections and the decision regarding the analysis of the evidence relied on to establish the existence of the infringement found in Article 2 of the contested decision

Arguments of the parties

97 According to Corus, there is a difference between the contested decision and the SO in the analysis of the 1990 notes cited in recitals 78 to 81 to the contested decision, in that, in particular, the Commission no longer claims, in recital 147 to the decision, that that evidence proves the existence of an agreement between the four European producers relating to plain-end pipes.

98 Moreover, the Commission referred to the 1993 documents cited in recital 91 to the contested decision (the fax sent by Corus to Vallourec headed 'BS cooperation agreement' and the 'steel tube system document') for the first time in the contested decision in order to establish the existence of an illegal agreement constituted by the supply contracts. Since Corus did not therefore have the opportunity during the administrative procedure to comment on the analysis adopted in the contested decision in that regard, its rights of defence were infringed.

99 The Commission replies that the final decision need not necessarily be identical in all respects to the statement of objections. In this case, the SO and the contested decision both contain the conclusion that Corus participated in the agreement constituting the infringement found in Article 2 of the contested decision, together with at least one other undertaking from 1990 and with its three European suppliers from 1993. Even if there were a difference between the SO and the contested decision, it would not impinge on Corus's rights of defence. Any such difference would warrant the annulment of a final decision only if there was a possibility that in the absence of that alleged irregularity the administrative proceedings could have led to a different result (Case 30/78 *Distillers* v *Commission* [1980] ECR 2229, paragraph 26). In order to make out an infringement of its rights of defence, Corus would

therefore have to demonstrate that the contested decision might have been different if it had had an opportunity to contest the existence of an agreement involving three other undertakings rather than just one. Since Corus denies that any agreement existed, the Commission considers that that would be its position regardless of the number of undertakings participating in the infringement and that Corus has, therefore, had the opportunity of defending itself adequately.

Findings of the Court

100 It must first be pointed out that the rights of the defence are not breached by the existence of a discrepancy between the statement of objections and the final decision unless a criticism appearing in the latter was not adequately set out in the former in such a way as to enable the addressees to defend themselves (see, to that effect, *Cement*, paragraphs 852 to 860).

101 Moreover, the assessment appearing in a statement of objections is often more succinct than that contained in the final decision as adopted, since it only represents the Commission's provisional view. Divergences of wording between a statement of objections and a final decision, deriving from the difference between the respective purposes of those two documents, are not, in principle, capable of infringing the rights of the defence. Thus, in this case, the fact that the SO does not contain a point equivalent to recital 147 to the contested decision, in which the Commission explicitly draws conclusions from the evidence examined in recitals 78 to 81 and 91 thereto, is entirely natural. On the contrary, such a concluding paragraph might have been regarded as premature at the SO stage.

102 The Commission observes, in recital 78 to the contested decision, that 'Vallourec and [Corus] ... introduced the concept of "Fundamentals Improved"' whereas it had

stated in point 63 of the SO that '[t]he Europeans' had done so. Thus, it no longer claims, in the contested decision, that the Vallourec notes are evidence of the existence of an agreement as from 1990 between all the four European producers in relation to plain-end pipes on the United Kingdom market.

103 It must be pointed out that, by thus changing its assessment, the Commission confined itself, in the contested decision, to relying on the facts which it considered that it had adequate evidence to support, particularly following the replies to the SO from the addressees thereof. The notes in question related only to Vallourec and Corus and therefore the Commission decided to draft recital 78 to the contested decision more conservatively, in that regard, than point 63 of the statement of objections.

104 In any event, it must be observed that that difference of wording, far from being contrary to the interests of the addressees of the SO, reflects the more limited probative value accorded by the Commission, in the contested decision, to the Vallourec notes as inculpatory evidence to prove the existence of the infringement found in Article 2 thereof, as compared with the SO. Accordingly, there can be no question of any infringement of the rights of the defence deriving from that difference.

105 As regards the arguments concerning the fax from Corus to Vallourec entitled 'BS cooperation agreement' and the steel tube system document, it need merely be observed that point 118 of the SO is drafted in exactly the same terms as recital 91 to the contested decision and therefore makes reference to those two items of evidence in the same way and in the same context as the latter. Moreover, contrary to Corus's contention, both the SO and the contested decision state that the 'BS cooperation agreement' fax refers to the contracts penalised in Article 2 of the contested decision: '[o]ne of the proposals consisted in transferring the OCTG activities to Vallourec while maintaining in force the contracts for the supply of plain ends between [Corus] and Vallourec, [Mannesmann] and Dalmine, without changing the proportions' (point 118 of the SO and recital 91 to the contested decision).

106 It follows that the present plea is unfounded and that, therefore, the claim for annulment of Article 2 of the contested decision must be rejected.

The claim for annulment of Article 1 of the contested decision

The plea based on the repercussions on the finding of the infringement in Article 1 of the contested decision of the non-existence of the infringement found in Article 2

Arguments of the parties

107 According to the applicant, if Article 2 of the contested decision were to be annulled, there would be insufficient evidence to prove that, from 1991 onwards, it participated in the infringement found in Article 1 of the contested decision.

108 It observes first that the infringement found in Article 2 of the contested decision is described in recital 164 as a means of ensuring the application of the principle of respect for domestic markets in the framework of the Europe-Japan Club. If Article 2 of the contested decision were to be annulled, the evidence of Corus's participation in the infringement found in Article 1 of the contested decision would be limited to its participation in the meetings of that club.

109 However, Corus regards its participation in those meetings as part of its strategy of withdrawing from the seamless tube market, decided on in 1987 and implemented by the closure of its Clydesdale plant, which produced plain-end pipes, in April

1991. The document reproduced at page 4902 of the Commission's file, entitled 'Paper for Presidents', which the Commission relied on to prove Corus's participation in those meetings, attests to the fact that the possible restructuring of the European industry was considered at those meetings. It was in the context of that restructuring that Corus sought to negotiate the reduction of its final activities in the plain-end pipe market. According to Corus, there is no documentary evidence that its participation in the meetings gave rise to the illegal collusion found by the Commission in Article 1 of the contested decision.

110 The Commission contends that the infringement found in Article 1 of the contested decision is based on different evidence from that relied on to establish the infringement found in Article 2. It also points out that Corus has not disputed that evidence, or the existence of the 'Fundamentals' governing market-sharing.

Findings of the Court

111 It must first be pointed out that since the claim for the annulment of Article 2 of the contested decision has been rejected, for the reasons set out above, the present plea has, in principle, been rendered nugatory.

112 The present plea could be well founded only if the Commission had wrongly relied on the existence of the infringement found in Article 2 of the contested decision in order to establish Corus's participation in that found in Article 1 thereof. That would be the case, first, if the existence of the infringement relating to plain-end pipes found in Article 2 of the contested decision had not been established to the requisite legal standard, or second, if it had not been established that the infringement consisted in illegal concertation between the four European producers relating to the infringement committed in the context of the Europe-Japan Club with the Japanese producers in relation to the downstream market in threaded pipes and tubes, as found in Article 1.

