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

In Case T-23/99,

LR af 1998 A/S (formerly Løgstør Rør A/S), established in Løgstør (Denmark), represented by D. Waelbroeck and H. Peytz, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Oliver and E. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant,

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

* Language of the case: English.

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

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

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 25 October 2000,

gives the following

Judgment

Facts of the case

1 LR AF 1998 A/S, formerly Løgstør Rør A/S, is a Danish company which at the material time manufactured and sold pre-insulated pipes used, *inter alia*, for district heating.

2 In district heating systems, water heated in a central site is taken by underground pipes to the premises to be heated. Since the temperature of the water (or steam) carried in the pipes is very high, the pipes must be insulated in order to ensure an

economic, risk-free distribution. The pipes used are pre-insulated and, for that purpose, generally consist of a steel tube surrounded by a plastic tube with a layer of insulating foam between them.

3 There is a substantial trade in district heating pipes between Member States. The largest national markets in the European Union are Germany, with 40% of Community consumption, and Denmark, with 20%. Denmark has 50% of the manufacturing capacity in the European Union and is the main production centre in the Union supplying all Member States in which district heating is used.

4 By a complaint dated 18 January 1995, the Swedish undertaking Powerpipe AB informed the Commission that the other manufacturers and suppliers of district heating pipes had shared the European market in a cartel and that they had adopted concerted measures to harm its activities or to confine those activities to the Swedish market, or simply to force it out of the sector.

5 On 28 June 1995, acting under a Commission decision of 12 June 1995, officials of the Commission and representatives of the competition authorities of the Member States concerned carried out simultaneous and unannounced investigations at 10 undertakings or associations of undertakings in the district heating sector, including the applicant (hereinafter 'the investigations').

6 The Commission then sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), to the applicant and most of the undertakings concerned.

7 On 20 March 1997, the Commission served a statement of objections on the applicant and the other undertakings concerned. A hearing of the undertakings concerned took place on 24 and 25 November 1997.

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

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

10 According to the decision, two German producers, the Henss/Isoplus group ('Henss/Isoplus') and Pan-Isovit GmbH, joined in the regular meetings of the

Danish producers from the autumn of 1991. In these meetings negotiations took place with a view to sharing the German market. In August 1993, these negotiations led to agreements fixing sales quotas for each undertaking.

11 Still according to the decision, all the producers agreed in 1994 to fix quotas for the whole of the European market. This European cartel involved a two-tier structure. The 'directors' club', consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each undertaking in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, 'contact groups' consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 With regard to the German market, the decision states that following a meeting between the six main European producers (ABB, Dansk Rørindustri, Henss/Isoplus, Pan-Isovit, Tarco and the applicant) and Brugg Rohrsysteme GmbH ('Brugg') on 18 August 1994, a first meeting of the contact group for Germany was held on 7 October 1994. Meetings of this group continued long after the Commission carried out its investigations at the end of June 1995 although, from that time on, they were held outside the European Union, in Zurich. The Zurich meetings continued until 25 March 1996.

13 As a characteristic feature of the cartel, the decision refers in particular to the adoption and implementation of concerted measures to eliminate Powerpipe, the only major undertaking which was not a member. The Commission states that certain members of the cartel recruited key employees of Powerpipe and gave Powerpipe to understand that it should withdraw from the German market. Following the award to Powerpipe of an important German project, a meeting

took place in Düsseldorf in March 1995 which was attended by the six major producers and Brugg. According to the Commission, it was decided at that meeting to organise a collective boycott of Powerpipe's customers and suppliers. The boycott was subsequently implemented.

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

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

'*Article 1*

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

The duration of the infringements was as follows:

— in the case of... Løgstør,... from about November/December 1990 to at least March or April 1996,

...

The principal characteristics of the infringement consisted in:

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

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

— agreeing prices for the product and for individual projects,

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

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

...

Article 3

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

...

(g) [Løgstør], a fine of ECU 8 900 000;

...'

16 The applicant was notified of the decision by letter of 12 November 1998, received by it the following day.

Procedure and forms of order sought by the parties

17 By application lodged at the Registry of the Court of First Instance on 21 January 1999, the applicant brought the present action.

18 Seven of the nine other undertakings held liable for the infringement also brought actions against the decision (Cases T-9/99, T-15/99, T-16/99, T-17/99, T-21/99, T-28/99 and T-31/99).

19 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to answer a number of written questions and to produce certain documents. The parties complied with those requests.

20 The parties presented oral argument and answered the questions put by the Court at the hearing held in open court on 25 October 2000.

21 The applicant claims that the Court should:

— annul the decision in so far as it is addressed to the applicant;

— alternatively, substantially reduce the amount of the fine;

— order the defendant to pay the costs.

22 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

23 The applicant relies in essence on five pleas in law. The first plea alleges factual errors in applying Article 85(1) of the EC Treaty. The second alleges infringement of the right of defence. The third alleges infringement of general principles and factual errors in determining the fine. The fourth alleges that the obligation to state reasons was infringed in connection with the determination of the fine. The fifth plea alleges that the rate of interest applied if the fine is not paid immediately is excessive.

I — *First plea in law, alleging factual errors in applying Article 85(1) of the Treaty*

A — *The compensation scheme in the framework of the Danish cartel*

1. Arguments of the parties

24 The applicant observes that the Commission erred in stating, in point 35 of the decision, that it participated in a compensation arrangement at the end of 1991. When Tarco demanded compensation for the market share which it had lost, the applicant merely suggested withdrawing, for Tarco's benefit, a tender submitted on the Icelandic market which it knew had already been rejected by the Icelandic customer. Although other compensation schemes were discussed, the applicant ultimately made no payment to Tarco. This shows that the applicant had no intention of participating in a compensation scheme and did not in fact do so.

25 The defendant observes that the applicant's explanations are inadequate, given that it admits having discussed compensation payments with Tarco and having made an offer to withdraw from a tendering procedure. The argument that no monetary compensation was paid does not contradict the analysis of the compensation scheme in the decision.

2. Findings of the Court

26 The Commission maintains in point 35 of the decision that, as regards the cartel on the Danish market, there is no dispute that a compensation mechanism was

operated at the end of 1991, but that the exact details of that compensation are unclear. The Commission refers, first, to Tarco's statement that cash was paid in return for invoices for non-existent deliveries of pipes and, second, to the applicant's reply of 2 October 1997 to the request for information of 26 August 1997, to the effect that Tarco's demand for compensation was settled by taking into account orders which the applicant had already placed with Tarco and by its relinquishment in favour of Tarco of its share in a joint project in Iceland (second paragraph of point 35 of the decision). The Commission concluded that, whatever the precise procedure for settling compensation had been in 1991, it was agreed that for 1992 a new system would apply, under which surplus market share would be 'rolled over' and re-assigned to the producers who were below their allocated quota (third paragraph of point 35 of the decision).

27 The applicant accepts that during discussions with Tarco following the latter's demand for compensation for the lost projects, it succeeded in satisfying that demand by stating that it was withdrawing its tender for an Icelandic project.

28 Even though the applicant was aware that it was not going to obtain that project in any event and even though, following discussions with Tarco, no payment was made, it cannot be disputed that the applicant relinquished a project in favour of Tarco in order to meet a claim for compensation based on the mechanism set up within the cartel.

29 The Commission was therefore correct to state that, even though the precise details of the compensation are unclear, it was established that the compensation mechanism was operated.

30 The applicant's complaint must therefore be rejected.

B — *The existence of a continuous cartel from 1990 until 1996*

31 The applicant denies having taken part in an infringement of Article 85 of the Treaty during a continuous period 'from about November-December 1990 to at least March or April 1996'. According to the applicant, there were two separate cartels, one limited to the Danish market, from January 1991 to April 1993, and a second covering the European market from March 1995 to November or December 1995 and supplemented, as regards Denmark and Germany, by cooperation from late 1994 and sporadically until March 1996.

32 The Court will first consider the arguments concerning the applicant's participation in the activities of the cartel, outside the Danish market, for the period 1990-1993, then the arguments concerning the suspension of its participation, in 1993, and the setting-up of a European cartel from 1994, and, last, the arguments concerning the duration and continuous nature of the cartel.

1. The applicant's participation in the cartel outside the Danish market during the period 1990-1993

— Arguments of the parties

33 The applicant observes that although a number of attempts were made by the undertakings concerned to secure cooperation in Germany between 1991 and 1993, these attempts were not successful and competition was not distorted during that period. The applicant did not want a market-sharing agreement because it felt that it was capable of increasing its market share. At the meetings

which it attended it participated passively, without entering into any commitments.

34 First, the applicant did not participate in an agreement to increase prices for 1991, including prices on export markets. The Commission is wrong to rely in that regard on the note of the meeting of the sub-committee of the Danish council for Central Heating (an association with no connection to the cartel) on 22 November 1990, since the price increases announced by the producers on that occasion had been decided unilaterally. That is shown by the fact that the applicant's price increases which took effect on 12 November 1990 had already been published prior to that meeting. The producers could not have 'coordinated' price increases which each of them had already decided. Tarco's statement to the contrary, on which the Commission also relies, is wrong. Furthermore, the person who signed that statement was not employed by Tarco at the time and was not present at the meeting.

35 In the period 1991-1993 the only infringements outside the Danish market were an agreement concerning Germany to increase gross price lists from 1 January 1992 and a cooperation agreement in Italy of 14 October 1991 concerning the Turin project. The agreement on gross price lists was not concluded until the meeting of 10 December 1991. At that meeting, however, no agreement was reached on common price lists or on a programme for monthly meetings. It is unlikely that the agreement on gross price lists had any direct effect on the German market, as the applicant was selling there through an independent distributor which fixed its own end prices and as the list price increases were offset by discounts granted by the applicant to its German distributor. The Turin project was an isolated instance of cooperation with no effect on the market.

36 Second, the applicant claims that it did not participate in an agreement on sharing the German market for 1994, as the Commission states in points 50 and 51 of the decision. It has no recollection of the meetings allegedly held in Copenhagen on 30 June 1993 and Zurich on 18 or 19 August 1993 as described in points 49 and 50 of the decision. Nor did it agree to the drafting of a uniform price list or to the preparation of a scheme of sanctions. The document which the Commission has presented as evidence of such an agreement, contained in annex 7 to the applicant's comments on the statement of objections, is merely a proposal by ABB which was submitted to the applicant at a later date (hereinafter 'the ABB proposal'). The applicant's refusal to sign such an agreement was not inconsistent with its acceptance of an audit by Swiss auditors, commissioned by the members of the cartel, to obtain figures on the overall size of the German market or with the fact that Pan-Isovit had the impression that the applicant was seeking an agreement. The applicant pretended to be interested in an agreement on conditions which it knew were unacceptable to the German undertakings in the cartel. At a brief meeting which the applicant attended on 8 September 1993, it stated that it did not wish to conclude any agreement on the German market. At a meeting on 29 September 1993 it again refused to accept the ABB proposal. Not only did the applicant therefore refuse to accept an agreement to share the German market, but it actually caused the attempts to reach such an agreement to fail.

37 The applicant maintains that the mere fact that it participated in meetings with an anti-competitive object cannot result in its liability as a participant in the cartel, because on a number of occasions it explained to the other participants that it was not interested in pursuing the cooperation envisaged, thus distancing itself 'publicly' from the matters discussed at the meetings. Furthermore, those discussions never achieved anything and had no effect on the market.

38 The defendant observes that, as regards cooperation outside Denmark between 1991 and 1993, an express agreement was concluded, first of all between Danish producers, on an export price increase at the beginning of 1991 and then on a

price increase in Germany from January 1992, on price-fixing and project-sharing in Italy, and on the system of quotas in terms of market share for 1994. These agreements cannot be treated as isolated events. The applicant participated in numerous regular meetings in the context of a cartel which, from autumn 1991, extended the formal cooperation of Danish producers to the German market.

— Findings of the Court

39 It is settled 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 meetings and will act in conformity with them, it may be concluded that it is participating in the cartel resulting from those meetings (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98, and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 85 and 86).

40 It is against that background that the Court must evaluate, as regards the period October 1991 to October 1993, the evidence gathered by the Commission and the conclusions which it drew from that evidence in point 38 et seq. of the decision.

41 First, it must be held that the Commission was correct to conclude in points 31, 38 and 135 of the decision that the applicant participated in the increases agreed upon by the Danish producers of their prices on export markets.

42 The applicant does not deny that it participated in the meeting of 22 November 1990, the minutes of which (annex 19 to the statement of objections) contain a list of price increases, stating for each Danish producer one or two percentages with a date, both in a column headed 'Denmark' and in a column headed 'Exports'. The conclusion which the Commission drew from that document, that the participants in that meeting agreed to coordinate an increase in their prices on the export markets, is corroborated by Tarco's statement that the participants in that meeting reached agreement on concerted increases in their basic price lists both for domestic sales and for export sales (Tarco's reply of 26 April 1996 to the request for information of 13 March 1996, hereinafter 'Tarco's reply').

43 The applicant cannot dispute the Commission's conclusion by claiming that the increase in export prices was not 'agreed' at that meeting. The Commission merely found that the Danish producers 'coordinated' their export price increases, which implies that the participants reached agreement at least on the way in which the envisaged price increases would be implemented, but it did not claim that the participants also agreed at the meeting in question on the principle or the precise percentage of the price increases. It follows from the minutes of the meeting of 22 November 1990 that the participants in any event announced the dates on which they were going to increase their prices and, where appropriate, the time-scale envisaged for that increase. The Commission was therefore entitled to find that there had been a concerted price increase.

44 The applicant's argument that it had already published a list of increased prices before the committee meeting of 22 November 1990 is irrelevant. First, the applicant has not stated to what extent the price list published in Danish on 12 November 1990 also applied to export sales, given that at the meeting of 22 November 1990 it was considered necessary to deal with export prices separately from those for the Danish market. Second, the date on which that list became applicable (12 November 1990) corresponds to a date mentioned in the minutes of the meeting of 22 November 1990 for the increase of the applicant's

prices on the Danish market, while all the price increases in the column headed 'Exports' were to become applicable at a later date (1 December 1990 for Dansk Rørindustri and 1 January 1991 for Tarco and the applicant). The applicant cannot therefore claim that it increased its export prices without being aware that the other producers intended to do likewise.

45 In that regard, it should be further pointed out that, contrary to what the applicant claims, the probative value of Tarco's reply is not affected by the fact that the person who signed it was not present at the meeting of 22 November 1990 or employed by Tarco at that time. As the reply was given on behalf of the undertaking as such, it carries more weight than that of an employee of the undertaking, whatever his individual experience or opinion. Furthermore, Tarco's representatives expressly stated in their reply that the reply represented the outcome of an internal investigation carried out by the undertaking.

46 Second, the applicant recognises that it participated in an agreement to increase gross prices in Germany from 1 January 1992 and in a cooperation agreement in October 1991 relating to the Turin project.

47 In that regard, the argument that the agreements in question had no effect on the market is irrelevant. Likewise, the argument that, following the agreement to increase gross prices, there was keen competition on the market, leading to a reduction in prices, is of no effect. For the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market (Joined Cases 56/64 and

58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 99, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 178; and judgment of the Court of First Instance in Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 87). As regards the agreement to increase gross prices in Germany, the fact that an undertaking participating with others in meetings during which decisions on prices are taken does not comply with the agreed prices does not lessen the anti-competitive object of those meetings and therefore the undertaking's participation in the collusion, but tends at the most to show that it did not implement the agreements in question (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 79).

48 Nor can the validity of the decision be affected, as regards the agreement to increase gross prices in Germany, by the applicant's assertion that that agreement did not include all the matters referred to by the Commission in the second paragraph of point 44 of the decision. The crucial elements of the agreement, which, according to ABB's reply of 4 June 1996 to the request for information of 13 March 1996 (hereinafter 'ABB's reply'), were agreed in principle at a meeting on 9 or 10 October 1991, are to be found in the brief handwritten notes relating to the meeting of 10 December 1991, taken by the applicant (annex 36 to the statement of objections), which refer, in particular, to the 'List of minimum prices for customers', 'Ex-factory + 7%', 'Monthly meeting(s)' and 'List 13.1.92'. Even if agreement was reached solely on the increase of gross prices, that does not invalidate the decision, since it follows from the third paragraph of point 137 that the Commission identified as an agreement within the meaning of Article 85 of the Treaty, for that period, only the agreement to increase prices in Germany from 1 January 1992. Likewise, the fact that such an agreement was reached at the meeting of 10 December 1991 and not at the meeting of 9 or 10 October 1991 is not of such a kind as to invalidate the conclusion which the Commission drew from that series of meetings, namely that the Danish cartel, in which the applicant was then participating, was supplemented, at some time in the autumn of 1991, by an agreement to increase gross prices on the German market. Furthermore, it is not disputed that that agreement, which in any event was

reached no later than December 1991, had already been discussed at the meeting of 9 or 10 October 1991.

49 Third, it is apparent that the Commission properly established that at the end of 1993 the applicant was party to an agreement to share the German market.

50 ABB has acknowledged that at the end of an audit establishing each producer's sales for 1992, the producers reached an agreement on 18 August 1993 to share the German market in accordance with the shares obtained in 1992, on the preparation of a new uniform price list and on the subsequent preparation of a system of sanctions (ABB's reply). According to ABB, negotiations on the allocation of market shares continued at meetings held in Copenhagen on 8 or 9 September 1993 and subsequently in Frankfurt (ABB's reply).

51 As regards the audit establishing sales for 1992, ABB's account corresponds with the conclusions which must be drawn from a memorandum of ABB IC Møller of 19 August 1993 (annex 53 to the statement of objections) setting out a table which states, for the Danish producers and for Pan-Isovit and Henss/Isoplus, the turnover and market share for 1992 and a figure representing the market share envisaged for 1994. According to ABB, the data on the turnover and market share of the undertakings concerned were provided by a firm of Swiss auditors (ABB's reply of 4 June 1996). On page 36 of its comments on the statement of objections, the applicant acknowledged the existence of a sales audit carried out by a firm of Swiss auditors. As regards the purpose of that audit, the credibility of the explanation provided by ABB cannot be called into question by the applicant's assertion that it only requested an audit of the sales of its distributor in Germany in order to provide reliable data on the total size of the German market. It is difficult to envisage that an undertaking would collaborate with a firm of auditors to which it provides its sales figures with the sole purpose of then being able to determine its own share of the market compared with the overall

market, when the other undertakings which accepted the same audit intend that all the information relating to market share be communicated to them.

52 Next, as regards the conclusion of an agreement in principle to share the market, ABB's argument, in its reply, that the undertakings had agreed in August 1993 to share the German market, even though the precise market share of each participant was still subject to negotiation which continued from one meeting to another, is confirmed not only by the information on market shares for 1994 in the ABB IC Møller memorandum referred to above but also in a memorandum of 18 August 1993 from Pan-Isovit (annex 52 to the statement of objections) and by the ABB proposal, which together show that in August and September 1993 negotiations on the allocation of market shares in Germany were continuing.

53 First, the existence of such negotiations is confirmed by the abovementioned memorandum of 18 August 1993, drawn up by Pan-Isovit for its parent company concerning a visit to the applicant on 3 August 1993, from which it is apparent that Pan-Isovit was informed that the applicant was 'in principle interested in agreements on prices, but only if [its] market share... [was] sufficient' and that the applicant '[was] endeavouring, in agreement with ABB, to place Tarco under control in Denmark and in Germany'.

54 Second, it is confirmed by the ABB proposal that, as regards market-sharing, all that remained to be discussed in September 1993 was the amount of individual quotas. In that regard, the ABB proposal, concerning an arrangement to share the German market based on the audit of sales, payments to be made where the allocated quotas were exceeded and a common price list, was received by the applicant, according to its comments on the statement of objections, in September 1993 and was supported by Pan-Isovit and Henss/Isoplus. As regards market shares, the percentages stated in that proposal correspond to the figures in the

ABB IC Møller memorandum ('26' for Pan-Isovit, '25' for ABB Isolrohr, '12' for the applicant and '4' for Dansk Rørindustri/Starpipe), except in the case of Tarco and Henss/Isoplus, which in the latter document are allocated '17' and '16' respectively, while the ABB proposal states '17.7%' and '15.3%'. As regards the increase in Tarco's share, ABB states in its reply that the figures for 1994 in the ABB IC Møller memorandum 'reflect the agreement reached at the meeting of 18 August [1993] to maintain those market shares for 1994, with slight adjustments following the discussions held at that meeting' and that, at the meeting of 8 or 9 September 1993, 'the purpose of the meeting seems to have been to continue the negotiations on the allocation of market shares following the report of the [firm of Swiss auditors]: Tarco apparently insisted on being allocated 18% of the German market'. Having regard to the consistency between ABB's statements and the increase in Tarco's share proposed by ABB, Pan-Isovit and Henss/Isoplus in September 1993, compared with the share mentioned in the ABB IC Møller memorandum in August 1993, it must be concluded that, following the meetings held in August and September 1993, an agreement to share the German market existed, even if discussions on quotas were continuing.

55 The applicant's argument that it did not accept the arrangement in the terms set out in the ABB proposal is irrelevant. The series of meetings at which the undertakings met to discuss the allocation of market shares would not have been possible had there not been at the material time a common intention among those participating in the meetings to restrict sales on the German market by allocating market shares to each trader.

56 It is settled law that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86, *Commission* v *Anic*

Partecipazioni, cited above, paragraph 130, and Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 120).

57 In those circumstances, the Commission correctly inferred from the fact that meetings on the allocation of market shares continued in August and September 1993 that there was an agreement between those participating in the meetings on, at least, the principle of sharing the German market.

58 It is true that the Commission has not established that such an agreement in principle existed in regard to the system of payments to be made in the event that the allocated quotas were exceeded and as regards the common price list. However, that cannot invalidate the findings of the decision, since, according to the third paragraph of point 137 of the decision, the Commission identified as an agreement within the meaning of Article 85 of the Treaty, in August 1993, only the agreement on the system of quotas in terms of market shares.

59 As to whether the applicant participated in such an agreement in principle to share the German market, its presence at the meetings of 30 June and 18 or 19 August 1993, of which it claims to have no recollection, is attested by ABB in its reply, while the applicant itself has acknowledged having been present at the meeting of 8 or 9 September 1993.

60 In that regard, even if the applicant was not present at the meetings of 30 June and 18 or 19 August 1993, it is apparent from the case-file that it was none the less involved in the negotiations forming the background to both those meetings. First, by giving its consent during the summer of 1993 to an audit of its sales on the German market, the applicant complied with the decision taken in that regard

at the meeting of 30 June 1993. Second, the applicant has acknowledged that, at a meeting with ABB in June 1993, the sharing of the German market was discussed and the applicant stated that it did not wish to accept a division of that market between the German undertakings, on the one hand, and the Danish undertakings, on the other hand, in a ratio of less than '60:40' for that market (comments on the statement of objections). A division along those lines was at the same time envisaged by ABB, according to its memorandum of 2 July 1993, in preparation for the meeting with the applicant (annex 48 to the statement of objections), in which ABB states that the applicant wanted a larger share of the market. It follows from that document and also from the Pan-Isovit memorandum of 18 August 1993 that even if, before the meeting of 18 or 19 August 1993, there had not yet been any agreement to share the German market, the applicant was among the undertakings looking to find an agreement.

61 In those circumstances, the applicant cannot avoid liability for the agreement in principle to share the German market by maintaining that it stated at the meeting of 8 or 9 September 1993 that it did not wish to conclude any agreement in Germany and that at a meeting of 29 September 1993 it refused to accept the ABB proposal.

62 The applicant's position during the meetings of 8 or 9 and 29 September 1993 did not amount to publicly distancing itself from the agreement in principle to share the German market which formed the subject-matter of the negotiations in August and September 1993. It is true that although the agreement to share the German market ultimately did not culminate in a written agreement and then broke down completely, that is mainly due to the applicant's conduct, as ABB acknowledged in its reply. However, since, at some time, a consensus was reached on the principle of sharing the German market, the applicant has not sufficiently proved that at that time it adopted a position which clearly informed the other participants in the negotiations that it was distancing itself from the principle of sharing that market. It is apparent from all the documents described in paragraphs 52 to 54 above that during August and September 1993 other participants, like Pan-Isovit and ABB, did not take the position adopted by the

applicant to mean that it was distancing itself from the principle of market-sharing.

63 By participating in the negotiations that took place in August and September 1993, and in particular by attending the meeting of 8 September 1993, without publicly distancing itself from what occurred at that meeting, the applicant gave the impression to the other participants that it subscribed to the results of the meeting and that it would act in conformity with them, so that it may be concluded that it participated in the agreement resulting from that meeting (see the case-law cited in paragraph 39 above).

64 As the Commission does not accuse the applicant of having subscribed to an agreement, within the meaning of Article 85 of the Treaty, on a system of compensatory payments and a common price list, and as it does not maintain that the agreement to share the German market was actually put into practice, it is of no avail to the applicant to rely on the fact that it objected to the conclusion of a written agreement on compensatory payments and the common price list or on the fact that the market-sharing agreement was not implemented.

65 It follows from the foregoing that, as regards the period November 1990 to September 1993, the Commission has established to the requisite legal standard that the applicant participated in the agreements to increase prices outside Denmark in 1990, to increase prices in Germany from 1 January 1992, to fix prices and share projects in Italy and in the agreement on the system of quotas in terms of market share in August 1993.

66 The applicant's arguments concerning its participation in anti-competitive activities outside the Danish market during the period 1990-1993 must therefore be rejected.

2. The suspension of participation in the cartel in 1993 and participation in the cartel from 1994

— Arguments of the parties

67 The applicant claims that it left the cartel in April 1993. The Commission is therefore wrong to state that at that time 'the price fall in Denmark was the result of a trial of strength inside the cartel, not of its abandonment'. The applicant's withdrawal from the cartel is corroborated by a number of ABB internal memoranda, which refer to its conduct as 'against the agreement' and 'aggressive', and also the significant change in the sharing of the Danish market owing to the applicant's demand for a greater market share.

68 As regards Germany before 1994 and Denmark from April 1993 until 1994, the importance of frictions within the cartel should not be played down because they resulted in the applicant leaving the cartel in 1993. As regards the period 1993-1994, the Commission has not established any parallel conduct on the relevant market, a market which, on the contrary, was experiencing a price war.

69 The applicant does not deny that it participated in occasional meetings in 1993 and 1994. Thus, it participated in a meeting with ABB on 5 and 6 July 1993 during which it rejected ABB's proposals that it should rejoin the cartel. However, such participation cannot constitute proof of uninterrupted parallel conduct throughout the period in question. The participation of some undertakings in occasional meetings in relation to the German market alone is of no relevance, since all the undertakings concerned, and the applicant in particular, had decided independently on their approach to the relevant market. Therefore,

the existence of contacts, following which the parties did not agree on sharing the market, is not sufficient to establish a concerted practice. The situation on the relevant market prior to 1995 shows clearly that there was no parallel behaviour.

70 As regards the European cartel, the applicant admits that it was present at the meeting of 3 May 1994 during which prices on the German market were discussed, but it denies having used any price list at that time. It does not recall having participated in the meeting of 18 August 1994 in Copenhagen and states that the first occasion on which it participated in a multilateral meeting was on 30 September 1994. None the less, the decision wrongly states that there was a global agreement on sharing the European market already in Autumn 1994. It was only from 20 March 1995 that a final arrangement of that market was agreed upon and it was only around that date that there were any attempts to implement such an agreement. As regards the German market, the first meeting of the contact group, on 7 October 1994, did not result in an agreement. The first meeting at which individual projects were allocated to the participants was held in January 1995. As regards the Danish market, no formal market-sharing agreement had yet entered into force in March 1995.

71 The defendant contends that the applicant did not leave the cartel in April 1993. Throughout the whole period of the infringement the applicant continued to attend the regular meetings. All the threats it made were intended to secure a larger quota from ABB. Furthermore, it attended the meetings in August and September 1993, and during autumn 1993 or early in 1994 it agreed to contribute to the salary of the person recruited from Powerpipe, after ABB asked it to do so.

72 It is pointless for the applicant to attempt to show that the cartel had been suspended in 1993-1994, since the Commission recognised in the actual decision that, although bilateral contacts continued between the various parties to the cartel, the various arrangements had been suspended between the end of 1993 and the beginning of 1994.

— Findings of the Court

73 The applicant's arguments must be taken to mean that, after it allegedly withdrew from the cartel, in April 1993, it was only from March 1995, after a final agreement had been reached on sharing the European market, that it participated in an agreement or a concerted practice within the meaning of Article 85 of the Treaty.

74 First, it must be observed that, contrary to what the applicant claims, it cannot be concluded from the change in the Danish cartel, around April 1993, that the applicant ceased at that time to participate in anti-competitive activities in the district heating sector.

75 It is sufficient to point out, in that regard, that even though, from March or April 1993, prices on the Danish market began to fall and the arrangements for the allocation of projects were no longer complied with, the Danish producers and Pan-Isovit and Henss/Isoplus entered into negotiations on sharing the German market at meetings held in Copenhagen on 30 June 1993, in Zurich on 18 or 19 August 1993 and in Copenhagen and Frankfurt on 8 or 9 September 1993, which led to an agreement in principle, in August 1993, that was subsequently developed at meetings held in September 1993. As stated in paragraphs 59 to 63 above, the Commission has established to the requisite legal standard that the applicant participated in those negotiations, in particular by being present at the meeting of 8 or 9 September 1993.

76 In that context, the Commission therefore correctly stated in point 37 of the decision that the price fall in Denmark at that time was the result of a trial of strength inside the cartel, not of its abandonment.

77 Second, as regards the period following the change in the agreement on the sharing of the German market, in September or October 1993, the Commission itself recognised in its decision that during a certain period the anti-competitive activities on the market were not significant and could not in any event be proved.

78 The Commission stated in point 52 of its decision that at that time prices fell by 20% in a few months on the major national markets. The Commission observed that the producers none the less continued to meet, even if for some time the multilateral meetings were replaced by bilateral and trilateral contacts. It was most probable, according to the Commission, that such contacts involved efforts by ABB to broker a new arrangement to restore 'order' in those markets (fifth paragraph of point 52 of the decision). According to the decision, meetings took place between the applicant and ABB on 28 January, 23 February and 11 March 1994 and between the applicant and Tarco on 8 January and 19 March 1994 (sixth and seventh paragraphs of point 52 of the decision). However, no information is available about that series of meetings, apart from the applicant's claim that Tarco had unsuccessfully demanded compensation from the applicant as the precondition for 'peace talks' (seventh paragraph of point 52 of the decision).

79 The Commission further stated, in point 53 of the decision, that meetings between the six producers were resumed on 7 March, 15 April and 3 May 1994. The March and April meetings involved discussions on price increases but seem to have been inconclusive. However, following the meeting on 3 May 1994 between the applicant, ABB, Henss and Pan-Isovit, a price list was drawn up which was to be used as the basis for all supplies to the German market (first paragraph of point 54 of the decision). The Commission contends that it is likely that it was agreed at a meeting between the six major undertakings and Brugg on 18 August 1994 to prepare a new common price list and to limit discounts to an agreed level (third paragraph of point 56 of the decision).

80 It follows that, as regards the period beginning after September or October 1993, the Commission recognised that even though contacts between the undertakings continued, there is no proof of an agreement or concerted practice within the meaning of Article 85 of the Treaty until a price increase for the German market was negotiated, and it is recognised in the decision that the negotiation did not lead to an agreement until after the meeting of 3 May 1994.

81 The Commission likewise considered, in the part of the decision headed 'Legal assessment', that the cartel arrangements were for a time 'in abeyance'. First, when assessing the nature of the infringement in this case, the Commission recognised that, even though the Danish and European cartels continued in such a way that they constituted a single continuing violation, there was a short period when the arrangements were in abeyance (third paragraph of point 145 of the decision). More specifically, the Commission states in the third paragraph of point 141 of the decision that, for the period September 1993 to March 1994, '[a]ny hiatus could be considered to be a suspension of the normal arrangements and relationships: the producers soon recognised that a prolonged power struggle was self-defeating and returned to the conference table'. Also, when assessing the duration of the infringement, the Commission stated that '[f]or the six-month period between October 1993 and March 1994 the arrangements can be considered to have been in abeyance, although (as ABB says) bilateral and trilateral meetings continued' and that '[b]y May 1994 the collusion had been re-established in Germany with the implementation of the Euro price list' (first paragraph of point 152 of the decision).

82 In that context, the applicant cannot claim that the Commission accused it in the decision of having participated in anti-competitive conduct during the period following its refusal to sign the agreement to share the German market, namely between September/October 1993 and March 1994.

83 Then, as regards the resumption of the cartel, the Commission rightly stated that the applicant participated in an agreement on a price list for the German market following the meeting held on 3 May 1994 and then, from autumn 1994, in an agreement on a quota system for the European market.

84 First, as regards the price list for the German market, ABB's reply states that there was a price list which, following a meeting held in Hanover on 3 May 1994, was to be used for all deliveries to German suppliers. That is confirmed by the letter of 10 June 1994, in which Mr Henss and the directors of the applicant, ABB, Dansk Rørindustri, Pan-Isovit and Tarco were invited by the co-ordinator of the cartel to a meeting to be held on 18 August 1994 (annex 56 to the statement of objections), which states:

'The meeting on the situation of the market in the FRG is now fixed for the following date:

Thursday 18 August 1994 at 11 a.m....

Since the list of 9 May 1994 is incomplete as regards certain heads and since comparisons of bids have therefore led to confrontations and significant differences of interpretation, I shall supplement the missing heads by the enclosed list.'

85 It is apparent from that letter that there was a price list which was to be applied when tenders were submitted and which had already taken effect, albeit with some problems. The existence of such a list is confirmed by Tarco in its second reply, dated 31 May 1996, to the request for information of 13 March 1996, which refers to a price list sent to the directors by the co-ordinator of the cartel 'probably in May 1994'. According to ABB's reply, measures designed to 'improve' the price level in Germany were then discussed at the meeting held in Copenhagen on 18 August 1994.