113 However it has been held in paragraphs 71 to 96 above that the existence of the infringement found in Article 2 of the contested decision was established to the requisite legal standard. Furthermore, it has been held in paragraphs 91 to 96 above that the contracts constituting that infringement were in fact signed in the context of concertation between the four European producers to which the contested decision was addressed with a view inter alia to strengthening the illegal agreement concluded in the context of the Europe-Japan Club.

114 In any event, it must be pointed out that, in Article 1 of the contested decision, the Commission, far from confining itself to considering that Corus had participated in the infringement found therein solely by reason of its anti-competitive conduct in the upstream market in plain-end pipes constituting the infringement found in Article 2 thereof, stated that that undertaking had also participated directly in the agreement sharing the markets in threaded pipes with the other European producers and the Japanese producers.

115 Whilst the existence of the infringement found in Article 2 of the contested decision supports the Commission's assessment regarding the infringement found in Article 1 thereof, that infringement and Corus's participation in it are based essentially on evidence distinct from that relied on to establish the existence of the infringement found in Article 2 thereof and, in particular, on the witness evidence of Mr Verluca (see, in particular, recitals 62 to 67 to the contested decision). Corus has not contested the appropriateness of that evidence for establishing the existence of the infringement found in Article 1 of the contested decision. Thus, even if it were considered appropriate to annul Article 2 of the contested decision, despite the foregoing findings, such annulment could not lead to the annulment of Article 1 thereof.

116 As regards the applicant's argument concerning the reasons for which it participated in the Europe-Japan Club meetings, it is established case-law that, where an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred

at them, thus giving the impression to the other participants that it subscribes to the results of the meeting and will act in conformity with them, it may be concluded that it is participating in the cartel resulting from those meetings (see, in particular, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232).

117 In this case, Corus has not denied its participation in the Europe-Japan Club meetings and, as already observed above, has not put forward any argument to challenge the truth and the probative value of the evidence relied on by the Commission in the contested decision in relation to the existence of the infringement found in Article 1 thereof.

118 It follows that the present plea must be rejected.

The plea alleging incorrect assessment of the duration of the infringement found in Article 1 of the contested decision

Arguments of the parties

119 Corus also puts forward a plea in law alleging that there is an inaccuracy in the contested decision regarding the duration of the infringement found in Article 1 thereof. By this plea, it seeks partial annulment of Article 1 and a reduction in the fine imposed on it.

120 Corus submits that the Commission states that it found that the infringement described in Article 1 of the contested decision commenced in 1990 because of the existence of the voluntary restraint agreements in force prior to that date (recital 108 to the contested decision). According to Corus, those agreements were extended until the beginning of 1991 and so, according to the Commission's own reasoning, there can have been no infringement before 1991. Corus adds that another addressee of the contested decision will provide evidence of that extension. Having included in its application a request that a preparatory inquiry should, if necessary, be ordered by the Court of First Instance, Corus requested in its reply that the Court should order the Commission or any third party to produce all documents relevant to the present case and in particular any documents providing evidence of an extension of the voluntary restraint agreements.

121 The Commission states that Corus has failed to provide any evidence in support of its argument that the voluntary restraint agreements with the Japanese Government did not end until 1991. Expressing the hope that some other party will provide such evidence cannot take the place of actual evidence, the Commission considers that it is not required to respond to that argument. In any event, non-imposition of a fine during the currency of the voluntary restraint agreements was already a concession in the light of the Commission's Notice concerning imports into the Community of Japanese goods (JO 1972 C 111, p. 13).

Findings of the Court

122 It must be pointed out in the first place that the Commission found, in recital 108 to the contested decision, that it could have set the starting date of the infringement as 1977 but chose not to do so because of the existence of the voluntary restraint agreements. Thus, in Article 1 of the contested decision, it found an infringement only from 1990 onwards. It must be held that by so doing the Commission made a concession to the addressees of the contested decision.

123 It is important to note that none of the parties has contended before the Court that any doubt should be cast on that concession in the present case. It follows that the Court's examination in these proceedings must not relate to the legality or appropriateness of that concession, but only to the question whether the Commission, having expressly made it in the grounds of the contested decision, correctly applied it in this case. It must be borne in mind, in that connection, that the Commission must produce precise and consistent evidence to support the firm conviction that the infringement took place, since the burden of proof concerning the existence of the infringement and, therefore, its duration, falls upon it (*CRAM and Rheinzink* v *Commission*, paragraph 71 above, paragraph 20; *Woodpulp II*, paragraph 50 above, paragraph 127; Joined Cases T-68/89, T-77/89 and T 78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraphs 193 to 195, 198 to 202, 205 to 210, 220 to 232, 249, 250 and 322 to 328; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and 72).

124 Thus, by virtue of the concession described above, the time at which the voluntary restraint agreements are said to have come to an end is the decisive criterion for assessing whether the infringement should be deemed to have started in 1990. Since those agreements were concluded at international level between the Japanese Government, represented by the Ministry of International Trade and Industry (MITI), and the Community, represented by the Commission, it must be stated that the latter should have retained the documentation confirming the date on which those agreements came to an end, in accordance with the principle of sound administration. Therefore, it should have been in a position to produce that documentation to the Court. However, the Commission informed the Court that it had searched its archives but was unable to produce documents recording the date of cessation of those agreements.

125 Although, in general, an applicant cannot transfer the burden of proof to the defendant by invoking circumstances which it is not in a position to establish, the concept of burden of proof cannot be applied for the benefit of the Commission in this case with regard to the date of cessation of the international agreements concluded by it. The Commission's inexplicable inability to produce evidence relating to a circumstance which concerns it directly makes it impossible for the Court to give a ruling in full knowledge of the facts concerning the date of cessation

of those agreements. It would be contrary to the principle of sound administration of justice to cause the consequences of that inability on the part of the Commission to be borne by the addressees of the contested decision which, in contrast to the defendant institution, were not in a position to produce the missing evidence.

126 In those circumstances, it must be considered, by way of exception, that it was incumbent on the Commission to produce evidence of the date of cessation of the voluntary restraint agreements. However, the Commission did not produce evidence of that cessation, either in the contested decision or before the Court.

127 Moreover, neither Corus nor, *a fortiori*, the Commission has claimed that the voluntary restraint agreements were still in force in 1991.

128 In those circumstances, it must be considered for the purposes of the present proceedings that the voluntary restraint agreements concluded between the Commission and the Japanese authorities remained in force until the end of 1990.

129 In any event, the Japanese applicants have produced evidence showing that the voluntary restraint agreements were renewed until 31 December 1990, at least in the case of the Japanese, which supports Corus's contention in these proceedings (see the judgment of this Court delivered today in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 345). It must be considered that the Court of First Instance may, in joined cases in which all the parties have had an opportunity to consult all the files, take account of its own motion of the evidence contained in the files of the parallel cases (see, to that effect, Case T-113/89 *Nefarma and Bond van Groothandelaren in het Farmaceutische Bedrijf* v *Commission* [1990] ECR II-797, paragraph 1, and Case

T-116/89 *Prodifarma and Others* v *Commission* [1990] ECR II-843, paragraph 1). In this case, the Court is called on to give judgment in cases which have been joined for the purposes of the oral procedure and which are concerned with the same decision and in which all the applicants have claimed that the amount of the fines imposed on them should be adjusted.