86 As regards the applicant's participation in that agreement on a common price list, the applicant admits that it attended the meeting of 3 May 1994 at which the price situation on the German market was discussed and that a price list was actually sent to it afterwards. Furthermore, it must be regarded as established that the applicant participated in the meeting of 18 August 1994, even though it claims, before the Court, that its sales director had intended to attend the meeting but in the end did not do so. The presence of a representative of the applicant at that meeting is confirmed not only by the applicant itself, in the table of business trips made by its sales director annexed to its reply of 25 April 1996 to the request for information of 13 March 1996, but also by ABB's reply and by Brugg (table in annex 2 to Brugg's reply of 9 August 1996 to the request for information). In view of the letter inviting the applicant to the meeting of 18 August 1994 and referring to the price list already sent to the applicant, the Commission correctly inferred that the applicant participated in the agreement on the price list and that it was present at the meetings of 3 May and 18 August 1994.

87 The applicant cannot rely on the fact that it never applied such an agreement, since the mere fact that an undertaking participating with others in meetings at which decisions on prices are taken does not observe the prices fixed is not of such a kind as to lessen the anti-competitive object of those meetings and therefore the participation of the undertaking concerned in the cartel, but tends at

the most to show that it did not implement the agreements in question (see the case-law cited in paragraph 47 above).

88 Next, as regards the agreement to share the European market, the applicant recognises that the meeting of 30 September and then other meetings on 12 October and 16 November 1994 involved discussions on sharing the European market, but it maintains that an agreement was not reached until March 1995.

89 In that regard, the Commission has established to the requisite legal standard its assertion that, at the meeting of 30 September 1994, an agreement was reached in principle that an overall quota system be set up for the European market, with detailed figures for each national market to be agreed and passed to the lower level contact group meetings for implementation (fourth paragraph of point 59 of the decision).

90 First of all, ABB has accepted in its reply that the principle of an overall division of the European market was already decided on at the meeting in September 1994, while the individual shares were determined later, at the meeting of 16 November 1994. Then, as regards the meeting of 30 September 1994, although the applicant maintains that no agreement was concluded at that meeting and that such an agreement required the participation of Brugg and another European producer, KWH, it has accepted that there was a consensus to continue with the procedure, that it was agreed that the applicant should consider ABB's proposal, that ABB would visit all the undertakings, including KWH and Brugg, in order to arrive at a definitive solution and that the market shares would be determined if and when ABB succeeded in bringing KWH into the agreement. That assertion on the applicant's part cannot serve to refute the conclusion which the Commission inferred from ABB's reply, namely that the participants in the meeting of 30 September 1994 had agreed on the principle of sharing the

European market. By conferring on ABB the task of drawing up an agreement with all the undertakings involved, the participants in that meeting demonstrated their common intention to co-ordinate their conduct on the market by allocating market shares to each trader, even though the actual share depended on any shares allocated to Brugg and to KWH.

91 The Commission therefore rightly stated that the agreement on the sharing of the European market was reached in principle at the meeting of 30 September 1994, although fixing of the individual shares was not to be decided until later. It should also be observed in that regard, that 20 March 1995 cannot in any event be taken as the date on which the allocation of shares of the European market was first the subject of a common agreement, since, according to the consistent statements of ABB, in its reply, and Pan-Isovit (in its reply of 17 June 1996 to the request for information), such an agreement was reached at the meeting of 16 November 1994.

92 Last, since the applicant's participation in the overall agreement to share the European market is established by its presence at the meetings of 30 September, 12 October and 16 November 1994, it is pointless to claim that that agreement was not implemented on the various national markets until later, after agreements had been concluded within the national contact groups.

93 It follows from the foregoing that the applicant's arguments must be rejected in so far as they challenge the finding made in the decision concerning the suspension of the applicant's participation in the cartel at the end of 1993 and the resumption of its participation in the cartel from the beginning of 1994.

94 However, it is still necessary to consider the applicant's position in so far as it also disputes the assessment of the duration and continuous nature of the infringement.

3. The duration and continuous nature of the infringement of which the applicant is accused

— Arguments of the parties

95 The applicant observes that, since there were two separate cartels, it did not take part in an infringement of Article 85 of the Treaty during a continuous period 'from about November-December 1990 to at least March or April 1996', or for 5 years and 5 months in all. The period must be taken to be 2 years and 3 months in the case of the initial Danish cartel and, as regards the later European cartel, depending on the countries, between 4 months and 16, or 18 months at the most in Germany's case.

96 In so far as the defendant states that it took account of the fact that 'in the early period the arrangements were incomplete and of limited effect outside the Danish market', the applicant submits that a less extensive infringement should result in a finding of lesser gravity rather than shorter duration.

97 The defendant observes that the cartel was a single comprehensive infringement rather than a series of multiple but discrete arrangements and that it lasted until the spring of 1996 rather than the autumn of 1995 and towards the end became even more egregious than before.

— Findings of the Court

98 According to the second paragraph of Article 1 of the decision, the duration of the infringement was, in the applicant's case, 'from about November/December 1990 to at least March or April 1996'.

99 Furthermore, in the fourth paragraph of point 153 of the decision, the Commission states that 'the participation of various undertakings in the infringement lasted as follows: (a) ABB, [the applicant], Tarco and [Dansk Rørindustri] from about November 1990 in Denmark, progressively extending to the whole of the Community and lasting until at least March or April 1996, subject to the arrangements being in abeyance for a period of up to six months from October 1993 to about March 1994'.

100 The Commission must therefore be considered to have correctly calculated the duration of the infringement of which the applicant is accused.

101 First of all, it cannot be disputed that the applicant's participation began in 'November/December 1990' on the Danish market and that the applicant did not cease its participation in the European cartel until 'March or April 1996'. It has been established in paragraphs 42 to 45 above that the applicant participated in November 1990 in concerted price increases at a meeting held on 22 November 1990. As regards the end of its participation in the cartel, it is sufficient to state that the applicant concedes that it also participated in a meeting of the directors' club on 4 March 1996 and in the meetings of the German contact group until 25 March 1996.

102 Second, the applicant is incorrect to maintain that the Commission should have found the existence of two separate cartels and should have taken account of the fact that its participation in the Danish cartel ceased in April 1993 and that its participation in the European cartel did not commence until March 1995. It has been found in paragraphs 50 to 65 and 84 to 88 above that the applicant still took part in an agreement in principle to share the German market in August or September 1993 and subsequently participated, from May 1994, in the agreement on the common price list in Germany. It is apparent from point 153 of the decision that in assessing the duration of the infringement of which the applicant is accused the Commission specifically took into account the fact that the cartel arrangements were in abeyance between October 1993 and about March 1994.

103 Furthermore, the fact that the Commission took into account a period during which the cartel was in abeyance is confirmed in the context of the calculation of the fine imposed on the applicant. According to the third paragraph of point 175 of the decision, the duration used in determining the fine is the same as that used for ABB. As regards ABB, it is stated in point 170 of the decision that the fact that the arrangements were in abeyance 'from late 1993 to early 1994', together with the fact that the arrangements were initially incomplete and of limited effect outside the Danish market and the fact that the arrangements reached their most developed form only with the Europe-wide cartel set up in 1994 to 1995, are among the factors which the Commission took into account in deciding to apply a weighting of 1.4 to the fine for an infringement which lasted more than five years.

104 In that regard, it should be observed that the fact that the applicant resumed its participation in the cartel in May 1994, whereas the decision took into account the fact that the arrangements were in abeyance only until 'about March 1994', is not of such a kind as to invalidate the Commission's assessment of the duration of the infringement, since it follows from point 170 of the decision that the fact that the cartel was in abeyance for a number of months was in any event only one of a number of factors taken into account in determining the consequences of the duration of the infringement to be used in calculating the fine, so that those consequences did not depend on the precise number of months during which the cartel arrangements were in abeyance.

105 Nor, since the fact that the cartel activities were in abeyance was taken into account in assessing the duration of the cartel, can the applicant find support in the fact that the Commission classified the cartel as a single, continuous infringement.

106 In so far as the Commission classified the cartel as a single, continuous infringement, it rejected the argument put forward during the administrative procedure, in particular by the applicant, that the 'Danish' and 'European' cartels were two entirely discrete and unrelated infringements. In that context, the Commission emphasised that from the time the cartel began in Denmark the longer-term objective was to extend control to the whole market (third paragraph of point 140 of the decision), that for the period September 1993 to March 1994 any hiatus could be considered to be a suspension of the normal arrangements and relationships (third paragraph of point 141 of the decision) and that there was a clear continuity of method and practice between the new agreement concluded in late 1994 for the whole European market and the earlier arrangements (first paragraph of point 142 of the decision).

107 It follows that the Commission, in considering in the decision that the European cartel set up at the end of 1994 was merely a continuation of the earlier cartel between producers on the district heating market, did not find that the applicant had participated continuously in a cartel during the whole period of November 1990 to March 1996. That conclusion is all the more necessary because the Commission expressly recognised that, 'while the infringement constituted a single continuing violation, its intensity and effectiveness varied over the duration of the time period covered: it progressively developed (subject to a short period when the arrangements were in abeyance) from arrangements affecting primarily Denmark in 1991 to other markets and by 1994 constituted a pan-European cartel covering almost all trade in the product' (third paragraph of point 145 of the decision).

108 The applicant's arguments in relation to the duration and continuous nature of the infringement must therefore be rejected.

109 Accordingly, the complaint concerning the existence of a continuous cartel from 1990 to 1996 must be rejected in its entirety.

C — *Participation in the European cartel as regards the Italian market*

1. Arguments of the parties

110 The applicant criticises the Commission for having incorrectly taken the Italian market into consideration in its case, when it was not present on that market. It cannot be held liable for infringements on that market by its local distributor, Socologstor, since it held only 49% of the shares in that undertaking.

111 There is no reason, it alleges, why the situation regarding Socologstor should be treated differently from that regarding Ke Kelit Kunststoffwerk GmbH ('Ke Kelit'), which also distributed the applicant's products but on which a separate fine was imposed. Even if the applicant's presence at meetings concerning the Italian market could constitute an infringement of the competition rules, the Commission has not demonstrated that the applicant was able to impose its will on Socologstor in order to achieve any restriction of competition.

112 The Commission refers to evidence of allocation of quotas for Italy to each producer, including the applicant, and to the applicant's presence at a meeting of the contact group for Italy and at another meeting concerning Italy held on 9 June 1995. The applicant would not have taken the trouble to attend those meetings had it had no real interest in Italy. Furthermore, the fact that the Commission could have brought proceedings against Socologstor does not exonerate the applicant from the acts committed by the cartel in Italy.

2. Findings of the Court

113 The applicant does not deny having participated in the first meeting of the contact group for Italy held in Milan on 21 March 1995 and in another meeting concerning Italy held in Zurich on 9 June 1995.

114 Furthermore, it is apparent from certain memoranda which the Commission obtained from the undertakings in question that, as regards the Italian market, the applicant was involved in the allocation of quotas and projects (annexes 64, 111 and 188 to the statement of objections), which is further confirmed by Pan-Isovit (in its reply of 17 June 1996 to the request for information).

115 Consequently, it must be held that the Commission had sufficient evidence to find that the applicant's participation in the European cartel also extended to the Italian market, and there is no need to ascertain to what extent the applicant was able to control the conduct of its distributor on that market.

116 The complaint raised by the applicant must therefore be rejected.

D — *Cooperation on quality norms*

1. Arguments of the parties

117 The applicant claims that it did not participate in the infringement of which the pipe producers are accused consisting in using quality norms to maintain prices at a certain level and delay the introduction of new cost-saving technologies. On the contrary, it was the victim of such conduct, which was primarily directed against the technology developed by it.

118 In that regard, the defendant wrongly maintains that such an infringement does not form part of the conduct sanctioned by the decision. Although such an infringement was not included in the 'principal characteristics' of the infringement, the decision states in point 2 that the conduct in question constitutes a separate infringement, attributed *inter alia* to the applicant. When defining the infringement, Article 1 of the decision explicitly refers to the reasoning set out elsewhere in the decision.

119 The defendant observes that the decision does not refer in Article 1 of the operative part to the use of quality norms as a principal characteristic of the infringement. The issue as to whether the applicant, having more efficient technology, was a victim of the cooperation as concerns the quality norms should be examined in the assessment of the mitigating circumstances taken into account in determining the amount of the fine.

2. Findings of the Court

120 The use of quality norms to keep up prices and delay the introduction of new cost-saving technology is mentioned as one of the characteristics of the infringement in question as set out in point 2 of the decision. Later in the decision, the Commission refers, in points 113 to 115, where it examines the role of the trade association European District Heating Pipe Manufacturers Association ('EuHP') in the cartel, to ABB's intention to use quality norms as a means of preventing the applicant from exploiting a continuous production process with savings in production costs and hence lower selling prices. Furthermore, according to the final indent of point 147 of the decision, the restrictions on competition in which the cartel engaged included 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions (the members of EuHP)'.

121 However, cooperation in relation to quality norms is not among the principal characteristics of the cartel mentioned in the third paragraph of Article 1 of the operative part of the contested decision, as amended. The Danish version of the decision served on the applicant on 21 October 1998 did actually contain, in its operative part, a passage referring to cooperation in relation to quality norms among the principal characteristics of the cartel. By specifically deleting that passage from the operative part, by an amending decision of 6 November 1998, the Commission clearly indicated its intention not to find that such cooperation formed part of the infringement of which the applicant was accused.

122 Even though a certain inconsistency still exists, since cooperation in relation to quality norms is not listed in the operative part of the decision among the characteristics of the infringement in question but is still described on a number of occasions in the grounds of the decision, there can be no doubt, following the clarification made by the abovementioned corrigendum, that the Commission

does not accuse the applicant of having infringed Article 85 of the Treaty by participating in cooperation in relation to quality norms.

123 Consequently, the applicant cannot challenge the validity of the decision by maintaining that it did not participate in such cooperation.

124 This complaint must therefore be rejected.

E — *Concerted action against Powerpipe*

1. Arguments of the parties

125 The applicant disputes each of the assertions in the decision concerning its participation in concerted action against Powerpipe. Although it was present at a number of meetings in which actions against Powerpipe were discussed, it did not implement any concerted action against that undertaking.

126 First, the applicant states that the Billund meeting in July 1992 and the recruitment of the managing director of Powerpipe, a Swedish undertaking, took place before Sweden acceded to the European Union on 1 January 1995. Consequently, those events are relevant only to the extent to which they affected competition within the European Union. Such effect, if any, was minimal.

127 The applicant was indeed present at the Billund meeting between ABB, Powerpipe and itself, at which ABB gave a warning to Powerpipe. None the less, the purpose of that meeting was to discuss the possible sale of Powerpipe to ABB and/or the applicant, and the applicant withdrew from the negotiations with ABB when the latter's intention to close and split up Powerpipe became clear.

128 As regards the recruitment of the managing director of Powerpipe, there had for some time been a plan to open a lobbying office in Brussels, and ABB's proposal to hire that person jointly for the post seemed to be a good choice. That question was not raised again until later, probably in the autumn of 1993 or early in 1994. The applicant was not aware that the person concerned had been hired until ABB presented it with the invoice for the related costs. The applicant understood that the person concerned wished to leave Powerpipe and had himself contacted ABB. It was in those circumstances that the applicant agreed to pay part of the costs associated with hiring him. It was not aware of and did not take part in any ABB campaign to entice other employees away from Powerpipe.

129 The applicant does not deny having contacted Powerpipe in 1994, under strong pressure from Henss, in order to persuade Powerpipe to withdraw from the Neubrandenburg project, and having suggested that Powerpipe find an amicable solution with Henss/Isoplus. However, it claims that it did not threaten Powerpipe in any way during that conversation or during a second telephone conversation.

130 As regards the Leipzig-Lippendorf project, the applicant states that, in spite of the fact that it was agreed within the cartel that this project should be allocated to the three German producers, it decided to seek to obtain the order. It states, however, that it had to order its German subsidiary to withdraw the tender submitted in connection with that project for 20-metre pipes and replace it by a tender for 18

-metre pipes. The initial tender would have required substantial investment in its new production facilities, which would not have been profitable. Owing to an error, the new tender was never submitted. As the awarding body was unhappy at the withdrawal of the initial tender, negotiations between it and the applicant subsequently ceased.

131 As regards the meeting of 24 March 1995, the applicant observes that at that time, to its knowledge, the awarding body for the Leipzig-Lippendorf project had not yet decided to award the contract to Powerpipe. The applicant was not present during the first part of the meeting, when collective action against Powerpipe may have been discussed. During the part of the meeting which it did attend, Henss pressed the issue of collective actions. However, the applicant requested the consortium of the three German producers to try to match Powerpipe's prices and even offered to supply pipes as a sub-contractor. The discussion also focused on Powerpipe's technical inability to honour the tender, particularly by the deadline. During the meeting, the applicant suggested that ABB should explain to the awarding body the damage already done to the image of district heating in general by the choice of an insufficiently qualified supplier for the Turin project. ABB's approach to the awarding body was unsuccessful, since the consortium did not want to match Powerpipe's price. It was not until April 1995 that the applicant learned that Powerpipe had been awarded the contract.

132 The applicant did not implement any agreement against Powerpipe; neither, to its knowledge, did any other producers, apart from ABB and Isoplus. At a meeting of the EuHP on 5 May 1995 ABB and Isoplus urged that concerted action be taken against Powerpipe to make it difficult for it to obtain supplies. As the applicant did not manufacture the products required by the sub-contractor on the Leipzig-Lippendorf project, it would have been unable to supply them anyway. There was no confirmation of any agreement directed against Powerpipe at a meeting held on 13 June 1995.

133 As regards Lymatex, the applicant's sub-contractor, the applicant did not in any way instruct it to harm Powerpipe. At the time Lymatex was significantly behind in its deliveries of joints to the applicant, while the latter was under a contractual obligation to obtain supplies from Lymatex for all its joints requirements in 1995. Contrary to what the decision states in point 102, the applicant merely urged Lymatex to comply with its contractual obligations to the applicant. A draft letter to Powerpipe was sent to the applicant on Lymatex's own initiative, apparently in order to show the applicant that Lymatex was endeavouring to solve its delivery problems, and was never commented on by the applicant.

134 Furthermore, the problem which Powerpipe was experiencing in meeting its contractual obligations was of its own making. As regards the Århus Kommunale Værker (ÅKV) project, Powerpipe entered into an unrealistic contract, under which it was required to supply, at short notice, joints of the same type as the applicant's, which was impossible. It was because of Powerpipe's failure to deliver these supplies that the awarding body for that project eventually cancelled the contract. The decision to cancel the contract was therefore taken independently of Lymatex's decision not to make further supplies to Powerpipe. That is confirmed by the fact that the decision to cancel supplies to Powerpipe was taken on 10 May 1995, thus on the same day that Lymatex informed Powerpipe that it was experiencing temporary delivery problems and could not accept new orders before September 1995. The customer's reasons for cancelling the contract therefore had nothing to do with the applicant's conduct.

135 The applicant therefore played no part in the attempts to force Powerpipe out of the market. The fact that it insisted on obtaining supplies from Lymatex was perfectly legitimate and the alleged effects of that approach on Powerpipe were not the result of any illegal behaviour.

136 The defendant observes that the applicant admits having attended a long series of meetings where measures against Powerpipe were discussed, in particular the meeting of July 1992 with ABB and Powerpipe at which the latter was 'warned'.

That admission suffices to implicate the applicant in the concerted actions against Powerpipe. Furthermore, the applicant has adduced no evidence to cast doubt on the findings in points 143 and 144 of the decision that it took part, by its presence at the meeting of 24 March 1995, in an agreement designed to harm Powerpipe.

2. Findings of the Court

137 It must be observed, first of all, that the applicant has not succeeded in invalidating the Commission's findings in respect of its collaboration in the plan to eliminate Powerpipe and, in particular, in respect of the recruitment of key employees of Powerpipe.

138 The applicant does not deny having attended the meeting held in Billund in July 1992 described in point 91 of the decision. Nor is it disputed that the applicant entered into and implemented the agreement with ABB to entice away Powerpipe's managing director and to share the associated costs.

139 The applicant's submission that the aim of the agreement to contribute to those costs was not to harm Powerpipe cannot be accepted. Having regard to the warning already given to Powerpipe by ABB at the meeting with Powerpipe in July 1992, in the applicant's presence, the applicant could not fail to be aware that ABB's intention to hire Powerpipe employees formed part of a strategy designed to harm Powerpipe. It is apparent from ABB's memorandum of 2 July 1993 in preparation for a meeting with the applicant that the hiring of the managing director was regarded as 'common action as regards Powerpipe' (annex 48 to the statement of objections). The applicant acknowledged during the administrative procedure that it was aware that the appointment of the person in

question might be regarded as a negative action against Powerpipe (statement of Mr Bech annexed to the applicant's reply of 25 April to the request for information of 13 March 1996).

140 In any event, even if the applicant can claim to have agreed initially to share in the costs of hiring the managing director solely in order to be able to open a lobbying office, that explanation does not justify the fact that it agreed to pay the contribution envisaged at a time when it was clear that the person in question was being hired by ABB to perform duties other than those proposed.

141 Neither is it disputed, second, that at the time when Powerpipe was tendering for the Neubrandenburg project the applicant agreed with ABB and Henss to put pressure on Powerpipe to withdraw its tender. Even though the applicant did not itself threaten Powerpipe during the meetings with it, it is common ground that it acted along the lines agreed with other participants in the cartel. The applicant admits that its sales director told Powerpipe at the time that a certain cartel existed between traders in the sector.

142 As regards the pressure of which the applicant was a victim, an undertaking which participates with others in anti-competitive behaviour cannot rely on the fact that it did so under pressure from the other participants. It could have complained to the competent authorities about the pressure brought to bear on it and have lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the activities in question (see the judgment of the Court of First Instance in Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 128, and *Tréfileurope* v *Commission*, cited above, paragraph 58).

143 Third, as regards the award of the Leipzig-Lippendorf project, the Commission's findings are based on the outcome of the meeting held in Düsseldorf on 24 March 1995.

144 In that regard, it should be stated, first, that the applicant does not deny that there was an agreement within the cartel that the Leipzig-Lippendorf project was intended for ABB, Henss/Isoplus and Pan-Isovit.

145 In that context, the Commission was entitled to conclude, in point 99 of the decision, that the withdrawal of the bid submitted by the applicant for that project was at least in part the result of pressure from the other producers. Even if the applicant had considered that the investments required by its initial bid could not be profitable, the assertion that its failure to submit a fresh bid was explained exclusively by an 'error' is not credible, since the applicant must have known, in view of the way in which the project had been allocated within the cartel, that such behaviour corresponded to what the other participants in the cartel expected of it.

146 Furthermore, it follows from the notes of the meeting of 24 March 1995 taken by Tarco (annex 143 to the statement of objections) that the fact that Powerpipe was awarded the Leipzig-Lippendorf project gave rise to the discussion of a series of measures. According to those notes:

'[Powerpipe] has been awarded the Leipzig-Lippendorf [project].

— No producer to supply at all to L-L, IKR, Mannesmann-Seiffert, VEAG.

— All requests for information concerning the project must be communicated to [X].

— None of our sub-contractors may work for [Powerpipe]; if they do, further cooperation will be stopped.

— We shall try to prevent [Powerpipe] from obtaining supplies of (for example) plastic.

— EuHP shall check whether we can complain about the contract going to an unqualified undertaking.'

147 It should be recalled that where an undertaking participates in a meeting having a clearly anti-competitive object, it gives the other participants the impression, unless it publicly distances itself from what occurs at the meeting, that it subscribes to the results of the meeting and will act in conformity with them (see the case-law cited in paragraph 39 above). In such circumstances, the fact that an unlawful collusion was referred to at the meeting in which the undertaking in question participated is sufficient to establish that it participated in the collusion in question.

148 Since anti-competitive measures were referred to at the meeting of 24 March 1995, all the undertakings that participated in that meeting without publicly distancing themselves from what occurred must be regarded as having participated in the agreement, or in the concerted practice, constituted by such measures.

149 In that regard, it is irrelevant whether the Leipzig-Lippendorf project had already been awarded to Powerpipe when the meeting of 24 March 1995 took place. The measures discussed at the meeting of 24 March 1995 were in any event aimed at a situation in which Powerpipe would obtain the contract. In any event, even though the contract between VEAG, the company that launched the call for tenders in question, and Powerpipe may not have been signed until after the date of that meeting, it is clear from VEAG's letter of 21 March 1995 to the general contractor of the project (annex 142 to the statement of objections) and also from VEAG's reply of 29 September 1995 to the request for information that the awarding body's decision in favour of Powerpipe was taken on 21 March 1995, before the date of that meeting.

150 Nor can the applicant avoid liability by claiming that it was not present at the part of the meeting during which a collective action against Powerpipe may have been discussed, since it admits that during the part which it did attend Henss pressed the issue of 'collective actions'.

151 Furthermore, the applicant's conduct at the meeting of 24 March 1995 cannot be taken to mean that it publicly distanced itself from the decision not to make deliveries to Powerpipe, since, having regard to the context, in particular Powerpipe's situation *vis-à-vis* the ÅKV project and the delivery problems experienced by Lymatex, it showed by its attitude that it supported that decision.

152 First, the applicant does not deny having expressed its dissatisfaction on discovering that Powerpipe, after obtaining the ÅKV project which the cartel intended should be awarded to ABB and the applicant, succeeded in obtaining the necessary supplies to carry out that contract from the applicant's Swedish subsidiary. Such an attitude shows that the applicant intended to ensure that Powerpipe would encounter problems in obtaining supplies to carry out its projects.

153 Second, it must be regarded as proved that the applicant instructed Lymatex to delay its deliveries to Powerpipe. Powerpipe's assertion that a Lymatex employee assured it that the decision not to make deliveries before September 1995 had nothing to do with the production problems to which Lymatex had referred in its letter to Powerpipe of 10 May 1995 (annex 153 to the statement of objections) is confirmed by the fact that a draft of that letter (annex 155 to the statement of objections) was found in the office of the director of the applicant during the investigations carried out by the Commission on 28 June 1995. The fact that Lymatex found it necessary to inform the applicant of its reply to Powerpipe's order even before it had been sent to Powerpipe shows that Lymatex intended to give the applicant at least the opportunity to comment on the proposed reply to that order. Having regard to the decision taken at the meeting of 24 March 1995 not to supply Powerpipe, the fact that the draft version of Lymatex's reply was present at the applicant's premises cannot be seen as anything other than confirmation of the fact that the applicant had contacts with Lymatex on or before 10 May 1995 during which it expressed its wish that deliveries to Powerpipe should be delayed. That conclusion is not contradicted by the finding that Lymatex did not cancel other Powerpipe orders. Furthermore, Lymatex did not provide the Commission with a truthful explanation of why it sent the applicant a draft of its reply, but maintained that the document in question was not a draft but a copy of the letter to Powerpipe and that it merely wished to show that it was making some attempt to comply with its contractual obligations towards the applicant (annex 157 to the statement of objections), whereas it is clear from the version of the letter in the applicant's possession that it was a draft version sent some hours before the final version was sent to Powerpipe.

154 Since it has been sufficiently proved that the applicant did not distance itself from the decision to boycott Powerpipe taken at the meeting of 24 March 1995, there is no need to determine to what extent the applicant's conduct was the direct cause of the losses which Powerpipe claims to have made, in particular on the ÅKV project.

155 It follows that the Commission has correctly established that the applicant participated in an agreement designed to harm Powerpipe, since the applicant has failed to show that it distanced itself from the outcome of the meeting in question.

156 That conclusion is not called in question by the applicant's argument that it was not in any event capable of implementing a boycott of Powerpipe, since it did not manufacture the equipment required by the sub-contractor for the project in question.

157 A boycott may be attributed to an undertaking without there being any need for it actually to participate, or even be capable of participating, in its implementation. Were that not so, an undertaking which approved a boycott but did not have the opportunity to adopt a measure to implement it would avoid any form of liability for its participation in the agreement.

158 In that regard, it should be observed that an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (see, in that regard, *Commission* v *Anic Partecipazione*, cited above, paragraph 203).

159 By virtue of its presence at the meeting of 24 March 1995, the applicant was aware of the measures envisaged to damage Powerpipe's business. Because it did not distance itself from such measures, it at least gave the impression to the other participants at the meeting that it subscribed to the results of the meeting, that it would act in conformity with them and that it was prepared to accept the risk.

160 Last, in so far as the Commission relied on activities which took place in Sweden before it acceded to the European Union on 1 January 1995, it is sufficient to observe that the measures designed to harm Powerpipe's activities for which the applicant must be held responsible were precipitated by Powerpipe's entry into the German market and were therefore designed from the outset to prevent Powerpipe from expanding its activities in the European Union. Furthermore, by agreeing to contribute to hiring Powerpipe's managing director, the applicant actually implemented, even before 1 January 1995 and in the common market, an agreement designed to harm Powerpipe's activities. It follows that the Commission took the anti-competitive activities originating in Sweden into account in so far as they actually affected competition within the European Union.

161 In that regard, point 148 of the decision clearly states:

'the Commission will for the purposes of this procedure take account of joint actions against Powerpipe prior to the accession of Sweden to the European Union (1 January 1995) only in so far as (i) it affected competition inside the Community (Powerpipe's entry to the German market) and (ii) it is circumstantial evidence of a continuing plan to damage or eliminate Powerpipe after that date.'

162 It follows from all the foregoing that the complaint relating to the concerted actions against Powerpipe must also be rejected.

F — *The pressure brought to bear by ABB*

1. Arguments of the parties

163 The applicant claims that the Commission underestimated the pressure brought to bear on it by ABB; the Commission disputes that claim.

2. Findings of the Court

164 As the applicant observes, the Commission refers on a number of occasions in its decision to the fact that ABB brought considerable pressure to bear on the other undertakings in the sector in order to persuade them to subscribe to the anticompetitive arrangements in question. Furthermore, in determining the amount of the fine imposed on ABB, the Commission recognised that it 'systematically used its economic power and resources as a major multinational company to reinforce the effectiveness of the cartel and to ensure that other undertakings complied with its wishes' (point 169 of the decision).

165 As regards the infringement of which the applicant is accused, it is sufficient to recall that, according to settled case-law, an undertaking which participates in

anti-competitive activities under pressure from other participants cannot rely on that presure, since it could have reported it rather than participating in the activities in question (see the case-law cited in paragraph 142 above).

166 As this complaint cannot be upheld, the plea in law alleging factual errors in the application of Article 85(1) of the Treaty must be rejected in its entirety.

II — *Second plea in law, alleging infringement of the rights of defence*

A — *Access to the file*

1. Arguments of the parties

167 The applicant maintains that the Commission discouraged it from insisting on having access to the file. Thus, Pan/Isovit, which apparently did insist on exercising its right of access, was penalised by receiving a smaller reduction for cooperation than others did. The applicant agreed under pressure to waive some of its rights, in the hope that it would receive the documents relating to the cartel directly from ABB. However, ABB provided it with only a selection of those documents, which were also incomplete. In that context, the applicant claims that the approach chosen by the Commission, namely to leave it to the undertakings concerned to ensure an adequate exchange of the documents in the file, was not a satisfactory solution.

168 The defendant denies having prevented the undertakings from having access to the file and states that the applicant agreed with the organisation of an exchange of documents between the undertakings concerned. The reduction of Pan-Isovit's fine had no connection with its attitude to access to the file. As for ABB, it is not true to say that it did not provide complete documentation.

2. Findings of the Court

169 Access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 89, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75, Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 59, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 69). Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Regulation No 17 and Article 2 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) can be exercised effectively (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 30).

170 According to settled case-law, in order to allow the undertakings and associations of undertakings in question to defend themselves effectively against the objections raised against them in the statement of objections, the Commission has an obligation to make available to them the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission (*Hercules Chemicals* v

Commission, cited above, paragraph 54, and Case T-175/95 *BASF Coatings* v *Commission* [1999] ECR II-1581).

171 In the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence (*Solvay* v *Commission*, cited above, paragraph 81, and *ICI* v *Commission*, cited above, paragraph 91). Having regard to the general principle of equality of arms, it is not acceptable for the Commission to be able to decide on its own whether or not to use documents against the undertakings, when the undertakings had no access to them and were therefore unable to decide whether or not to use them in their defence (*Solvay* v *Commission*, cited above, paragraph 83, and *ICI* v *Commission*, cited above, paragraph 93).

172 In the light of those principles, it is necessary to determine whether in the present case the Commission complied with its obligation to give access to the entire investigation file.

173 First, it must be observed that the Commission stated in its letter of 20 March 1997, annexed to the statement of objections served on the applicant:

'In order to help the undertakings prepare their comments on the complaints addressed to them, the Commission may allow them to consult the file concerning them. In this case, the Commission has enclosed with the statement of objections all the relevant documentation, consisting of all the relevant correspondence exchanged pursuant to Article 11 of... Regulation [No 17]. References to facts wholly unconnected with the subject-matter of the case have been struck out of the documents enclosed with the statement of objections.

In the event that you wish to examine the documents available for consultation and relating to your undertakings at the Commission's premises, or if you have any questions concerning the present proceedings, please contact... within three weeks of receipt of this letter.'

174 The applicant confirmed, in answer to a written question put by the Court, that it contacted the Commission on 23 April 1997 in order to receive authorisation to have access to the entire file. Although it is common ground that such a telephone conversation took place, the parties disagree as to precisely what was said, in particular as regards, first, whether the Commission refused a request for access to the file by stating, as the applicant maintains, that 'so little do [the undertakings] actually show evidence of cooperation, [they] should rather agree to ensure themselves the exchange of copies' and, second, whether the applicant ultimately requested access to the entire file. The parties are agreed, however, that an exchange of documents between the undertakings concerned was discussed during that conversation.

175 It is common ground that in April and May 1997 the Commission suggested that the undertakings to which the statement of objections was addressed should arrange to exchange all the documents seized at their premises during the investigations. It is not disputed that all the undertakings concerned, apart from Dansk Rørindustri, agreed to exchange the documents as suggested by the Commission. Subsequently, each of the undertakings participating in the exchange of documents, including the applicant, received from each of the other undertakings the documents seized at its premises, together with a list drawn up either by the undertaking concerned or, in the case of ABB and Pan-Isovit, and at their request, by the Commission. Some of the documents seized from Dansk Rørindustri were sent to the undertakings on 18 June 1997, at the Commission's request, while others were sent by the Commission on 24 September 1997.