130 Thus, the Court has formally taken notice, in the present case, of evidence produced by the four Japanese applicants and it is unnecessary to give a decision on Corus's request that the Commission be ordered to produce those documents in the present proceedings

131 It must also be observed that Corus is asking the Court not only to annul the contested decision as regards the start-date of the infringement found in Article 1 thereof and, to that extent, the duration of that infringement but also, in the exercise of the unlimited jurisdiction conferred on the Court of First Instance, in accordance with Article 229 EC, by Article 17 of Regulation No 17, to reduce the amount of its fine in order to take account of that shorter duration. As a result of that unlimited jurisdiction, the Court of First Instance, when amending the contested measure by changing the amount of the fines imposed by the Commission, must take account of all the relevant factual circumstances (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 692). In those circumstances, and since all the applicants have contested the Commission's finding that the infringement began on 1 January 1990, it would not be appropriate for the Court to examine in isolation the situation of each of the applicants in the circumstances of the present case by confining itself to the factual evidence on which they have chosen to rely in order to plead their cases and failing to take account of evidence which other applicants or the Commission may have relied on.

132 Moreover, it is clear from all the foregoing considerations that the Commission's argument that Corus did not put forward the present plea in the appropriate manner is irrelevant in the circumstances of this case.

133 It follows that, in the light of the concession made by the Commission in the contested decision, the duration of the infringement found in Article 1 of the contested decision must be reduced by one year. Thus, Article 1 of the contested decision must be annulled to the extent to which it states that the infringement found against Corus commenced before 1 January 1991.

134 For the rest, the claim for the annulment of Article 1 of the contested decision must be dismissed.

The claim that the fine should be cancelled

Arguments of the parties

135 In support of this claim, Corus puts forward a single plea: breach of its rights of defence. It submits that, according to the case-law, the Statement of Objections must set forth clearly all the essential facts upon which the Commission is relying so that the addressees thereof have the information they need to defend themselves not only against a finding of infringement but also against the imposition of a fine, where one is imposed. In order to observe the rights of defence of the addressees, the Commission must therefore give, on the basis of the information available to it, sufficient indications in the statement of objections of the duration of the alleged infringement, its gravity and whether it was committed intentionally or negligently (Joined Cases 100/80 to 103/80 *Musique diffusion française* v *Commission* [1983] ECR 1825, paragraphs 14, 15 and 21; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 20; and Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others* v *Commission* [2000] ECR I-1365, paragraph 142).

136 As regards the duration of the infringement, Corus adds that the Court of Justice has specifically stated that the Commission should indicate the duration which it provisionally proposes to take into account at the stage of issuing its statement of objections, on the basis of the information available to it, and not simply state that it will take into account the duration of the infringement in fixing a fine, as it alleges (*Musique diffusion française and Others* v *Commission*, paragraph 135 above, paragraph 15). According to Corus, the obligation to indicate the gravity of the infringement and whether it was committed intentionally or negligently must be the same, so that the addressees of a statement of objections can effectively exercise their rights of defence in relation to those matters. The Court of First Instance confirmed that interpretation in *Cement*, paragraph 76 above (paragraphs 483 and 484). Otherwise, that obligation would be devoid of purpose, because it would imply that the statement of objections must set out the relevant criteria and no more, which are in any case clear from Article 15(2) of Regulation No 17.

137 In the present case the Commission failed to satisfy that obligation, as regards both the gravity of the infringement and the question whether it was committed intentionally or negligently, points 153 and 154 of the SO being silent on those matters. Corus states that it drew the Commission's attention to that lacuna in paragraph 6.7 of its reply to the SO (annex 11 to the application), yet the Commission provided it with no further information on the point.

138 Corus maintains that in those circumstances it was given no opportunity to comment on the Commission's assessment of those matters before the Commission adopted the contested decision, in which it concluded that the infringement of which Corus is supposedly guilty was very serious and that Corus had been aware that its actions were unlawful (recital 161 to the contested decision). Corus's rights of defence were therefore infringed and the fine imposed on it should consequently be annulled.

139 According to the Commission, Corus's interpretation of paragraph 21 of the judgment in *Musique diffusion française and Others* v *Commission*, paragraph 135 above (paragraph 21), is wrong in that it infers from that judgment that the

Commission must set out in the statement of objections its provisional assessment of the factors which it proposes to take into consideration in fixing the fine. In reality, the Court of Justice simply said that the Commission must state the criteria which it will apply in fixing the fine. Corus's interpretation of the judgment in *Musique diffusion française and Others* v *Commission* is incompatible with that given in the judgment in *Michelin* v *Commission*, paragraph 135 above (paragraph 19), namely that for the Commission to give indications as regards the level of fines envisaged, before the undertaking under investigation has had the opportunity to submit its observations on the allegations against it, would be to anticipate its final decision and would thus be inappropriate.

140 Moreover, the argument which Corus draws from paragraphs 483 and 484 of *Cement*, paragraph 76 above, is irrelevant: those paragraphs concern the question whether the Commission had indicated in the statement of objections its intention to impose a fine on certain undertakings. In the present case, however, it is common ground that point 154 of the SO clearly indicated the Commission's intention to impose a fine on Corus.

141 It is clear from Article 15(2) of Regulation No 17 that, in order to do that, the Commission must necessarily take into account the gravity and duration of the infringement. Corus must therefore necessarily have seen the relevance of those parameters. Moreover, given that a finding that the infringement was intentional or negligent is a condition for the imposition of a fine under that provision, the warning given ought to have sufficed to inform Corus of the Commission's position as regards those factors. Since the publication of the Commission's 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, hereinafter 'the Guidelines') preceded the sending of the SO to its addressees, Corus ought to have inferred that the market-sharing agreement imputed to it constituted a very serious infringement of Article 81(1) EC.

142 As regards the fact that the Court of First Instance held in its judgment in *Cement*, paragraph 76 above, that a statement of objections must contain details of the intentional or negligent nature of the infringement and of its gravity, the Commission considers that those details may be set out in the actual body of the statement of objections and need not necessarily be contained in the part which refers to Article 15(2) of Regulation No 17. The Commission notes that Corus found the information in the SO relating to the duration of the infringement to be satisfactory. Since that information was contained in passages of the SO other than those dealing with the imposition of a fine, the Commission argues that Corus accepted the principle that the whole of the statement of objections must be taken into account in that regard. The SO contains a detailed description of the infringement from which it is clear that the Commission regarded it as significant (see, in particular, point 147 of the SO). As regards the question whether the infringement was intentional, the Commission states that, according to the case-law, it is not required to prove subjective intention, but simply that the parties ought to have known that their conduct amounted to an infringement of Article 81(1) EC (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 299). In those circumstances, it is sufficient for the Commission to show in the statement of objections that the parties' conduct was such as could objectively be considered intentional or negligent.