176 It is also common ground that following the telephone conversation of 23 April 1997 the applicant did not contact the Commission's officers again about access to the file.

177 In its answer to the written question put by the Court, the applicant claims that it inferred from that telephone conversation that it was in its interest not to request access to the Commission's entire file, otherwise it would be accused, because of that attitude, with not cooperating during the administrative procedure.

178 However, the applicant provides no evidence of any conduct on the Commission's part from which it might reasonably have inferred, at the material time, that the exercise of its right of access to the investigation file would have had any effect on the subsequent assessment, when the fine was being calculated, of the extent to which it had cooperated. It is true that ABB, in a letter of 6 June 1997 to the Commission, linked its proposal to exchange documents with its wish to cooperate with the Commission and that Tarco stated in a letter of 19 June 1997 to the Commission that by participating in the exchange of documents '[it] continue[d] to manifest [its] wish to cooperate and [its] actual cooperation with the Commission even though [it] risk[ed] not having access to the entire file'. None the less, those assertions, although they refer to the willingness of the undertakings concerned to cooperate, make no reference to any conduct on the part of the Commission which might have given the impression that a request for access to the file would have led to an increase in the fine. Nor has the applicant proved the assertion in its application that it agreed 'under pressure' not to insist on having access to the file. The same applies, moreover, to its assertion that Pan-Isovit's request for access to the file had an effect on the assessment of its cooperation when the amount of the fine was being calculated.

179 It must therefore be concluded that the applicant has not proved that the Commission had brought pressure on it not to avail itself of the opportunity to have access to the entire investigation file. Consequently, it must be presumed that the applicant had no intention of making use of that opportunity.

180 In any event, it must be considered that the Commission, in making provision and arrangements for access to the file at its premises as stated in the letter enclosed

with the statement of objections, fulfilled its obligation to grant the undertakings access to the investigation file, on its own initiative and without waiting for any approach on their part.

181 Nor, in those circumstances, can the Commission be accused of having wished to facilitate access to the investigation file by requesting the undertakings concerned to exchange between themselves, through their legal advisers, the documents obtained from each of them during the investigations.

182 It should be observed, in that regard, that the applicant cannot rely on lack of access to the file on the ground that, in the course of that exchange of documents, ABB sent documents from which certain passages had been deleted.

183 It follows from the letter of 4 June 1997 from ABB's counsel to the applicant's legal advisers that ABB had 'redacted' some documents because they were internal documents containing confidential information. It is settled case-law that access to the file cannot extend to the business secrets of other undertakings and to other confidential information (see paragraph 170 above). If the applicant had had any misgivings about the version of certain documents prepared by ABB or by other competitors, in particular about the information deleted by ABB from certain documents, or if it had suspected that the lists of documents drawn up by its competitors were not exhaustive, there was nothing to prevent it from contacting the Commission and if necessary making use of its right of access to the entire investigation file at the Commission's premises.

184 It follows from all the foregoing that by suggesting that the undertakings concerned facilitate access to the documents by exchanging documents among

themselves, and at the same time itself ensuring the right of access to the entire investigation file, the Commission had due regard to the requirements laid down in the case-law of the Court of First Instance, namely that an exchange of documents between the undertakings cannot in any event eliminate the Commission's own duty to ensure that during the investigation of an infringement of competition law the rights of defence of the undertakings concerned are respected. The defence of one undertaking cannot depend upon the goodwill of another undertaking which is supposed to be its competitor and against which the Commission has made similar allegations, since their economic and procedural interests often conflict (Case T-30/91 *Solvay* v *Commission*, cited above, paragraphs 85 and 86, and *ICI* v *Commission*, cited above, paragraphs 95 and 96).

185 It follows that the complaint alleging lack of access to the file must be rejected.

B — *Infringement of the right to be heard in relation to the production of fresh evidence*

1. Arguments of the parties

186 The applicant claims that the Commission infringed its rights of defence by twice introducing, by letters of 22 May and 9 October 1997, further documents in support of its case after it had sent the statement of objections. The Commission is not entitled to rely on those documents, since it did not indicate clearly in the statement of objections that it would do so.

187 The defendant observes that there is no procedural rule precluding it from adducing further evidence after it has sent the statement of objections. In the

letters in question, the Commission explained that the enclosed documents referred to the arguments raised in the statement of objections or in the observations thereon. As the letters were sent well before the hearing, the applicant had ample opportunity to reply and indeed did so.

2. Findings of the Court

188 It follows from a reading of Article 19(1) of Regulation No 17, in conjunction with Articles 2 and 4 of Regulation No 99/63, that the Commission must communicate the objections which it raises against the undertakings and associations concerned and may adopt in its decisions only those objections on which those undertakings and associations have had the opportunity to make known their views (*CB and Europay* v *Commission*, cited above, paragraph 47).

189 Similarly, due observance of the rights of the defence, which constitutes a fundamental principle of Community law and which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure, requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39).

190 However, there is no provision which prevents the Commission from sending to the parties after the statement of objections fresh documents which it considers support its argument, subject to giving the undertakings the necessary time to submit their views on the subject (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 29).

191 In the letter of 22 May 1997, the Commission indicated the relevance to the statement of objections of 20 March 1997 of the documents enclosed as annexes X1 to X9 and indicated the section of the statement of objections to which each of the documents related. It follows that the applicant was sufficiently informed of the relevance of the documents to the objections already communicated.

192 The documents enclosed with the letter of 9 October 1997 consisted in a series of supplementary documents to the statement of objections, numbered 1 to 18, and a series of answers provided by some of the undertakings following requests for information, together with tables indicating, for each document, the subject concerned and a reference to the relevant passage of the statement of objections and, where appropriate, to the passages in certain undertakings' observations on the statement of objections.

193 It follows that the Commission's letters of 22 May and 9 October 1997 did not introduce fresh objections but that they cite certain documents constituting further evidence in support of the objections set out in the statement of objections.

194 Since the Commission sufficiently specified the extent to which each of the documents sent after the statement of objections related to that statement and since, moreover, the applicant does not maintain that it did not have the necessary time to submit its observations on the documents, it must be held that the applicant had an opportunity to make known its views on the truth and relevance of the facts, objections and circumstances alleged in those documents.

195 For those reasons, the complaint must be rejected in so far as it concerns the production of fresh evidence.

C — *Infringement of the right to be heard as concerns the application of the guidelines for calculating fines*

1. Arguments of the parties

196 The applicant maintains that the Commission infringed its rights of defence by relying on its new guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the new guidelines' or 'the guidelines'). Although these guidelines fundamentally altered the rules applicable until then, the Commission gave no indication in its statement of objections that it would apply a new policy in setting the fines. It is generally considered desirable that the Commission should indicate in its statement of objections which criteria it intends to apply in arriving at the fine.

197 The defendant points out, as regards its failure to mention the level of the fine in the statement of objections, that it is under no obligation to do so.

2. Findings of the Court

198 It should be observed, *in limine*, that it is common ground that the Commission determined the fine imposed on the applicant in accordance with the general method for setting fines described in the guidelines.

199 It is settled case-law that where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

200 It follows that, so far as concerns the determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make their submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. Moreover, the undertakings have an additional guarantee, as regards the setting of that amount, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235).

201 In that regard, the Commission explained, on pages 53 and 54 of the statement of objections sent to the applicant, the duration of the infringement which it proposed to find in the applicant's case.

202 Then, on pages 57 and 58 of the statement of objections, the Commission set out its reasons for considering that the present infringement was a very serious infringement and also the factors constituting aggravating circumstances, namely the manipulation of the procedures for submitting tenders; the aggressive implementation of the cartel in order to ensure the compliance of all the participants in the agreements and to exclude the only competitor of any importance which did not participate in the agreements; and the fact that the infringement continued after the investigations had been carried out.

203 At the same place, the Commission stated that, in assessing the fine to be imposed on each individual undertaking, it would take into account, *inter alia*, the role played by each of them in the anti-competitive practices, all the substantial differences as regards the duration of their participation, their importance in the district heating sector, their turnover in the district heating sector, their total turnover, if appropriate, in order to take account of the level and economic power of the undertaking in question and to ensure a sufficiently deterrent effect and, last, all the mitigating circumstances.

204 Then, on page 58 of the statement of objections, the Commission observed, as regards the applicant, that it had played a leading role in the cartel, that it was the second largest producer of district heating pipes and that it played an active role in all the activities of the cartel, even though that role was minor compared with ABB's.

205 In doing so, the Commission set out in the statement of objections the elements of fact and of law on which it would base the calculation of the fine to be imposed on the applicant, so that, in that regard, the applicant's right to be heard was duly observed.

206 Since it had indicated the elements of fact and of law on which it was to base its calculation of the fines, the Commission was under no obligation to explain the way in which it would use each of those elements in determining the level of the fine. To give indications as regards the level of the fines envisaged, before the undertaking has been invited to submit its observations on the allegations against it, would be to anticipate the Commission's decision and would thus be inappropriate (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 21, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 19).

207 Nor, consequently, was the Commission bound to inform the undertakings concerned, during the administrative procedure, that it intended to use a new method to calculate the amount of the fines.

208 In particular, the Commission was not bound to mention, in the statement of objections, the possibility of a change in its policy as regards the level of the fines, a possibility which depended on general considerations of competition policy having no direct relationship with the particular circumstances of these cases (*Musique diffusion française* v *Commission*, cited above, paragraph 22). The Commission is not under an obligation to put undertakings on notice by warning them of its intention to increase the general level of fines (Case T-12/89 *Solvay* v *Commission*, cited above, paragraph 311).

209 It follows that the applicant's right to be heard did not place the Commission under an obligation to inform it of its intention to apply the new guidelines in its case.

210 For all those reasons, the complaint relating to a breach of the right to be heard must also be rejected in so far as it concerns the application of the guidelines on the method of setting fines.

III — *Third plea in law, alleging infringement of general principles and errors of fact in assessing the fine*

A — *Infringement of the principle of non-retroactivity*

1. Arguments of the parties

211 The applicant complains that the Commission infringed the principle of non-retroactivity by applying the new guidelines in its case, when it had cooperated with the Commission without being aware of the Commission's intention to change fundamentally its policy on fines.

212 The applicant states that the fines provided for in Article 15 of Regulation No 17 are of a criminal-law nature and are therefore covered by Article 7 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), which prohibits the imposition of penalties more severe than those applicable when the offence in question was committed. It is therefore contrary to Article 7 paragraph 1 of the Convention to apply retroactively the new legal rules which the Commission imposed on itself as concerns the determination of the amount of the fine, which are of a normative character and binding on the Commission. Even if these new rules were not regarded as being of a normative character, but merely as being a change in the Commission's practice, the application of the norms resulting from such a change is contrary to the principles contained in Article 7 paragraph 1 of the Convention. It follows, in particular, from the case-law of the European Court of Human Rights that these principles also apply to changes in case-law.

213 The applicant accepts that, normally, the Commission is entitled to increase the general level of the fines without prior warning. In the present case, however, the Commission fundamentally changed its policy and practice on fines and was therefore obliged to give prior warning, particularly where, as in the applicant's case, an undertaking has voluntarily submitted self-incriminating evidence without being aware of that fundamental change.

214 The guidelines actually lead, for undertakings in the applicant's position, to a systematic increase in the level of fines. Because the fines are calculated on the basis of absolute amounts, the guidelines impose a method of calculation which affects small and medium-sized undertakings much more severely than a system under which the fine is wholly or partly dependent on the turnover of the undertaking concerned.

215 The defendant replies that the new guidelines merely set out the framework within which the Commission proposes to apply Article 15 of Regulation No 17 and do not alter that framework. The Commission could have imposed precisely the same fine on the applicant without ever adopting the new guidelines.

216 Furthermore, the guidelines represent a change in the Commission's general approach to setting fines and do not necessarily entail an increase in the level of the fine in a specific case. Even if the purpose of the guidelines were to impose higher penalties, that would be entirely compatible with the case-law.

2. Findings of the Court

217 It is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, Opinion 2/94 of the Court of Justice of 28 March 1996 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect (*Kremzow*, cited above, paragraph 14, and Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 60). Furthermore, paragraph 2 of Article F of the Treaty on European Union (now, after amendment, Article 6(2) EU) provides that 'the Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

218 Article 7 paragraph 1 of the Convention provides that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed' and that 'a heavier penalty [shall not] be imposed than the one that was applicable at the time the criminal offence was committed'.

219 The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the Convention as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Community judicature (Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22).

220 Although Article 15(4) of Regulation No 17 provides that Commission decisions imposing fines for infringement of competition law are not of a criminal nature (*Tetra Pak*, cited above, paragraph 235), the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition (see, by analogy, *Michelin* v *Commission*, cited above, paragraph 7).

221 Such observance requires that the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed.

222 In that regard, the fines which the Commission is able to impose for infringement of the Community rules on competition are defined in Article 15 of Regulation No 17, which was adopted before the date on which the infringement was committed. The Commission is not empowered to amend Regulation No 17 or to depart from it, even by rules of a general nature which it imposes on itself. Although it is common ground that the Commission assessed the fine imposed on the applicant in accordance with the general method for setting fines set out in the guidelines, in doing so it remained within the framework of the fines set out in Article 15 of Regulation No 17.

223 Article 15(2) of Regulation No 17 provides that '[t]he Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently[,]... they infringe Article 85(1)... of the Treaty'; and that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

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

225 According to the guidelines, the Commission is to take as the starting point in calculating the amount of the fines an amount determined according to the gravity of the infringement ('the general starting point'). In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (first paragraph of Section 1.A). Within that framework, infringements are to be put into one of three categories: 'minor infringements', for which the likely fines are between ECU 1 000 and ECU 1 000 000, 'serious infringements', for which the likely fines are between ECU 1 million and ECU 20 million, and 'very serious infringements', for which the likely fines are above ECU 20 million (first to third indents of the second paragraph of Section 1.A). Within each of these categories, and in particular as far as 'serious' and 'very serious' infringements are concerned, the proposed scale of fines is to make it possible to apply differential treatment to undertakings according to the nature of the infringement committed (third paragraph of Section 1.A). It is also necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (fourth paragraph of Section 1.A).

226 Account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (fifth paragraph of Section 1.A).

227 It may be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight

and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. Consequently, it may be necessary to adapt the general starting point according to the specific nature of each undertaking ('the specific starting point') (sixth paragraph of Section 1.A).

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

229 The guidelines then set out, by way of example, a list of aggravating and attenuating circumstances which may be taken into consideration in order to increase or reduce the basic amount and refer to the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the leniency notice').

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

231 It follows that, under the method laid down in the guidelines, the fines continue to be calculated according to the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, and the maximum percentage of turnover of each undertaking as laid down in that provision is observed.

232 Consequently, the guidelines cannot be regarded as going beyond the legal framework of the fines set out in that provision.

233 Nor, contrary to what the applicant claims, does the change brought about by the guidelines, compared with the Commission's existing administrative practice, constitute an alteration of the legal framework determining the fines which can be imposed and it is not, therefore, contrary to the principles contained in Article 7 paragraph 1 of the Convention.

234 First, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17.

235 Second, having regard to the wide discretion which Regulation No 17 leaves to the Commission, the fact that the latter introduces a new method of calculating fines, which may, in certain cases, lead to increased fines, but does not exceed the maximum level established by that regulation, cannot be regarded as an aggravation, with retroactive effect, of the fines as legally provided for by Article 15 of Regulation No 17, which infringes the principles of legality and legal certainty.

236 It is of no avail to argue that if fines are set according to the method described in the guidelines, in particular on the basis of an amount determined, in principle, according to the gravity of the infringement, the Commission will then impose higher fines than previously. It is settled case-law that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; judgment in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; see also Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 163). It is also settled case-law that under Regulation No 17 the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127).

237 Furthermore, according to the case-law, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, paragraph 109, Case T-12/89 *Solvay* v *Commission*, paragraph 309, and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). The proper application of the Community competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique diffusion française and Others* v *Commission*, paragraph 109).

238 For all those reasons, the complaint alleging infringement of the principle of non-retroactivity must be rejected.

B — *Infringement of the principle of protection of legitimate expectations*

1. Arguments of the parties

239 The applicant maintains that the application of a new policy in calculating the fines, after it had voluntarily submitted self-incriminating evidence, is contrary to the principle of legitimate expectations. It is, it alleges, entitled to rely on the Commission's practice with regard to the setting of fines which was applicable at the time when it approached the Commission. The Commission's discretion was circumscribed, in these circumstances, by the fact that the applicant cooperated with it on the basis of the method of setting fines set out in Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard), and in the Draft Commission notice on the non-imposition or the mitigation of fines in cartel cases (OJ 1995 C 341, p. 13, hereinafter 'the draft leniency notice'), upon which both the applicant and the Commission relied at the time.

240 The defendant contends that it follows from the case-law that offenders against the competition rules have no 'right' to a particular level of fines. Nor can the applicant maintain that, when it decided to submit documents, it relied on the leniency notice, only to find that the fining policy had been changed by the new guidelines. The Commission complied in full with the letter and the spirit of that notice by reducing the fine by 30%. Since the notice does not deal with the calculation of the basic fine, it could not give the undertakings concerned an expectation as to the level of the fine prior to its reduction under that notice.

2. Findings of the Court

241 As regards the setting of fines for infringements of the competition rules, the Commission exercises its powers within the limits of the discretion conferred on it by Regulation No 17. It is settled case-law that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained (see Case 245/81 *Edeka* [1982] ECR 2745, paragraph 27, and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33).

242 On the contrary, the Commission is entitled to raise the general level of fines, within the limits laid down in Regulation No 17, if that is necessary to ensure the implementation of the Community competition policy (see the case-law cited in paragraph 237 above).

243 It follows that undertakings involved in an administrative procedure which may lead to a fine cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously applied.

244 As regards the expectation which the applicant allegedly derived from the Cartonboard decision, in particular as concerns the reduction for cooperating during the administrative procedure, the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (see, in

relation to attenuating circumstances, Case T-374/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368).

245 In any event, the Commission could not apply in the present case the policy current at the time of the adoption of the Cartonboard decision, as it had since adopted its leniency notice, published on 18 July 1996. Since that date, the Commission has created a legitimate expectation amongst undertakings that the criteria set out in that notice will be applied, and is now therefore bound to apply them.

246 In that regard, it should be emphasised that when the applicant approached the Commission it had no reason to believe that the Commission would apply to its case the method described in its draft leniency notice, since it was quite clear from that document, which was published in the Official Journal, that it was a draft. The draft was accompanied by a statement in which the Commission announced that it intended to issue a notice concerning the non-imposition or mitigation of fines in cases where undertakings cooperated in the preliminary investigation or proceedings in respect of an infringement, and that, before adopting the notice, it invited all interested persons to submit their written observations on the draft. The only effect of that such a draft could have was to warn the undertakings concerned that the Commission intended to issue a notice on the subject.

247 In so far as the applicant's reasoning is based on the hypothesis that the Commission did not comply with the leniency notice, its arguments are the same as those based on a misapplication of the notice.

248 It follows that the complaint must be rejected in so far as it alleges infringement of the principle of protection of legitimate expectations.

C — *Infringement of the principles of equal treatment and proportionality, and legality of the guidelines*

1. Arguments of the parties

249 The applicant puts forward a number of arguments to substantiate its contention that the Commission imposed an excessive and discriminatory fine on it, thus infringing both the principle of equal treatment and the principle of proportionality.

250 First, in taking as the starting point for setting the fine abstract amounts based solely on the gravity of the infringement, the Commission discriminated against small and medium-sized undertakings. The Commission classified the undertakings concerned in four categories, according to size. As the specific starting point which it fixed for ABB, an undertaking in the first category, was less than 10% of its turnover, the method of calculation made it possible to give full effect to all the relevant factors for the determination of the final amount of the fine. For the applicant and the other undertakings belonging to the second and third categories, however, which were smaller than ABB, the specific starting points were so high that the effects of those factors were absorbed by the need to go below the limit of 10% of turnover imposed by Regulation No 17.

251 Consequently, the Commission has discriminated against small and medium-sized undertakings, contrary to its general policy to treat companies which are active essentially in the field covered by the infringement less severely than multinationals active simultaneously in numerous sectors. The Commission's conduct is also contrary to Article 130(1) of the EC Treaty (now Article 157(1) EC), which provides that the Commission is to encourage an environment

favourable to initiative and the development of, in particular, small and medium-sized undertakings.

252 Second, the calculation method used by the Commission meant that the undertakings in the second and third categories were fined basic amounts higher than the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17. The applicant submits that that limit cannot be exceeded at any point in the calculation. If the Commission were at liberty to calculate the fine on basic amounts exceeding the 10% limit, any adjustment which it made to the amount of the fine would be purely illusory and devoid of any impact on the final amount of the fine, which in any event is equal to 10% of total turnover.

253 In its reply, the applicant adds that Section 5(a) of the guidelines states that 'the final amount calculated according to [the] method (basic amount increased or reduced on a percentage basis)' may not in any case exceed 10% of the turnover of the undertakings. The guidelines themselves do not therefore permit a calculation giving a result in excess of the limit of 10% of turnover.

254 The applicant observes that, in order to take account of the limit of 10% of turnover, when it calculated the fine after taking the mitigating circumstances into account but before it reduced the amount to make allowance for cooperation, the Commission reduced the fines, for the undertakings in the second and third categories, to the highest legally permissible level. In the applicant's case, the fine which had been set before the reduction for cooperation was applied was ECU 12 700 000, or exactly 10% of its turnover.

255 Third, the Commission set the fines at a level which does not reflect the individual size of the undertakings. Although the Commission's previous practice had been

to base fines on turnover from the products to which the infringement related, in the present case it reduced the applicant's fine to 10% of its total turnover. The Commission is obliged, when setting the fine, to take into account each of those turnover figures in order to take account of the size and presence of the undertakings concerned on the various markets.

256 On this point, the applicant further observes that the Commission ignored the reality of the applicant's situation by classifying it as an undertaking essentially specialising in the product in question, whereas, in reality, its turnover on the relevant market represents only 36.8% of its overall turnover. Owing to that incorrect assessment of the applicant's situation, the fine was disproportionate to its turnover on the relevant market. The method employed to set the fine had the effect of discriminating against the applicant by comparison with undertakings in the third category, since the difference between the fines imposed on those undertakings and that imposed on the applicant is disproportionate to the differences in their size.

257 Fourth, by calculating the amounts of the fines on the basis of amounts above the legally permissible ceiling, the Commission deprived itself of the possibility of taking into consideration the other factors which are to be taken into account in assessing the gravity of the infringement. Thus, the Commission did not calculate the amount of the fines according to the profit each of the undertakings concerned had made on the relevant market, although the need to take that factor into account has been recognised in the case-law of the Court of Justice and also in the Commission's own practice set out in the *XXIst Report on Competition Policy*. The Commission did not take into consideration the fact that the applicant did not make excessive profits during the period of the alleged infringement. The applicant cannot understand how the other factors on which the Commission relied in order to set the fine could, as it claims, reflect the notional profits made by each undertaking.

258 Last, the fine is disproportionate in that the Commission failed to take into account the applicant's ability to pay the fine and thus set it at a level that threatens its survival. The Commission's previous practice has frequently been to impose lower fines than normal when the undertakings concerned were in financial difficulties. In the guidelines, moreover, the Commission expressed its intention to take account of undertakings' real ability to pay in a specific social context and to adjust the fines accordingly. Undertakings derive legitimate expectations from that intention. In that regard, the applicant states that it suffered heavy losses in 1997 and 1998, which, combined with the fine, have caused a loss in excess of the net value of its own equity. In order to avoid insolvency and to obtain the funds to pay the fine, the applicant had to sell the majority of its industrial and commercial activities and also the name 'Løgstør Rør'. Even though the applicant still exists as a legal person, it has therefore been eliminated from the relevant market.

259 The applicant states that the Commission's aim in setting the amount of fines should be deterrent and not be liable to eliminate undertakings from the relevant market, thus damaging competition in the relevant sector. Fixing the fines at such a high level may lead to the disappearance from the market of ABB's two main competitors, the applicant and Tarco.

260 In so far as the Commission, in order to fix the excessive and discriminatory amount of the fine, based itself on its new guidelines when calculating the amount of the fines, the applicant claims that the guidelines are illegal under Article 184 of the EC Treaty (now Article 241 EC). The Commission, it alleges, determined in the guidelines basic amounts for the calculation of the fine which are so high that they deprive it of its discretion under Article 15(2) of Regulation No 17 to take into account all relevant factors, including any mitigating circumstances.

261 The Commission observes, first, that the allegation that it discriminated against the applicant in determining the amounts used to calculate the fines is unfounded.

262 Its use of a single figure of ECU 20 million as a starting point for all the offenders cannot be regarded as discriminatory, since that amount was subsequently adjusted, depending on the offender and the gravity of its participation in the infringement. The Commission explicitly took account of the difference in size and economic capacity of the undertakings concerned, in particular by raising the initial amount to be imposed on ABB. The fine of ECU 8.9 million imposed on the applicant, instead of being fixed at the highest permissible level, is below the maximum limit authorised by Regulation No 17.

263 Furthermore, even if ABB had received unduly favourable treatment compared with the applicant, that should not lead to a reduction of the fine imposed on the applicant, since a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party. In any event, the applicant cannot claim to be a medium-sized undertaking. As regards Article 130 of the Treaty, in view of its general nature, it seems scarcely conceivable that a measure could ever be annulled on the ground that it was incompatible with that provision.

264 The defendant further denies that the amounts used in calculating the fines cannot at any time be more than 10% of turnover. What matters for the purpose of the limit laid down in Article 15(2) of Regulation No 17 is only the final result of the calculation of the fine, not the amounts used when calculating it. The Commission could have used a starting point lower than 10% of turnover which would have resulted in a fine of the same amount. Where the application of the criteria in the guidelines leads to a figure above the maximum limit, there is nothing to prevent the Commission from reducing the amount to a sum corresponding precisely to that limit before applying the criteria in the leniency

notice. In so far as the applicant relies it its reply on the wording of Section 5(a) of the guidelines, it is submitting a new argument which is inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance.

265 Furthermore, the interpretation of the limit of 10% of turnover advocated by the applicant is unfounded, since it would mean that the Commission was required to begin the calculation at an abnormally low level in order to ensure that that limit was not exceeded at any point in the calculation, with the result that a starting point might be fixed that was not consistent with the criteria set out in the guidelines. Using that method, the entire calculation would have to be made backwards and the starting point would only become clear at the end of the operation. Such a method would be arbitrary and would lead the Commission to disregard the circumstances of each individual case.

266 The Commission is entitled to impose a fine which does not exceed 10% of an undertaking's world-wide turnover. Although it has often taken into consideration the turnover on the relevant market as the starting point for the calculation of the fines, it was under no obligation to follow its former practice. In calculating the amount of fines, it must take a large number of factors into account and not attach disproportionate importance to a single turnover figure. In any event, the Commission's previous practice was not invariable, since fines have also been determined by reference to turnover other than that on the relevant market or to the profits made by the parties to the infringement.

267 The decision stated that the applicant specialised in a single product, but did not say that it only manufactured one product. The description of the applicant as essentially a single-product company is not incorrect since, according to the information provided by the applicant itself, pre-insulated pipes accounted for

approximately 80% of its world-wide turnover at the time of the investigation. Furthermore, the Commission relied on that factor solely in order to distinguish the applicant from ABB and to reduce the starting point for the fine from ECU 20 million to ECU 10 million.

268 The Commission is under no obligation to take into account the profits derived from the infringement. It is generally difficult to determine what profits each undertaking has derived from its participation in the infringement, and that would have been so particularly in the present case. In any event, the other factors relied on by the Commission are deemed to reflect the theoretical profits made by each undertaking. Where there has been a serious and deliberate infringement of Article 85 of the Treaty, that infringement may be considered to be sufficiently important for the Commission not to attach particular importance to the actual profits.

269 Nor is the Commission required to take account of an undertaking's poor financial situation when fixing the amount of the fine, provided that it remains below the maximum limit laid down in Regulation No 17. In the present case, the applicant has not shown that its existence was threatened by the fine or that the sale of its business was necessary because of the obligation to pay the fine. Such a step may have been taken for various reasons and cannot therefore be tantamount to the elimination of the undertaking from the relevant market.

270 As the fine is neither excessive nor discriminatory, the applicant has no reason to challenge the legality of the guidelines. Nor is it true to claim that, by adopting the guidelines, the Commission bound itself in such a way that it no longer took account of any attenuating circumstances or of the role played by the various participants in the cartel.

2. Findings of the Court

271 It should be observed that, together with its arguments alleging infringement of the principles of equal treatment and of proportionality, the applicant has submitted an objection of illegality, under Article 184 of the Treaty, in respect of the guidelines, in so far as the Commission, in adopting those guidelines, deprived itself of its discretion under Regulation No 17 to take account of the size of the individual undertakings and the role which each of them played in an infringement. That objection of illegality must be examined first.

— The objection of illegality in respect of the guidelines

272 It is settled case-law that Article 184 of the Treaty expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which, although they are not in the form of a regulation, form the legal basis of the decision under challenge, if that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 39 and 40).

273 Since Article 184 of the Treaty is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (Case 21/64 *Macchiorlati Dalmas e Figli* v *High Authority*

[1965] ECR 175, at 187 and 188; Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at 409; Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 57).

274 As regards the guidelines, it should be noted that the Commission stated, in the opening paragraphs: 'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of... turnover [and]...[t]he new method of determining the amount of a fine will adhere to the following rules'. It follows that, although the guidelines do not constitute the legal basis of the contested decision, which is based on Articles 3 and 15(2) of Regulation No 17, they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings.

275 Furthermore, it is common ground that the Commission assessed the fine imposed on the applicant in accordance with the general method which it laid down for itself in the guidelines (see paragraph 222 above).

276 In the present case, therefore, there is a direct legal connection between the contested individual decision and the general measure represented by the guidelines. Since the applicant was not in a position to ask that the guidelines be declared void, as a general measure, the guidelines may form the subject-matter of an objection of illegality.

277 In that context, it should be observed that, as stated in paragraphs 223 to 232 above, the Commission, in publishing in the guidelines the method which it

proposed to apply in setting the fines imposed under Article 15(2) of Regulation No 17, remained within the legal framework laid down by that provision.

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

279 In that regard, it is settled case-law that the gravity of the infringements must be established in accordance with numerous factors, such as, *inter alia*, the particular circumstances of the case, its context and the deterrent nature of the fines, although no binding or exhaustive list of criteria which must necessarily be taken into account has been drawn up (see the case-law cited in paragraph 236 above).

280 The criteria for assessing the gravity of the infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance which is disproportionate in relation to the other factors and that the fixing of the fine cannot be the result of a

simple calculation based on total turnover (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraphs 120 and 121, Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94, and T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176).

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

282 It follows that by setting out in its guidelines a method of setting the fines which is not based on the turnover of the undertakings concerned the Commission did not depart from the Community judicature's interpretation of Article 15 of Regulation No 17.

283 In that regard, although the guidelines do not provide that the fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant product market, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it.

284 It so happens that, under the guidelines, the turnover of the undertakings concerned may be relevant when the actual economic capacity of the offenders to

cause significant harm to other traders and the need to ensure that the fine has sufficient deterrent effect is taken into consideration, or when account is taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (see paragraph 226 above). The turnover of the undertakings concerned may also be relevant when the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition is determined, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type (see paragraph 227 above). Likewise, the turnover of the undertakings may give an indication of any economic or financial benefit acquired by the offenders or of other specific characteristics which, depending on the circumstances, may need to be taken into consideration (see paragraph 230 above).

285 Furthermore, the guidelines state that the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetical calculation (seventh paragraph of Section 1(A)).

286 Contrary to what the applicant claims, the guidelines do not go beyond what is provided for in Regulation No 17. The applicant alleges that the guidelines allow the Commission to impose, depending on the gravity of the infringement, a starting point for setting the fine which is so high that, having regard to the fact that, according to Article 15(2) of Regulation No 17, the amount of the fine cannot in any event exceed the maximum of 10% of turnover of the undertaking concerned, it is no longer possible, in certain cases, for other factors, such as duration or mitigating or aggravating circumstances, to still have an effect on the level of the fine.

287 In that regard, it should be observed that Article 15(2) of Regulation No 17, in providing that the Commission may impose fines of up to 10% of turnover

during the preceding business year for each undertaking which participated in the infringement, requires that the fine eventually imposed on an undertaking be reduced if it should exceed 10% of its turnover, independently of the intermediate stages in the calculation intended to take the gravity and duration of the infringement into account.

288 Consequently, Article 15(2) of Regulation No 17 does not prohibit the Commission from referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the amount of the fine eventually imposed on the undertaking does not exceed that maximum limit.

289 The guidelines make similar provision, moreover, where they state that 'the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17' (Section 5(a)).

290 In a case where the Commission refers in the course of its calculation to an intermediate amount in excess of 10% of the turnover of the undertakings concerned, it cannot be criticised because certain factors taken into consideration in its calculation do not affect the final amount of the fine, since that is the consequence of the prohibition laid down in Article 15(2) of Regulation No 17 on exceeding 10% of the turnover of the undertaking concerned.

291 In so far as the applicant submits that the guidelines are unlawful in the light of Regulation No 17, its objection must therefore be rejected.

— Infringement of the principle of equal treatment

292 The applicant complains that the Commission imposed on it, as on the other small and medium-sized undertakings, a fine which, compared with the fine imposed on ABB, did not take sufficient account of its turnover or its size.

293 In that regard, it is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

294 In the present case, the Commission considered that the present infringement constituted a very serious infringement for which the likely fine would be at least ECU 20 million (point 165 of the decision).

295 In order to take account of the difference in size of the undertakings which took part in the infringement, the Commission divided the undertakings into four categories according to their relative importance in the market in the Community, subject to adjustment where appropriate to take account of the need to ensure effective deterrence (second to fourth paragraphs of point 166 of the decision). It follows from points 168 to 183 of the decision that the specific starting points for the calculation of the fines imposed on the four categories were, in order of size, ECU 20 million, ECU 10 million, ECU 5 million and ECU 1 million.