143 In any event, Corus put forward specific arguments, in paragraphs 1.6, 3.14 and 3.15 of its reply to the SO, to play down the severity of the infringement, expressly referring to that aspect in paragraphs 6.3, 6.4 and 6.7 of its reply. In paragraphs 3.12, 3.15 and 4.5 to 4.9 of its reply to the SO, Corus set out reasons to justify its conduct before concluding, in paragraphs 6.1 and 6.2 of that document, under the heading 'Issues on fining', that it had not infringed Article 81(1) EC, thus denying any infringement and, *a fortiori*, any intentional infringement. The Commission infers from those circumstances that Corus was given, and took, the opportunity of expressing its views on all issues relevant to the fines and that there was therefore no breach of its rights of defence. Thus, the alleged breach of Corus's rights of defence had no adverse effect on its ability to defend itself in practice and so, in any event, the decision should not be annulled for that reason (see, to that effect, *PVC II*, cited in paragraph 71 above, paragraph 1020).

Findings of the Court

144 It must first be observed that the statement of objections must set out clearly all the essential evidence on which the Commission relies in order to give its addressees the information necessary to defend themselves not only against the finding of an infringement but also, if appropriate, against the imposition of fines. The Commission is therefore under an obligation, in order to respect the rights of defence of the addressee, to give, on the basis of the evidence available to it, a sufficient indication, at the statement of objections stage, of the duration of the alleged infringement, its gravity and whether the infringement was committed intentionally or negligently (*Musique diffusion française and Others* v *Commission*, paragraph 135 above, paragraphs 14, 15 and 21; *Michelin* v *Commission*, paragraph 135 above, paragraph 20; and *Compagnie Maritime Belge Transports and Others* v *Commission*, paragraph 135 above, paragraph 142).

145 In that connection, the obligation to give an indication of the gravity and intentional or negligent nature of the infringement would be rendered pointless if a simple paraphrase of Article 15(2) of Regulation No 17 were in itself sufficient to satisfy it (see, to that effect, *Cement*, paragraphs 483 and 484). Indeed, it would make no sense for the Commission merely to be obliged — on pain of the infringement decision being annulled in the event of its failure to do so — to inform the addressees of a statement of objections about the content of the provisions of Regulation No 17, with which they are supposed to be acquainted in any case.

146 In the light of the foregoing, it must be held that, contrary to its contention, the Commission is required to give, in the statement of objections, a brief provisional assessment as to the duration of the alleged infringement, its gravity and the question whether, in the circumstances of the case, the infringement was committed intentionally or negligently. However, the adequacy of that provisional assessment, whose purpose is to give the addressees of the statement of objections an opportunity to defend themselves, must be evaluated in relation not only to the wording of the measure in question but also to its context and the entirety of the

legal rules governing the matter concerned (see, by analogy, Joined Cases T-371/94 and T-39 4/94 *British Airways and Others* v *Commission* [1998] II-2405, paragraph 89 et seq.).

147 In the present case, as far as the intentional or negligent nature of infringement is concerned, it must be concluded that the information provided in the SO is sufficient to satisfy the requirements of the case-law.

148 The Commission made it clear several times in the SO (in particular in points 129 and 137) that the object of the agreement concluded in the context of the Europe-Japan Club was to share the markets in threaded pipes and, thereby, to restrict competition. It is sufficient for the Commission to establish, in a decision finding an infringement of the competition rules, that conduct of an objectively illegal nature was engaged in intentionally or negligently for the imposition of a fine to be authorised under Article 15(2) of Regulation No 17. It is clear that the fact of concluding a market-sharing agreement, of the kind established in Article 1 of the contested decision, necessarily displays intention, since an undertaking cannot conclude such an agreement inadvertently.

149 In those circumstances, it must be concluded that the SO made it clear beyond any doubt that the Commission considered, at that stage of the procedure, that the infringement subsequently established in Article 1 of the contested decision had been committed intentionally.

150 In contrast, the arguments put forward by the Commission regarding its provisional assessment of the gravity of the infringement are not very convincing.

151 In the SO, the Commission confined itself, in points 153 and 154 thereof, to stating that it intended imposing a fine, referring to the terms of Article 15(2) of Regulation No 17. It is true that it stated in the SO, in point 147, that there was a market-sharing agreement which gave rise to an appreciable restriction of competition. However, it must be pointed out that that statement does not enable it to be ascertained whether, in the Commission's view, the infringement was 'serious' or 'very serious' within the meaning of the Guidelines.

152 Similarly, the Commission's argument concerning the publication of the Guidelines does not carry conviction. Once again, if the Court were to consider that the publication of them were sufficient in itself to enable the addressees of a statement of objections to infer from the description of the nature of the infringement the category in which the Commission classified it, the obligation, laid down in the case-law, to give indications concerning the gravity of the infringement would serve no practical purpose (paragraph 145 above).

153 Thus, it must be concluded that in this case the SO is vitiated by a defect, in that the Commission did not indicate in the SO its provisional classification of the gravity of the infringement committed.

154 However, this finding cannot in itself give rise to annulment of the contested decision. The obligation to include in the statement of objections a brief provisional appraisal concerning the duration of the alleged infringement, its gravity and whether the infringement was committed intentionally or negligently is not an end in itself but is designed to place the addressee of the statement of objections in a position properly to defend himself (see paragraph 146, and, by analogy, *Cement*, paragraph 76 above, paragraph 156).

155 Thus, that obligation is inseparable from and dependent on the principle of the rights of the defence (see, by analogy, *Cement*, paragraph 76 above, paragraph 156, and the case-law cited therein). It is not appropriate for the Community judicature to annul Community measures on the basis of omissions in a preparatory document such as a statement of objections, which have no repercussions on the defence of the undertakings concerned. It is therefore necessary to consider whether Corus's defence was affected by the defect noted in paragraph 153 above.

156 In this case, Corus expressly put forward arguments in its reply to the SO, in particular in section 6 thereof, in order to play down the gravity of the infringement committed. In particular, Corus claimed that it was clear from the context of the market-sharing agreement at issue that any infringement committed by it was not sufficiently serious to justify the imposition of a fine (see paragraph 6.3 of the reply to the SO), that it was in the process of withdrawing from the markets in seamless OCTG pipes and line pipe and therefore of diminishing its role in relation thereto when the infringement was allegedly committed (see point 6.4, paragraph 3, of the reply to the SO) and, finally, that the geographical scope of its participation and the category of products involved in the infringement were limited (see, respectively, point 6.4, paragraph 2, and point 6.5 of the reply to the SO). It must also be pointed out that Corus put forward detailed arguments of a factual nature concerning those matters in section 3 of its reply to the SO.

157 Consequently, Corus has not demonstrated in what way the conduct of the administrative procedure and the content of the contested decision might have been different regarding the gravity of the infringement and, therefore, the amount of the fine, if the Commission had specified, in the SO, the degree of gravity which it attributed to the infringement resulting from the market-sharing agreement in the framework of the Europe-Japan Club (see, to that effect, *PVC II*, paragraph 71 above, paragraph 1021, and the case-law cited therein). The mere assertion made by Corus in point 6.7 of that reply, to the effect that it presumed that it would have a further opportunity of giving its views on the criteria mentioned in the Guidelines, cannot change its legal position in that regard.

158 Finally, it must be observed, for the sake of completeness, that that conclusion is supported by the fact that Corus put forward, before the Court, arguments which were substantially the same (see paragraph 161 et seq. below) as those appearing in section 6 of its reply to the SO (see paragraph 156 above), in order specifically to challenge the appraisal of the gravity of the infringement found in Article 1 of the contested decision, as set out in recitals 159 to 165 thereto. The Community judicature enjoys unlimited jurisdiction to reappraise the amount of fines imposed under Article 17 of Regulation No 17. It follows that, if a party considers that one of the factors relating to that issue was incorrectly dealt with by the Commission, it can put forward all arguments capable of supporting that view before the Court.