296 As regards the determination of the starting points for each category, the Commission stated, following a question put by the Court, that these amounts reflect the importance of each undertaking in the pre-insulated pipe sector, having regard to its size and weight compared with ABB and in the context of the cartel. For that purpose, the Commission took into account not only their turnover on the relevant market but also the relative importance which the members of the cartel ascribed to each of them, as evidenced by the quotas allocated within the cartel, set out in annex 60 to the statement of objections, and by the results obtained and forecast in 1995, set out in annexes 169 to 171 of the statement of objections.

297 In addition, the Commission made a further upward adjustment of the starting point for the calculation of the fine to be imposed on ABB, to ECU 50 million, to take account of its position as one of Europe's largest industrial combines (point 168 of the decision).

298 In that context, it must be held, having regard to all the relevant factors taken into consideration in fixing the specific starting points, that the difference between the starting point chosen for the applicant and that chosen for ABB is objectively justified. Since the Commission is not required to ensure that the final amounts of the fines for the undertakings concerned to which its calculations lead reflect every difference between them in terms of turnover, the applicant cannot criticise the Commission because the starting point taken for it resulted in a fine higher, in percentage of total turnover, than the fine imposed on ABB.

299 Furthermore, the Court has already held that the Commission, in so far as, in determining the amount of the fines, it relied in the present case on the turnover of an undertaking on the relevant market, is not obliged to take into account, in assessing the gravity of the infringement, the relationship between the total turnover of an undertaking and the turnover produced by the goods which are the subject-matter of the infringement (*SCA Holding* v *Commission*, cited above, paragraph 184). *A fortiori*, therefore, the Commission is not obliged to set the

fines according to the total turnover of the undertakings concerned in a situation such as the present case, where it chose to take a series of relevant factors into account in assessing the gravity and duration of the infringement and, in particular, in determining the starting points for the calculation of the fines.

300 In so far as the starting point chosen for the applicant is objectively distinguished from that chosen for ABB, the Commission cannot be criticised because certain factors taken into consideration in its calculation do not affect the final amount of the fine imposed on ABB, since that is the consequence of the prohibition laid down in Article 15(2) of Regulation No 17 on exceeding 10% of the turnover of the undertaking concerned (see paragraph 290 above). Moreover, as regards the lesser gravity of the role played by the applicant in the infringement by comparison with ABB, it is clear from point 171 of the decision that the particular role of ABB was taken into account as an aggravating circumstance in order to increase the amount of the fine to be imposed on it.

301 It follows that the applicant has not established that the Commission imposed a discriminatory fine on it by comparison with the fine imposed on ABB or that the Commission discriminated generally against small and medium-sized undertakings compared with a large undertaking such as ABB.

— Infringement of the principle of proportionality

302 As regards infringement of the principle of proportionality, the applicant complains that the Commission, first, did not take sufficient account of its turnover on the relevant market, and consequently imposed a discriminatory fine

on the applicant compared with the fines imposed on undertakings in the third category.

303 In that regard, it is sufficient to observe that it is apparent from the decision and from the explanation provided by the Commission following a written question put by the Court that the Commission took account, in setting the specific starting points for the calculation of the fines, of a series of factors reflecting the size of each undertaking in the pre-insulated pipe sector, including turnover on the relevant market. The mere fact that the Commission did not, in that context, take as a basis solely the turnover on the relevant market of each of the undertakings, but took into consideration other factors relating to the importance of the undertakings on that market, cannot lead to the conclusion that the Commission imposed a disproportionate fine. It follows from the case-law that it is important not to confer on an undertaking's total turnover or on its turnover accounted for by the goods in respect of which the infringement was committed an importance which is disproportionate in relation to the other factors (see paragraph 280 above).

304 In that context, it cannot be concluded that the fine imposed on the applicant is disproportionate, since the starting point for its fine is justified in the light of the criteria which the Commission used in assessing the importance of each of the undertakings on the relevant market. Having regard to the quota allocated to the applicant within the cartel and to the forecast results, as set out in annexes 60 and 169 to 171 of the statement of objections, the Commission was justified in imposing on it at least a starting point twice as high as that imposed on undertakings in the third category.

305 The applicant cannot find support in the fact that the Commission, in point 175 of the decision, classified it as 'a single-product company'. It is clear from that passage that such a classification was intended solely to distinguish the lower

starting point for the applicant's fine in relation to the starting point chosen for ABB. The applicant has not succeeded in explaining how such a classification, assuming that it is incorrect, can have harmed it.

306 In so far as the applicant complains that the Commission did not take its turnover on the relevant market into consideration when applying the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17, it is settled case-law that the turnover referred to in Article 15(2) of Regulation No 17 must be understood as referring to the total turnover of the undertaking concerned, which alone gives an approximate indication of its size and influence on the market (see *Musique diffusion française and Others* v *Commission*, cited above, paragraph 119, Case T-144/89 *Cockerill-Sambre* v *Commission* [1995] ECR II-947, paragraph 98, and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 160). Provided that it complies with the limit laid down in Article 15(2) of Regulation No 17, the Commission may set the fine on the basis of the turnover of its choice, in terms of geographical area and relevant products.

307 Nor, second, can the applicant plead infringement of the principle of proportionality on the ground that the Commission did not calculate its fine according to the profit it had made on the relevant market. Although the profit which undertakings have been able to derive from their practices is among the factors which may count in the assessment of the gravity of the infringement (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 129, and *Deutsche Bahn* v *Commission*, cited above, paragraph 127), and even though the Commission, to the extent to which it is capable of estimating that unlawful profit, can set the fines at such a level that they exceed such a profit, it follows from a well-established line of decisions that the gravity of infringements must be established in accordance with numerous factors such as, in particular, the particular circumstances of the case, its context and the deterrent nature of the fines, although no binding and exhaustive list of the criteria that must be taken into account has been drawn up (see paragraph 236 above). The Commission has likewise stated in its guidelines that any economic or financial advantage

acquired by the offenders is among the objective factors that must 'depending on the circumstances' be taken into consideration in order to adjust the amount of the fines envisaged (see paragraph 230 above). In any event, since the Commission set the starting point for the fine to be imposed on the applicant on the basis of a series of factors reflecting the applicant's importance on the market, it cannot be maintained that it ignored the advantages which the applicant was able to derive from the infringement in question.

308 As regards the applicant's ability to pay the fine, it is sufficient to observe that, according to a consistent line of decisions, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking concerned, since recognition of such an obligation would be tantamount to giving an unjustified competitive advantage to undertakings least well adapted to the market conditions (*IAZ and Others* v *Commission*, cited above, paragraphs 54 and 55, Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraphs 75 and 76, and Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 316). Likewise, where the guidelines state that account should be taken of the 'real ability to pay in a specific social context', and the fines adjusted accordingly, this is subject to the proviso '[d]epending on the circumstances' (see paragraph 230 above).

309 In so far as the applicant relies on an infringement of the principle of proportionality, its arguments must therefore also be rejected.

310 Accordingly, the complaint alleging infringement of the principles of equal treatment and proportionality and unlawfulness of the guidelines must be rejected in its entirety.

D — *Incorrect assessment of the duration of the infringement*

1. Arguments of the parties

311 The applicant maintains that the Commission is not entitled to multiply the intermediate amount of the fine by 1.4 on the ground that the cartel allegedly lasted for five years, since the applicant only participated in one relatively brief cartel in Denmark, which it left in 1993, and in a short-lived, wider cartel which lasted only a few months before cooperation within it completely broke down. The fact that ABB recognised the existence of a continuous infringement is of no relevance to the calculation of the infringement in respect of the applicant.

312 Furthermore, the fact that 'in the early period the arrangements were incomplete and of limited effect outside the Danish market' should also have been taken into account in assessing the duration of the infringement.

313 The defendant observes that the applicant's argument is tantamount to disputing its participation in a continuous cartel. In any event, by fixing the duration of the infringement at five years in point 170 of the decision, the Commission took account of the incomplete nature of the arrangements outside Denmark in the early days.

2. Findings of the Court

314 As stated in paragraphs 99 to 109 above, the Commission correctly calculated the duration of the infringement in respect of which the applicant is accused.

315 As regards the fact that the arrangements within the cartel were incomplete in the early days and of limited effect outside the Danish market, the Commission took sufficient account of those factors when assessing the duration of the infringement in respect of which the applicant is accused.

316 The complaint must therefore be rejected.

E — *Incorrect application of the aggravating circumstances*

1. Arguments of the parties

317 The applicant takes issue with the fact that the Commission increased the basic fine by 30% to take into account the aggravating factors which it identified, in particular the fact that the applicant deliberately continued to participate in the infringement after the investigations carried out by the Commission and the active role which the applicant allegedly played in the sanctions against Powerpipe. In doing so, the Commission also failed to demonstrate the existence of any of the aggravating circumstances listed in Section 2 of its own guidelines.

318 The Commission was wrong to increase the fine on the ground that the infringement continued after the investigations. The continuation of the practices in question after the investigation has begun is inherent in any infringement and

cannot therefore be regarded as an aggravating circumstance. That is confirmed by the Commission's practice in previous decisions and by the fact that its own guidelines show that non-continuation of an infringement is to be taken into account as a mitigating circumstance. If early termination of an infringement may be regarded as a mitigating circumstance, there is no reason to treat continuation of the infringement after the beginning of the investigation as an aggravating circumstance.

319 As regards the concerted measures taken against Powerpipe, the applicant reiterates that it did not participate in any punitive action against Powerpipe.

320 The defendant observes that the list of aggravating circumstances in the guidelines is not exhaustive. It was therefore entitled to regard continuation of the infringement as an aggravating circumstance, especially where the infringements were so serious that no right-minded person could possibly believe the conduct to be lawful. It concludes by stating that the applicant's responsibility for the concerted action against Powerpipe was demonstrated in the decision.

2. Findings of the Court

321 First of all, as regards the list of aggravating circumstances set out in the guidelines, the guidelines clearly state that the list is given purely by way of example.

322 As regards the active role which the applicant played in the reprisals against Powerpipe, it is sufficient to recall that, as stated in paragraphs 139 to 164 above, it is established that the applicant approached ABB in July 1992 with a view to harming Powerpipe's activities, that it agreed with ABB in 1993 to lure away one of ABB's key employees and that, following the meeting of 24 March 1995, it endeavoured, by approaching one of its suppliers, to delay deliveries to Powerpipe by that supplier. In those circumstances, the Commission was entitled to find that its active role in the reprisals against Powerpipe constituted an aggravating circumstance, while the major role played by ABB in that regard was also recognised.

323 Second, the applicant does not deny having continued the infringement after the Commission had carried out its investigation.

324 Contrary to what the applicant claims, the fact that terminating an infringement after the Commission has first intervened may be regarded as a mitigating circumstance does not mean that continuing an infringement in such a situation cannot be regarded as an aggravating circumstance. An undertaking's reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case. Since the Commission cannot therefore be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance, the fact that it may classify such termination as a mitigating circumstance in one particular case cannot deprive it of its power to find that such continuation constitutes an aggravating circumstance in another case.

325 Accordingly, the complaint cannot be upheld.

F — *Failure to take mitigating circumstances into account*

1. Arguments of the parties

326 The applicant criticises the Commission for not having taken into account certain factors which in the past were systematically regarded as mitigating circumstances, in particular the existence of pressure brought to bear on one undertaking by another or the fact that an undertaking introduced a policy of compliance with Community law.

327 First, the Commission should have taken into consideration that fact that the applicant is a medium-sized family undertaking without the resources of an undertaking forming part of a group, which reduced its ability to pay the fine.

328 Second, the applicant was subject to constant pressure from ABB, which had the power and resources to dominate the sector. ABB never concealed the fact that its long-term objective was to acquire control of the applicant or to harm it because of the threat posed by its cheaper technology. The applicant's purpose was therefore to avoid antagonising ABB rather than to comply with a cartel imposed by it. The pressure brought to bear by ABB must therefore be taken into consideration as a mitigating circumstance in the applicant's case.

329 On this point, the applicant disputes the defendant's argument that it is sufficient to take those circumstances into consideration when assessing the gravity of

ABB's behaviour. When making a separate assessment of each undertaking, the Commission was bound to consider the actual effect that ABB's pressure strategy had had on the conduct of the undertakings and thus on the applicant's conduct. In any event, the decision should have taken into account the relatively less serious role played by the applicant compared with that of ABB, the leader of the cartel.

330 Third, the Commission should have considered the fact that the applicant had a more efficient technology which allowed it to exercise downward pressure on costs. It thus had at all times a greater interest in gaining market shares than in freezing its position on the market. Within the EuHP, it was the victim of opposition to the use of its new cheaper technology.

331 The defendant's argument that the applicant's failure to lodge a complaint prevented that situation from being taken into account as a mitigating circumstance is contradicted by the very wording of the leniency notice.

332 Fourth, the applicant's participation in the cartel had only limited effects on the market, since in 1991 and 1992 it had achieved significantly higher market shares in Denmark than the shares allocated to it. Thus, the applicant did distance itself, to the extent required by the case-law, from the quota practices employed by the other undertakings. Furthermore, it was the applicant that terminated the first cartel in Denmark in April 1993.

333 Fifth, the applicant left EuHP at the end of 1997. The applicant points out that the cooperation within the EuHP was part of the conduct sanctioned by the decision. The Commission should have taken the facts surrounding its departure from the EuHP into consideration when setting the fine.

334 Last, in the spring of 1997 the applicant introduced an internal programme in order to comply with Community law, involving the distribution of a 'compliance manual' and lectures to and discussions with its Danish and German personnel.

335 The defendant contends that none of the circumstances set out in the application should have been taken into consideration as a mitigating circumstance.

2. Findings of the Court

336 In the present case the Commission was entitled to take the view that no mitigating circumstances applied to the applicant.

337 First of all, the mere fact that the Commission considered in previous decisions that certain factors constituted mitigating circumstances for the purposes of determining the amount of the fine does not mean that it is obliged to make the same assessment in a subsequent decision (*Mayr-Melnhof* v *Commission*, cited above, paragraph 368).

338 Furthermore, the fact that the applicant is a medium-sized family undertaking does not constitute a mitigating circumstance. Even assuming that there is a link between the family nature of the members of an undertaking and its solvency, which is not established, it is settled case-law that the Commission is not obliged to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving an unjustified

competitive advantage to undertakings least well adapted to the market conditions (see paragraph 308 above).

339 Next, as regards the pressure which ABB brought to bear on the applicant, the applicant could have reported the pressure to the competent authorities and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participate in the cartel (see paragraph 142 above). In any event, the Commission cannot be criticised for having disregarded such pressure, because, when it assessed the fine to be imposed on ABB, the pressure which ABB had brought to bear on the other undertakings in order to persuade them to enter the cartel was regarded as a factor leading to an increase in its fine.

340 The same applies to the pressure brought to bear on the applicant by the other undertakings participating in the EuHP concerning the use of its new technology. Because the applicant had cost-saving technology at its disposal, it was actually in a stronger position to oppose the activities of the cartel and, in the event that the cartel prevented it from using its technology, to lodge a complaint with the Commission.

341 Nor is there anything in the wording of the leniency notice or the guidelines to prevent a finding that the existence of pressure on the part of competing undertakings is not to be regarded as a mitigating circumstance where the undertaking concerned has not lodged a complaint in respect of such pressure.

342 Last, the applicant cannot derive an argument from the fact that, within the framework of the Danish cartel, it did not always comply with the quotas

allocated within the cartel. As stated in points 36 and 37 of the decision, even though the applicant threatened to leave the cartel, it did not terminate its participation therein, but rather sought, by its threats, to obtain an increased quota. The applicant admits having itself at that time submitted proposals for a review of the division of market shares (applicant's reply to the statement of objections). As regards its withdrawal from the Danish cartel in April 1993, it must be observed that, as stated in paragraphs 75 to 77 above, after the Danish cartel became weaker, the applicant was still involved in negotiations on sharing the German market.

343 In those circumstances, the Commission was entitled to take the view that the applicant's conduct within the cartel could not give rise to any mitigating circumstance.

344 As regards the applicant's withdrawal from the EuHP early in 1997, it is sufficient to observe that, since the Commission did not find in the applicant's case that cooperation within the EuHP was a constituent element of the infringement, and since it found that the infringement was terminated in the spring of 1996, it was not required to accept the applicant's withdrawal from the EuHP, which, furthermore, was after the infringement period, as a mitigating circumstance for the applicant.

345 Last, the Commission cannot be criticised for not having regarded the applicant's implementation of an internal compliance programme as a mitigating circumstance. Although it is indeed important that the applicant took measures to prevent future infringements of Community competition law by its personnel, that fact does not alter the reality of the infringement found in the present case (Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 357). Furthermore, it follows from the case-law that, although the implementation of a compliance programme demonstrates the intention of the undertaking in question to prevent

future infringements and therefore constitutes a factor which better enables the Commission to accomplish its task of applying the principles laid down by the Treaty in competition matters and of influencing undertakings in that direction, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in a specific case (*Fiskeby Board* v *Commission*, cited above, paragraph 83, and *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 417). That is all the more so when, as here, the infringement in question constitutes a manifest violation of Article 85(1)(a) and (c) of the Treaty.

346 For all those reasons, therefore, the complaint must be rejected.

G — *Incorrect application of the leniency notice*

1. Arguments of the parties

347 The applicant submits, first, that the reduction of 30% of the fine granted under Section D of the leniency notice does not sufficiently reflect the value of its cooperation with the Commission. Second, it maintains that the Commission should have applied to it the principles set out in its draft leniency notice rather than the provisions of the final version of that notice. Third, it should not have been fined in respect of events after the date of the investigations.

348 First, the Commission should have taken into account the fact that the applicant was the first undertaking to inform the press that it would cooperate with the Commission in its investigation. It was the first undertaking to give the Commission substantial evidence and information, including evidence of the continuation of the cartel activities after the investigations, of which the Commission was unaware. In its systematic cooperation with the Commission, the applicant proved to be flexible by waiving its right of access to the file and its right not to incriminate itself. The Commission cannot base its refusal to award a larger reduction on the sole fact that the applicant did not begin to cooperate until well after the investigations had begun, since Section D of the notice requires only that the undertaking concerned cooperate before the statement of objections is sent.

349 The applicant maintains that its cooperation should have led to its fine being reduced by more than 30% since its cooperation went far beyond merely not contesting the facts, which, in the *Cartonboard* decision for example, led to a reduction of 33% of the fine. In the present case, a mere failure to contest the facts led to a 20% reduction of the fine imposed on Ke Kelit.

350 The applicant could have expected a similar reduction to the one granted in the *Cartonboard* decision, to which the Commission had also made reference when the applicant first approached it. In 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, hereinafter 'the *Alloy surcharge* decision'), reductions of 40% of the fine were granted for producing evidence, while no fine at all was imposed on the undertaking which had been the first to adduce evidence.

351 Second, the Commission should have applied the principles set out in its draft leniency notice, not those set out in the final version of the leniency notice. As the

final version had not yet been published, the applicant took the decision to cooperate with the Commission on the basis of the draft leniency notice and the Commission's previous practice. In the draft leniency notice, moreover, the Commission stated that it was aware that the notice would create legitimate expectations on which companies might rely when disclosing the existence of a cartel to the Commission.

352 Under the draft leniency notice, a reduction of at least 50% should be granted if, after the Commission has carried out investigations, the undertaking satisfies three criteria, namely, first, that it is the first undertaking to cooperate, second, that it provides the Commission with extensive information and maintains continuing cooperation and, third, that it has not forced any other undertaking to participate in the cartel or been a ringleader in the illegal activity. The draft leniency notice therefore does not contain the condition, found in the final version, that the investigations should have failed to provide sufficient grounds for initiating the procedure leading to a decision. The draft leniency notice reflected in this regard the then existing practice of the Commission, illustrated *inter alia* by the *Cartonboard* decision, in which the undertakings were granted reductions of two thirds of their fines for having provided evidence which had reduced the need for the Commission to rely on circumstantial evidence and for having influenced other undertakings which might otherwise have continued to deny the wrongdoing.

353 Even if the Commission had been entitled to apply its notice in the final version and had been correct in its conclusion that the applicant fell within category D of that notice, the applicant is unable to see why it was not given the maximum possible reduction of 50%.

354 Third, the applicant should not have been fined for illegal activities during the period following the investigations, since it was the applicant that had informed

the Commission of those activities, of which the Commission acknowledges it was unaware at the time. Both the draft leniency notice and the final version state in Section B that an undertaking which informs the Commission of a cartel of which it was not aware is entitled to a considerable reduction, or better still, according to the draft notice, not to be fined at all.

355 In the present case the reduction in the fine imposed on the applicant was very limited, since the facts disclosed to the Commission had already led to an increase in the fine, first because they increased the duration of the infringement and, second, essentially, because the fine was increased by 30% to reflect the gravity of the infringement.

356 The Commission contends that the discretion which it enjoys in applying its leniency notice was exercised lawfully and reasonably. Under Section D of the notice, the assistance provided by the applicant did not merit a reduction of more than 30%, since the applicant did not begin to cooperate until it received a request for information. Nor has the applicant advanced any argument to show that Section B or Section C of that notice was applicable. In any event, the Commission cannot depart from its final notice, since it must observe its publicly-announced policy.

357 As the Commission enjoys a wide margin of discretion in that regard, in view of the large number of factors to be taken into consideration, the applicant cannot have had any legitimate expectation of a particular reduction granted in previous cases, such as the *Cartonboard* decision. Nor can the applicant's case be compared to the cases of the undertakings whose fines were reduced by 40% in the *Alloy surcharges* decision. Furthermore, the argument which the applicant bases on the 20% reduction granted to Ke Kelit could only lead to an increase in the fine imposed on Ke Kelit.

358 In any event, the applicant cannot rely on Section B of the leniency notice to claim immunity in respect of the facts committed after the investigation had been initiated. On the contrary, the fact that the applicant continued the infringement in those circumstances was sufficiently objectionable to induce the Commission to increase the fine as a deterrent.

2. Findings of the Court

359 It should be observed at the outset that in the leniency notice the Commission defined the conditions in which undertakings which cooperate with it during the investigation into a cartel may be exempt from a fine or receive a reduction in the fine which they would otherwise have had to pay (see Section A 3 of the leniency notice).

360 As stated in Section E 3 of the leniency notice, the notice has created legitimate expectations on which undertakings wishing to inform the Commission of the existence of a cartel rely. Having regard to the legitimate expectation which undertakings wishing to cooperate with the Commission were able to derive from that notice, the Commission was therefore obliged to comply with it when assessing the applicant's cooperation for the purpose of setting the fine.

361 However, the applicant cannot maintain that the Commission should have applied the criteria set out in the draft notice in its case. As held in paragraph 246 above, the draft notice, by warning undertakings that the Commission proposed to adopt a leniency notice concerning cooperation by undertakings in the investigation or prosecution of infringements, could not in itself give rise to any expectation that the criteria in it would be definitely adopted and then applied. If

the position were not so, it would have the undesirable effect of discouraging the Commission from publishing draft notices in order to obtain the observations of the traders concerned.

362 As regards the application of the leniency notice to the applicant's case, it should be observed that the applicant does not fall within the scope of Section B of that notice, which refers to cases where an undertaking has informed the Commission about a secret cartel before the Commission has undertaken an investigation (in which case the fine may be reduced by at least 75%), or within that of Section C, which concerns an undertaking which has disclosed the secret cartel after the Commission has undertaken an investigation which has failed to provide sufficient grounds for initiating the procedure leading to a decision (in which case the fine may be reduced by between 50% and 75%).

363 Point D of the leniency notice states that '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would had been imposed if it had not cooperated'. The notice specifies that:

'Such cases may include the following:

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

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

364 The applicant has failed to prove that the Commission, having recognised that the applicant voluntarily provided it with documentary evidence which contributed substantially to establishing important aspects of the case, in particular the fact that the members of the cartel had decided to continue its operation after the investigation, which the Commission suspected but of which it possessed no proof (point 177 of the decision), should have granted it a reduction higher than the 30% accorded to it.

365 The Commission observed in point 177 of the decision that the requests for information provided the applicant with the occasion to communicate evidence of the infringement. In that regard, it follows from the decision that, in respect of ABB's cooperation, the Commission considered that that undertaking could not be accorded the full 50% reduction available under Section D, as it had been necessary to wait until the detailed requests for information had been sent out before it cooperated (third and fourth paragraphs of point 174). It follows that the Commission was not prepared to reduce the fine by 50% when the undertaking concerned did not provide information before receiving a request for information. It is common ground that the applicant sent the documents to the Commission only after it received a request for information from the Commission.

366 As regards a comparison between the present case and the Commission's previous practice, the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to

grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (see paragraph 244 above).

367 Nor can the applicant derive an argument from the fact that KE KELIT'S fine was reduced by 20% because it did not contest the alleged facts. Even supposing that the Commission granted too high a reduction of the fine to that other undertaking, respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (*SCA Holding* v *Commission*, cited above, paragraph 160, and *Mayr-Melnhof* v *Commission*, cited above, paragraph 334).

368 Nor can the applicant claim a higher reduction for the period commencing after the initiation of the investigation, during which the infringement continued and in respect of which the applicant provided evidence to the Commission. Since continuation of the cartel constitutes an aspect that cannot be dissociated from the infringement, the infringement could only be considered as a whole when the leniency notice was applied. Since the applicant did not satisfy the conditions for the application of either Section B or Section C of the notice, its conduct had to be assessed under Section D.

369 Last, the Commission was entitled to take account of the fact that the infringement continued after the investigations not only when it calculated the duration of the infringement, but also as a further aggravating circumstance, since such conduct showed that the parties to the cartel were particularly determined to continue their infringement in spite of the risk of fines.

370 In those circumstances, the Commission did not err in law or in fact in applying its leniency notice and the complaint must therefore be rejected.

IV — *The fourth plea in law, alleging breach of the obligation to state reasons when setting the fine*

A — Arguments of the parties

371 The applicant complains that the Commission breached the obligation to state reasons by failing to ensure the transparency of the method used to set the fine. The Commission has not provided an explanation of the fact that the fine was fixed on the basis of starting points expressed in absolute amounts, unrelated to the turnover of the undertakings and higher than the maximum legally permissible level. It has not explained how it assessed the gravity of the infringement with regard to the small and medium-sized undertakings involved. In particular, it has not explained how it could depart from its previous practice of determining the amount of the fines in proportion to turnover on the relevant market.

372 The applicant alleges that the defendant also breached the obligation to state reasons by retroactively applying its new guidelines on the method of setting fines without any justification.

373 There was a further breach of that obligation in that the Commission departed from its previous leniency practice and from its draft leniency notice, which expressed precisely that practice, and instead applied a different policy set out in the final version of the leniency notice.

374 Furthermore, the Commission breached its obligation to state reasons by ignoring all the mitigating circumstances put forward by the applicant. Even if the Commission was not required to take into consideration the circumstances listed by the applicant, it should have explained why it had ignored them.

375 The defendant observes that the applicant, in its plea regarding the obligation to state reasons, is merely presenting, under another guise, the arguments which it has already put forward in relation to alleged discrimination.

376 In any event, the applicant's argument in relation to the alleged failure to state reasons is unfounded, as regards both the 'retroactive' application of the new guidelines and the fact that the Commission departed from its draft leniency notice. Last, since the Commission was under no obligation to treat certain circumstances as mitigating circumstances, it was not required to state reasons in that regard.

B — Findings of the Court

377 It is settled case-law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the

addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

378 Where a decision imposes fines on a number of undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be determined, *inter alia*, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, cited above, paragraph 54).

379 In the present case, the Commission first of all sets out in its decision its general findings concerning the gravity of the infringement in question and also the particular elements of the cartel on which it based its conclusion that the present case constituted a very grave infringement for which the fine would normally be at least ECU 20 million (points 164 and 165 of the decision). It then states that this amount must be adjusted to take account of the actual economic capacity of the offending undertakings to cause significant damage to competition and of the need to ensure that the fines were sufficiently deterrent (point 166 of the decision). The Commission then states that in determining the level of the fines, it took into account any aggravating or mitigating circumstances and also the position of each undertaking in relation to the leniency notice (point 167 of the decision).

380 As regards the fine to be imposed on the applicant, the Commission then states that, in view of the applicant's importance as the second-largest European producer of pre-insulated pipes and in order to reflect its situation as essentially a single-product company, the starting point for its fine will be adjusted to ECU 10

million owing to the gravity of the infringement in its case (first and second paragraphs of point 175 of the decision). The Commission then states that the fine to be imposed on the applicant will be weighted to reflect the duration of the infringement (third paragraph of point 175 of the decision).

381 The Commission goes on to state that the basis of the applicant's fine must be increased because of the particularly aggravating circumstance of its deliberate continuation of the infringement after the investigations and the further aggravating circumstance represented by the applicant's active role in the retaliatory measures against Powerpipe, although it was not on a par with ABB (first and second paragraphs of point 176 of the decision). The Commission also states that there are no extenuating circumstances; although the applicant may have come under pressure from ABB at various times it greatly exaggerates the extent of that pressure in claiming that it was dragged unwillingly into the cartel by ABB (third paragraph of point 176 of the decision). The Commission further states that, since the final amount calculated according to that method may not in any case exceed 10% of the applicant's worldwide turnover, as laid down in Article 15(2) of Regulation No 17, the fine will be set at ECU 12 700 000 so as not to exceed the permissible limit (fourth paragraph of point 176 of the decision).

382 Last, the Commission states that under the leniency notice, the applicant's fine will be reduced by 30% because it voluntarily provided documentary evidence which contributed to establishing important aspects of the case, in particular the fact that the members of the cartel decided to continue it after the investigation, which the Commission suspected but of which it possessed no proof (point 177 of the decision).

383 Interpreted in the light of the detailed statement in the decision of the allegations of fact against each of its addressees, points 164 to 167 and 175 to 177 contain a

relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by the applicant (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 43).

384 In those circumstances, the Commission cannot be criticised for not having given more precise reasons for the levels of the basic amount and the final amount of the fine imposed on the applicant or of the rate of reduction accorded for its cooperation, particularly since, as regards the last point, the decision classified its cooperation, in terms of importance, as falling under Section D of the leniency notice.

385 Even supposing that, as regards the level of the fine, the decision constitutes a significant increase compared with previous decisions, the Commission quite explicitly stated its reasons for fixing the amount of the applicant's fine at such a level (see Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31).

386 Nor can the applicant criticise the Commission for not having given reasons for its calculation of the fine which dealt with the matters which it put forward as mitigating circumstances.

387 Since the Commission stated in the decision that it was not taking into account any mitigating circumstance in relation to the applicant, it provided all the information which the applicant needed to know whether the decision was well founded or whether it might be vitiated by an error allowing the applicant to challenge its validity.

388 Although Article 190 of the Treaty requires the Commission to state reasons for its decisions with reference to the facts forming the basis of the decision and the considerations which led it to adopt the decision, it does not require the Commission to discuss all the points of fact and of law dealt with during the administrative procedure (*Michelin* v *Commission*, cited above, paragraphs 14 and 15, and *Fiskeby Board* v *Commission*, cited above, paragraph 127).

389 In any event, as regards the pressure experienced by the applicant, in the third paragraph of point 176 of the decision the Commission explained its reasons for not taking that pressure into account as a circumstance which justified a reduction of the fine.

390 Last, the Commission cannot be criticised for not having explained the legal framework applying to the present case, in particular the application of the new guidelines or of the leniency notice. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 63). Having regard to the Commission's undertaking, when publishing the guidelines and the leniency notice, to adhere to them when determining the amount of a fine for an infringement of the competition rules (see paragraphs 245 and 274 above), it was not required to state whether and on what grounds it was applying them when determining the amount of the fine imposed on the applicant.

391 Consequently, the plea alleging breach of the obligation to state reasons must be rejected.

V — *The fifth plea in law, alleging that the rate of interest on the fine is excessive*

A — Arguments of the parties

392 The applicant states that the rate of default interest, fixed in Article 4 of the decision at 7.5%, the rate charged by the European Central Bank on its ECU transactions on the first working day of the month in which the decision was adopted plus 3.5 percentage points, is abnormally high. It places unreasonable pressure on the applicant to pay the fines quickly although the applicant believes that it has good legal grounds for challenging the decision. Accordingly, the interest rate should be reduced to a reasonable level.

393 In that regard, the applicant refers to the Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge and Others* v *Commission* [2000] ECR I-1365, at I-1371, where the Advocate General states that the interest rate must not be so high as to oblige undertakings to pay fines and that the addition of three and a half percentage points to an already high rate, without any explanation, is not acceptable.

394 The defendant observes that it was entitled to fix a rate sufficiently high to dissuade the undertakings from defaulting on the fine. Having regard to current commercial bank rates, a rate of 7.5% was wholly reasonable and well within the limits of its discretion.

B — Findings of the Court

395 The charging of default interest on fines imposed on undertakings which, deliberately or negligently, infringe Article 85 of the Treaty ensures that the Treaty is effective. Default interest increases the Commission's power when it carries out its task under Article 89 of the EC Treaty (now Article 85 EC) of ensuring that the rules on competition are applied and ensures that the rules of the Treaty are not rendered ineffective by practices applied unilaterally by undertakings which delay paying fines imposed on them. If the Commission did not have the power to charge default interest on fines, undertakings which delayed paying their fines would enjoy an advantage over those which paid their fines within the period laid down (Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraphs 48 and 49).

396 If Community law did not permit measures designed to offset the advantage that an undertaking might derive from delaying payment of a fine, that would encourage manifestly unfounded actions brought with the sole object of delaying payment (*AEG* v *Commission*, cited above, paragraph 141).

397 In that context, by charging a rate of interest of 7.5%, fixed at the rate charged by the European Central Bank on its ECU transactions on the first working day of the month in which the decision was adopted plus 3.5 percentage points, the Commission clearly did not exceed the discretion which it enjoys when fixing a rate for default interest.

398 In that regard, it is to be noted that, although the interest rate must not be so high as to oblige undertakings to pay fines even though they consider that they have

good grounds for challenging the validity of the Commission decision, the Commission may none the less adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour (Opinion of Advocate General Fennelly in *Compagnie Maritime Belge and Others* v *Commission*, cited above, paragraph 190).

399 As the Commission did not commit any error of assessment in setting the rate of default interest, the plea alleging that the rate was excessive must be rejected.

400 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

401 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung P. Mengozzi

Registrar President

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