159 In those circumstances, even if the Commission had set out its provisional assessment in the SO as to the gravity of the infringement, there is no reason to suppose that Corus would have put forward, in its reply to the SO, arguments which differed appreciably from those actually set out in section 6 of that reply.

160 In the light of the foregoing, the present plea and, therefore, the claim for cancellation of the fine must be rejected.

The claim that the fine should be reduced

The plea alleging an error of assessment regarding the gravity of the infringement

Arguments of the parties

161 Corus argues that, even if it did participate in the infringement found in Article 1 of the contested decision, the fact that it was in the process of withdrawing from the

seamless tubes market meant that its commercial position was very different from that of the other producers sanctioned by the decision. The Commission ought, therefore, to have taken the view that its part in the infringement was less serious and, consequently, have fixed a lower basic fine than that imposed on the other participants in the infringement.

162 Corus also emphasises that its activities were traditionally focused on the United Kingdom market, which was only 'semi-protected' according to the Commission (recital 62 to the contested decision) and in which the Japanese producers were major competitors. Moreover, its sales of seamless OCTG in that market were essentially of premium thread pipes, rather than the standard thread pipes covered by Article 1 of the contested decision. According to Corus, the Commission ought therefore to have taken those factors into account too in determining the gravity of the infringement committed by it.

163 Corus also states that the infringement found in Article 2 of the contested decision is regarded by the Commission as accessory to the infringement found in Article 1. Thus, annulment of Article 2 would necessarily have an impact on the gravity of Corus's alleged involvement in the main infringement referred to in Article 1.

164 The Commission states that it took full account, in recitals 106 and 162 to the contested decision, of the fact that the infringement found in Article 1 had had only limited effects and reduced the amount of the fine accordingly. Corus's argument that its participation in the infringement had only a limited impact is thus irrelevant in the context of the present proceedings.

165 Moreover, the annulment of Article 2 of the contested decision would have no impact on the amount of the fine because, as Corus points out, no separate fine was imposed on account of that article.

Findings of the Court

166 It must be noted at the outset that, although the Commission did not expressly refer to the Guidelines in the contested decision, it nevertheless determined the amount of the fines by applying the calculation method which it imposed on itself in that document (see, in that connection, *Hercules Chemicals* v *Commission*, paragraph 116 above, paragraph 53, confirmed on appeal by the Court of Justice in Case C-51/92 P *Hercules* v *Commission* [1999] ECR I-4235, and the case-law cited therein).

167 According to point 1 A of the Guidelines, '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'. In recital 159 to the contested decision, the Commission observes that it specifically takes account of those three criteria in determining the gravity of the infringement.

168 However, in recital 161 to the contested decision, the Commission relied essentially on the nature of the offending conduct of all the undertakings as the basis for its conclusion that the infringement found in Article 1 of the contested decision is 'very serious'. In that connection, it referred to the seriously anti-competitive nature of the penalised market-sharing agreement and its harmful effect on the proper functioning of the internal market, the intentional nature of the infringement committed and the secret and institutionalised nature of the system established to restrict competition. The Commission also took account, in recital 161, of the fact that the 'four Member States in question account for most of the consumption of seamless OCTG and line pipe in the Community and therefore constitute an extended geographic market'.

169 On the other hand, the Commission found, in recital 160 to the contested decision, that 'the specific impact of the infringement on the market has been limited', given that the two specific products covered by it, namely seamless standard OCTG and project line pipe, accounted for only 19% of Community consumption of seamless OCTG and line pipe and that welded tubes could meet part of the demand for seamless tubes as a result of technological progress.

170 Thus, in recital 162 to the contested decision, the Commission, after classifying that infringement as 'very serious' on the basis of the factors enumerated in recital 161, took into account the relatively low volume of sales of the products in question by the addressees of the contested decision in the four Member States concerned (EUR 73 million per year). That reference to the size of the relevant market corresponds, in essence, to the abovementioned appraisal concerning the limited impact of the infringement on the market in recital 160 to the contested decision. The Commission thus decided to set the amount relating to gravity at EUR 10 million. The Guidelines provided, in principle, for a sum 'above [EUR] 20 million' for an infringement falling within that category. It must be concluded that the reduction of the amount determined in relation to gravity to 50% of the minimum sum normally adopted in the case of a 'very serious' infringement adequately takes account of the limited impact of the infringement on the market in this case.

171 Finally, the Commission found, in recital 165 to the contested decision, that all the addressees of the contested decision were large firms, so that there was no need to differentiate, by reference to size, between the amounts of the fines imposed on the various participants in the infringement.

172 It must be pointed out, in that connection, that the Commission largely relied on that assessment as to the nature of the infringement for its view that the infringement was very serious. It is clear from the Vallourec notes, referred to in particular in recitals 62, 67, 78 and 80 to the contested decision, that the collaboration between Corus and Vallourec was particularly close.

173 As regards Corus's argument based on the fact that it was in the process of withdrawing from the OCTG and line pipe market and that it was therefore in a different commercial situation from all the other addressees of the contested decision, it must be observed first that the subjective reasons for which an undertaking commits an infringement are not relevant to the assessment of the objective gravity of the infringement. For so long as Corus did not withdraw from the markets in question and continued actively to participate in the infringement complained of, the temporary nature of its presence in those markets is irrelevant.

174 On the other hand, it must be observed that the Commission found, in recital 92 to the contested decision, that Corus had sold its threading business to Vallourec on 22 February 1994 and that, in its case, the infringement was committed only from 1990 to February 1994, as is pointed out in Article 1(2) of the contested decision. It is clear from recital 166 to the contested decision that the infringement attributed to Corus was taken into account only for a period of four years, from 1990 to 1994, as is confirmed by the fact that the basic amount was set at EUR 14 million for Corus in recital 167. In the light of a reading of the contested decision as a whole, it must be concluded that the year 1990 was included and that 1994 was excluded for the purposes of that calculation.

175 Thus, there is no reason to consider in this case, having regard in particular to the abovementioned close cooperation between Corus and Vallourec, that Corus's offending conduct was of a less serious nature than that of the other undertakings which participated in the infringement. The taking into account of the shorter duration, as described in the foregoing paragraph, of the infringement found in Article 1 of the contested decision in Corus's case suffices to reflect the fact that Corus withdrew from the threaded-pipe markets in February 1994.

176 Next, it must be borne in mind that an undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the collusion in which it participated, especially by means of regular meetings

organised over several years, was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel (*PVC II*, cited in paragraph 71 above, paragraph 773). In the light of the particularly close cooperation between Corus and Vallourec, noted above (see also recitals 62, 67, 78 and 80 to the contested decision), it is clear that Corus was directly implicated in the preparation of a common strategy adopted in the context of the Europe-Japan Club and that it knew all the details of the market-sharing agreement constituting the infringement penalised. Thus, in this case, there is no reason to consider that Corus was not responsible for the cartel as a whole.

177 As regards the fact that the United Kingdom offshore market, an important sector of Corus's domestic market, was only partially protected, it is clear from the Vallourec notes (see recitals at 62, 67, 78 and 80 to the contested decision) and from the 'Paper for Presidents' and the '(g) Japanese' document (the latter document being reproduced at page 4909 of the Commission's file) (see recital 84), which were drawn up by Corus employees, that Corus sought to limit Japanese sales on that market as far as possible. In those circumstances, Corus cannot rely on that limited protection as a basis for claiming that the infringement committed by it was not 'very serious'. Moreover, the limited nature of the protection of the United Kingdom offshore market does not in any way undermine the Commission's finding, in recital 161 to the contested decision, that the geographic market affected was an extended market.

178 As regards Corus's arguments relating to the limited impact of its participation in the infringement on the markets concerned, in particular because of the existence of Japanese competition on its domestic market and the fact that it sold for the most part premium OCTG rather than standard OCTG, it must be borne in mind once more in this context that the Commission took account of the limited impact of the infringement on the market by setting the amount of the fine relating to gravity at 50% of the minimum sum usually applied in the case of a 'very serious' infringement (see paragraph 170 above).

179 It is true that the sixth paragraph of point 1 A of the Guidelines provides that it is possible 'in some cases to apply weightings to the amounts determined within each of the three categories [of infringement] in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition'. According to that paragraph, that approach is appropriate 'particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'.

180 However, it is clear from the use of the expression 'in some cases' and the term 'in particular' in the Guidelines that weighting according to the individual size of undertakings is not a systematic stage in the calculation which the Commission has imposed on itself but falls within the scope of the flexibility which it has allowed itself in cases where it is called for. It is appropriate in this context to refer to the case-law according to which the Commission enjoys a discretion enabling it to take account or not take account of certain factors when determining the amount of the fines which it intends imposing, having regard in particular to the circumstances of the case (see, to that effect, the order of the Court of Justice of 25 March 1996 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, paragraphs 32 and 33, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited above, paragraph 465; see also, to that effect, Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraph 68). In view of the terms of the sixth paragraph of point 1 A of the Guidelines, referred to above, it must be considered that the Commission retains a degree of discretion concerning the appropriateness of weighting fines according to the size of each undertaking.

181 In that connection, it must also be remembered that the purpose of fines is to have a deterrent effect in matters of competition (see, in that connection, the fourth paragraph of point 1 A of the Guidelines). Thus, in view of the large size of the addressees of the contested decision, mentioned in recital 165 to the contested decision, a substantially greater reduction of the amount determined in respect of gravity of the infringement might have deprived the fines of their deterrent effect.

182 Accordingly, it must be considered that the Commission did not go beyond the limits of its discretion, as described in paragraph 180 above, by not applying the sixth paragraph of point 1 A of the Guidelines in this case.

183 As regards Corus's argument that the annulment of Article 2 of the contested decision should have an impact on the amount of the fine imposed to penalise the infringement found in Article 1 thereof, it need merely be pointed out that no fine was imposed in respect of the infringement referred to in Article 2 of the contested decision and that the Commission certainly did not take account of that infringement when determining the amount of the fine which it in fact imposed on Corus (recital 164 to the contested decision). Consequently, that argument is irrelevant.

184 It follows from all the foregoing that the present plea must be rejected,

The plea alleging breach of the principle of the protection of legitimate expectations

Arguments of the parties

185 Corus claims that, by failing to grant it any reduction in the amount of the fine, the Commission frustrated the expectation which it legitimately drew from Section D.2 of the Leniency Notice. Under that provision, an undertaking that does not substantially contest the facts alleged in a statement of objections should benefit from a reduction of 10 to 50% of the fine that would have been imposed had it not cooperated. Corus also emphasises that the Commission itself expressly acknowledged in the Leniency Notice that the notice is likely to create legitimate expectations on the part of undertakings. Finally, Corus refers, by way of analogy, to Case T-7/89 *Hercules Chemicals*, paragraph 116 above.

186 As regards the Commission's argument that its Leniency Notice did not give rise to any legitimate expectations on Corus's part because it was not published until 1996, it is sufficient to point out that the SO was not sent to Corus until 1999. Moreover, in the contested decision, the Commission expressly relied on the Leniency Notice in order to reduce the fines imposed on Vallourec and Dalmine.

187 Corus also argues that it is clear from case-law that the idea underlying the reduction of fines imposed on undertakings which state that they do not contest the facts on which the Commission bases its allegations is that such an acknowledgement of the factual allegations can be relied upon to prove that the allegations are correct, thus facilitating the Commission's task of finding infringements of the Community competition rules and bringing them to an end (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 256).

188 In the present case, Corus stated, in paragraph 1.5 of its reply to the SO, that it did not substantially contest the facts relating to the infringement found in Article 1 of the contested decision, even though it disputed that there had been any infringement. Corus states that a distinction should be drawn between the facts alleged and the legal characterisation of those facts. It concludes that the fact that an undertaking disputes the legal characterisation of the facts does not diminish the scope and usefulness of the cooperation it offers in acknowledging the facts themselves. It argues that, in other decisions relating to unlawful cartels, the Commission has reduced the fines imposed on undertakings even where they disputed the existence of concerted action constituting an infringement or claimed that they had not been involved in that concerted action (see Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy surcharge) (OJ 1998 L 100, p. 55), recitals 98 to 100, and Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81] of the EC Treaty (Case No IV/35.691/E.4) Pre-insulated Pipe Cartel) (OJ 1999 L 24, p. 1), paragraph 180. Corus submits that, in the same way, it should have benefited from a reduction in the fine imposed on it.

189 The Commission states, in answer to Corus's claim that it cooperated, first of all that its Leniency Notice was not published until 1996. Since Corus brought the infringements found in the contested decision to an end in February 1994, that notice was not applicable.

190 Moreover, as regards the infringement found in Article 1 of the contested decision, Corus, in particular in paragraph 3.15 of its reply to the SO, disputed not only the assessment of the facts but also the very existence of an unlawful agreement. By so doing, it placed the Commission under an obligation to prove the facts it alleged in the SO. Corus's stance therefore did not further the Commission's task. Accordingly it cannot be regarded as cooperation justifying a reduction in the fine imposed on it (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 309, and the case-law cited therein, and paragraph 332). In that connection, the Court of First Instance has held explicitly that an undertaking which denies participation in any infringement of Article 81(1) EC is not entitled to a reduced fine on the grounds of cooperation (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 59, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraphs 262 and 363).

191 The Commission concludes from the foregoing that Corus continues to contest before the Court the facts set out in the contested decision. Therefore, if Corus was entitled to a reduction of its fine in return for cooperation, the Commission considers that it would be appropriate to request the Court to cancel that reduction and therefore increase the fine imposed. That would mean that an undertaking which had benefited from a reduction in its fine in return for cooperation would be substantially contesting the facts in its application, a situation in which such a request would be justified under the last sentence of the Leniency Notice. Corus must therefore choose, in these proceedings, between the pleas and arguments by which it disputes the existence of the infringement and the argument which it bases on the Leniency Notice, since those two aspects of its application are incompatible.

Findings of the Court

192 It must be observed first that the Leniency Notice, having been published in 1996, might have encouraged Corus to assert, in its reply to the SO of 20 April 1999, that it did not 'substantially' contest the facts regarding the Europe-Japan Club. Thus, no consideration of a temporal nature precludes the possibility that the Leniency Notice might have led that company to entertain legitimate expectations.

193 As to whether a reduction of the fine imposed on Corus was justified in this case on the basis of the Leniency Notice, in such a way that the principle of the protection of legitimate expectations was infringed, it must be pointed out at the outset that an undertaking's conduct must facilitate the Commission's task of identifying and penalising infringements of the Community competition rules (see *Mayr-Meinhof* v *Commission*, paragraph 190 above, paragraph 309, the case-law cited therein, and paragraph 332). Thus, it is not sufficient for an undertaking to state in general terms that it does not contest the facts alleged, in accordance with that notice, if, in the circumstances of the case, that statement is not of any help to the Commission at all.

194 In this case, the Commission in particular alleged in the SO that the members of Europe-Japan Club concluded an anti-competitive agreement with the object and effect of sharing markets. Corus, although stating that it did not contest the facts in that connection, asserted in paragraph 1.7 of its reply to the SO, and again in paragraph 3.15(2) thereof, that the anti-competitive effects of such an agreement, supposing it had existed, would have been negligible, with the result that the commercial rationale of the agreement and, therefore, its existence must be called in question. It stated before the Court that a distinction must be drawn between the facts as such, which it did not contest, and their legal characterisation, which it does contest.

195 However, it must be stated that, in the specific case of an agreement which, regardless of any effects which it may have, has the object of sharing markets, an admission of the truth of the facts is sufficient, in principle, to establish two of the essential elements of an infringement of Article 81(1) EC, namely the existence of an agreement and its anti-competitive object.

196 Moreover, it must be observed that in this case the Commission relied for the most part on the same evidence in the SO and in the contested decision and that a considerable number of the items of evidence, in particular Mr Verluca's statements and the various Vallourec notes, relate to the content of strategic discussions of a collusive nature between the members of the Europe-Japan Club concerning, in particular, the Community markets (see, in particular, points 56, 60, 63 and 65 of the SO and recitals 62, 67, 73 and 78 to the contested decision).

197 Accordingly, it must be held that Corus could not, in its reply to the SO, cast doubt on its participation in the agreement and on the anti-competitive object constituting the infringement subsequently established in Article 1 of the contested decision without contesting the facts relating to the discussions in question and the matters discussed.

198 It follows from the foregoing that the fact that Corus raised questions, in its reply to the SO, concerning the existence of the agreement gave rise, having regard to the circumstances of the case, to a doubt as to the value of its statement, in the same reply, that it was not contesting the facts, so that the significance of that statement is ambiguous. That ambiguity is reinforced by the fact that Corus tempered its statement that it did not contest the facts by using the term 'substantially', without explaining what specific facts were covered by that reservation.

199 In those circumstances, it was impossible for the Commission at the stage of the administrative procedure, just as it is impossible for the Court in the present proceedings, to identify the precise facts which Corus has admitted and by virtue of which its cooperation might have facilitated the Commission's task. It follows that, in this case, the admission by Corus of the facts alleged in the SO is not such as to justify any reduction of its fine on the basis of the Leniency Notice, as interpreted by the case-law.

200 In the light of the foregoing, this plea must be rejected.

The plea alleging breach of the principle of equal treatment

Arguments of the parties

201 Corus points out, first, that, according to settled case-law, the principle of equal treatment is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25; to the same effect, Case T-100/92 *La Pietra* v *Commission* [1994] ECR-SC I-A-83 and II-275, paragraph 50). It adds that that principle is often applied in relation to the imposition of fines (Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 116 above, paragraph 295; Case T-141/89 *Trefileurope* v *Commission* [1995] ECR II-791, paragraph 185; Case T-142/89 *Böel* v *Commission* [1995] ECR II-867, paragraphs 128 to 135; Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraphs 54 to 56; Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraphs 57 to 61; Case

T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 56; *Finnboard* v *Commission*, paragraph 190 above, and *Mayr-Melnhof* v *Commission*, paragraph 190 above, paragraphs 334 to 336 and 352 to 354).

202 Corus contends that Vallourec, whose fine was reduced by 40%, did no more than reply to questions put to it during an on-the-spot investigation by Commission officials, as it was legally required to do, and Corus did the same. It observes, in that connection, that Mr Verluca's statements were made in response to questions which the Commission addressed only to Vallourec.

203 Moreover, Dalmine, which benefited from a reduction of 20% of its fine, merely informed the Commission that it was not substantially contesting the facts, without acknowledging that it had participated in an infringement. It was thus no more cooperative than Corus. The inequality of treatment which Corus has suffered, which the Commission does not justify in its defence, is therefore clear. Dalmine was even less cooperative than Corus, in particular in that it initially refused to supply certain information requested by the Commission and subsequently invoked the privilege against self-incrimination in order to justify its refusal to answer certain questions, both in its reply to the SO and in the action, which was dismissed as manifestly inadmissible, which it brought against the decision adopted by the Commission under Article 11(5) of Regulation No 17. Dalmine also contested the legality of the decisions on the basis of which the Commission carried out investigations in December 1994 and hence the Commission's right to use the documents obtained during those investigations (recital 118 to the contested decision).

204 Corus also maintains that it is clear from the contested decision (recital 174) that the Japanese applicants offered no effective cooperation to the Commission and contested the existence of the agreement during the administrative procedure, a fact which distinguishes their situation from that of Corus. Like Dalmine, the Japanese

producers contested both the legality of the decisions on the basis of which the Commission carried out investigations in December 1994 and the use by the Commission of the documents obtained during those investigations. As regards Mannesmann, it is again clear from the contested decision (recital 174) that it never indicated clearly whether or not it contested the facts and that it refused to provide certain information which the Commission had requested by a decision under Article 11(5) of Regulation No 17. The Commission thus infringed the principle of equal treatment in refusing to reduce the fine imposed on Corus and thereby treating Corus in the same way as it treated Mannesmann and the four Japanese producers.

205 The Commission replies, first, that it enjoys a discretion in setting the level of fines, so that the notion of equal treatment in relation to fines must be understood in the light of that rule (*Martinelli* v *Commission*, paragraph 201 above, paragraph 59). In any event, that principle applies only where comparable situations are treated differently (Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 116 above, paragraph 295).

206 In the present case, however, there are objective differences between Corus's situation and that of the other addressees of the contested decision. First, Vallourec provided the Commission with a written statement that was very useful (Mr Verluca's statement of 17 September 1996; see in particular recitals 53 and 170 to the contested decision) and, also, it did not substantially contest the facts on which the Commission had based the SO. Secondly, Dalmine did not contest the facts on which the Commission based its decision (recital 172 to the contested decision), and was unequivocal in that regard, whereas Corus cast doubt on the very existence of the agreement. In any event, even if the Commission was wrong to reduce the fines imposed on Vallourec and Dalmine, that argument has no bearing on Corus's claim for a reduction. Lastly, it is irrelevant that the reasons which prevented Corus from

obtaining a reduction in its fine were different from those which prevented Mannesmann and the Japanese producers from obtaining a reduction: Corus failed to fulfil the relevant criteria of the Leniency Notice, irrespective of the position of the other undertakings.

Findings of the Court

207 According to well-established case-law, the Commission may not, in assessing the cooperation afforded by undertakings, disregard the principle of equal treatment, a general principle of Community law, which, according to settled case-law, is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 237, and the case-law there cited).

208 It must also be borne in mind that, in order to justify the reduction of a fine, an undertaking's conduct must facilitate the Commission's task of identifying and penalising infringements of the Community competition rules (see *Mayr-Meinhof* v *Commission,* paragraph 190 above, paragraph 309, the case-law cited therein, paragraph 332, and paragraph 193 above).

209 It must be stated that, in this case, there are objective and significant differences, in the light of the latter criterion, between the situation of Corus and that of Vallourec and of Dalmine.

210 First, Vallourec not only did not contest the materiality of the facts on which the Commission based the SO but also, unlike Corus, provided written statements which were very useful to the Commission, in particular those made by Mr Verluca on 17 September and 14 October 1996 (see, in particular, recitals 60, 62, 72 and 108 to the contested decision).

211 No representative of Corus ever provided a statement of probative value and scope comparable to those of Mr Verluca. Corus's reply of 31 October 1997, referred to in recital 66 to the contested decision, is of limited scope and probative value, particularly since it is not clear whether or not Corus intended to withdraw it as regards the procedure concerning seamless tubes by a letter of 30 March 1999 addressed to the Commission (see, in that connection, the judgment in *JFE Engineering and Others* v *Commission*, cited in paragraph 129 above, paragraphs 305 to 308).

212 As regards the circumstance, referred to by Corus, that Mr Verluca's statements were made in reply to questions which the Commission put only to Vallourec, it need merely be pointed out that the Commission is under no obligation to put the same questions, during its investigation, to all the undertakings which it suspects of participating in an infringement. Indeed, such an obligation would detract from the Commission's freedom of action in the conduct of its investigations in competition cases and would therefore undermine their effectiveness.

213 It is true that, to the extent to which undertakings provide the Commission, at the same stage of the administrative procedure and in similar circumstances, with similar information concerning the facts attributed to them, the degrees of cooperation provided by them must be regarded as comparable (*Krupp Thyssen Stahl and Acciai speciali Terni* v *Commission*, paragraph 207 above, paragraphs 243 to 246).

214 However, that clearly was not the case in this instance (see paragraph 211 above). Accordingly, that case-law is not applicable.

215 As regards Dalmine, it is common ground, both in the present case and in Case T-50/00 *Dalmine* v *Commission*, which was joined to this case for the purposes of the hearing, that that company did not contest the facts on which the Commission based the contested decision, as indicated in recital 172 thereto. Although Corus stated, in its reply to the SO, that it did not contest the facts alleged by the Commission regarding the infringement subsequently found in Article 1 of the contested decision, it has been noted in paragraphs 192 to 199 above that, by reason of its vague and ambiguous nature, that statement is not sufficient to justify a reduction of the fine imposed on Corus.

216 The mere fact, therefore, that no ambiguity of that kind was imputed to Dalmine regarding its admission of the facts is sufficient for it to be concluded that the Commission was not guilty of any unequal treatment in that regard. As regards the other circumstances mentioned by Corus in support of its argument that Dalmine was even less cooperative than it was, it must be pointed out that those circumstances relate to Dalmine's refusal, which initially occurred before the SO was sent to it, to respond to requests for information and that no cooperation on Dalmine's part was mentioned by the Commission in relation to that aspect of the investigation.

217 It follows that the Commission was right to consider that those circumstances had no bearing on Dalmine's admission of the facts in its reply to the SO or, therefore, on the reduction of 20% of the fine granted to Dalmine under that heading by the Commission, in accordance with the Leniency Notice.

218 Finally, as the Commission points out, it is of no importance that the reasons for which Corus has been unable to secure a reduction of the fine differ from those which prevented Mannesmann and the Japanese producers from being granted a reduction, since it has been held above that Corus does not fulfil the conditions laid down in that connection in the Leniency Notice, regardless of the situation of those other undertakings.

Calculation of the amount of the fine

219 It follows from the foregoing that the fine imposed on Corus must be reduced to take account of the fact that the duration of the infringement has been established in this case as three years rather than four years.

220 The method of calculating fines adopted in the Guidelines and employed by the Commission in this case has not been criticised in itself, for which reason the Court considers, in the exercise of its unlimited jurisdiction, that it is appropriate to apply that method in the light of the conclusion reached in the foregoing paragraph.

221 Thus, the basic amount of the fine shall be EUR 10 million, plus 10% for each year of the duration of the infringement, that is to say 30% in all, which gives a figure of EUR 13 million. That amount must then be reduced by 10% to reflect the attenuating

circumstances referred to in recitals 168 and 169 to the contested decision, giving a final amount for Corus of EUR 11.7 million instead of EUR 12.6 million.

The claim that the Commission should be ordered to repay the amount of the fine or, in the alternative, the amount by which the fine is reduced, plus interest

222 It has been held on numerous occasions that, as a consequence of a judgment of annulment, which takes effect *ex tunc* and thus has the effect of retroactively eliminating the annulled measure from the legal system (see Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 30; Opinion of Advocate General Léger in Case C-127/94 *Ecroyd* [1996] I-2731, I-2735, point 74; and Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, paragraph 50), the defendant institution is required, by virtue of Article 233 EC, to take the necessary measures to reverse the effects of the illegalities as found in the judgment of annulment, and, in the case of an act that has already been executed, this may take the form of restoring the applicant to the position he was in prior to that act (see Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 60; Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32; Case 21/86 *Samara* v *Commission* [1987] ECR 795, paragraph 7; Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 59 and 60, and *Corus UK* v *Commission*, paragraph 50).

223 Foremost amongst the steps referred to in Article 233 EC, in the case of a judgment annulling or reducing the fine imposed on an undertaking for infringement of the Treaty competition rules, is the Commission's obligation to repay all or part of the fine paid by the undertaking in question, in so far as that payment must be described

as a sum unduly paid following the annulment decision. That obligation applies not only to the principal amount of the fine overpaid but also to default interest on that amount (*Corus UK* v *Commission*, paragraph 222 above, paragraphs 52 and 53).

224 In this case, it cannot be presumed that the Commission will fail to fulfil the obligations imposed on it by the combined effect of the present judgment and of Article 233 EC.

225 Consequently, there is no need to give a decision on the present claim in these proceedings.

226 Similarly, it must be held, for the same reason, that there is likewise no need to give a decision on Corus's claim that the Court should order that all measures needed to give effect to this judgment should be taken.

Costs

227 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that the costs be shared or that each party bear its own costs. Since each party has been unsuccessful on one or more heads in this case, the applicant and the Commission must each be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Article 1(2) of Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) in so far as it establishes the existence of the infringement found in that article against the applicant as pre-dating 1 January 1991;**

2. **Sets the fine imposed on the applicant by Article 4 of Decision 2003/382 at EUR 11 700 000;**

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

4. **Orders the parties to bear their own costs.**

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 8 July 2004.

H. Jung J. Pirrung

Registrar President

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