JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

6 October 2005 *

In Joined Cases T-22/02 and T-23/02,

Sumitomo Chemical Co. Ltd, established in Tokyo (Japan),

Sumika Fine Chemicals Co. Ltd, established in Osaka (Japan),

represented by M. Klusmann, lawyer, and V. Turner, Solicitor,

applicants,

v

Commission of the European Communities, represented by L. Pignataro-Nolin and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATIONS for annulment of Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1) in so far as it concerns the applicants,

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

composed of H. Legal, President, P. Lindh, P. Mengozzi, I. Wiszniewska-Białecka and V. Vadapalas, Judges,

Registrar: J. Plingers, Administrator,

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

gives the following

Judgment

Background to the dispute

1 By Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1,'the Decision'), the Commission found, in Article 1, that several undertakings had infringed Article 81(1) EC and Article 53(1) of the

Agreement on the European Economic Area (EEA) by participating in a series of agreements affecting 12 different markets for vitamins, namely vitamins A, E, B1, B2, B5, B6, folic acid, vitamins C, D3, H, beta-carotene and carotinoids. In particular, it appears from paragraph 2 of the Decision that, as part of those agreements, the undertakings in question fixed prices for the different products, allocated sales quotas, agreed on and implemented price increases, issued price announcements in accordance with their agreements, sold the products at the agreed prices, set up a machinery to monitor and enforce adherence to their agreements and participated in a structure of regular meetings to implement their plans.

2 Those undertakings included the Japanese undertakings Sumitomo Chemical Co. Ltd ('Sumitomo') and Sumika Fine Chemicals Co. Ltd ('Sumika'), which were found to be responsible for infringements on the Community and EEA markets for vitamin H (also known as biotin) and folic acid (Article 1(1)(j) and (k) of the Decision) respectively.

3 The Commission found in Article 1(2)(k) and (l) of the Decision that the infringements committed by Sumitomo and Sumika lasted from October 1991 to April 1994 and from January 1991 to June 1994 respectively.

4 Under Article 2 of the Decision, the undertakings found to be responsible for infringements were ordered to bring them to an end immediately in so far as they had not already done so and to refrain from any act or conduct found to be an infringement and from any measure having the same or equivalent object or effect.

5 Whilst the Commission imposed fines for infringements found in the markets for vitamins A, E, B2, B5, C, D3, beta-carotene and carotinoids, it did not impose fines in respect of the infringements found in the markets for vitamins B1, B6, H and folic acid (Article 3 of the Decision).

6 It is clear from paragraphs 645 to 649 of the Decision that the infringements found in those markets came to an end more than five years before the Commission began its investigation and that Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) therefore applied in respect of those infringements.

7 Accordingly, no fines were imposed on Sumitomo and Sumika amongst others.

8 It is also clear from the Decision (paragraph 650) that those two undertakings submitted, in their respective replies to the statement of objections, that the infringements which they allegedly committed were time-barred and so could no longer be the subject of a Commission decision.

9 The Commission rejected that argument at paragraph 651 of the Decision, arguing that 'the rules on limitation periods concern exclusively the imposition of fines or penalties' and that '[t]hey have no bearing on the entitlement of the Commission to investigate cartel cases and to adopt, as appropriate, prohibition decisions'.

Procedure and forms of order sought

10 By separate applications lodged at the Registry of the Court of First Instance on 7 February 2002, Sumitomo and Sumika brought the present actions, registered as Cases T-22/02 and T-23/02 respectively.

11 By order of the President of the First Chamber of the Court of First Instance of 30 April 2004, Cases T-22/02 and T-23/02 were joined for the purposes of the oral procedure and judgment on account of the connection between them, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance.

12 Pursuant to Article 14 of the Rules of Procedure and acting on a proposal from the First Chamber, the Court decided, after the parties had been heard in accordance with Article 51 of those rules, to refer the present cases to a Chamber sitting in extended composition.

13 The composition of the Chambers of the Court of First Instance changed at the beginning of the new judicial year and the Judge-Rapporteur was assigned to the Fourth Chamber, to which these cases were accordingly assigned.

14 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure.

15 The parties presented oral argument and their replies to the Court's questions at the hearing on 18 November 2004.

16 In Case T-22/02 Sumitomo claims that the Court should annul the Decision in so far as it concerns it and order the defendant to pay the costs.

17 In Case T-23/02 Sumika claims that the Court should annul the Decision in so far as it concerns it and order the defendant to pay the costs.

18 The Commission contends in each of the two joined cases that the Court should dismiss the action and order the applicant to pay the costs.

The claims for annulment

19 In support of their actions, the applicants raise two pleas in law alleging that the Commission's power to find the infringements was time-barred and that the Commission lacked competence.

1. *The first plea in law, alleging that the Commission's power to find the infringements was time-barred*

20 The applicants submit that in the present case the Commission could not adopt a prohibition decision in regard to them because it was time-barred by reason, first, of the expiry of the time-limit laid down in Article 1 of Regulation No 2988/74 and, second, of certain general principles of Community law.

First limb: application of Regulation No 2988/74

Arguments of the parties

21 The applicants submit that the power of the Commission to impose fines or penalties for infringements of the Community rules relating to competition is subject to a limitation period of five years under Article 1 of Regulation No 2988/74 and that the Commission itself admitted that that limitation period had expired in relation to the applicants.

22 They consider that a formal prohibition decision such as that which was taken in the present case against them must be treated as a 'penalty' within the meaning of that article because at least three types of punitive effect flow from it.

23 First, the Decision, finding an infringement of competition law through an alleged worldwide cartel, is capable of giving rise to other public-law proceedings in Member States where the rules on limitation periods are different and even in other countries; the Commission's findings could be used as evidence in those

proceedings, which would result in the applicants at the very least incurring very high costs in preparing their defence. Second, the applicants could face civil law actions brought before national courts by third parties who would base their actions for damages on the Decision. Third, the Decision is seriously detrimental to the applicants' reputation, as would be the adverse publicity arising from civil actions brought by third parties.

24 The applicants point out that according to the preamble to Regulation No 2988/74 the aim of the regulation is to introduce, in the interests of legal certainty, the principle of limitation as regards both fines and other penalties. The purpose of introducing limitation periods such as those laid down by Regulation No 2988/74 in a particular legal system is to ensure that, in the interests of the sound operation of the legal system, infringements committed a long time previously are no longer the subject of proceedings and sanctions. Legal certainty, justice and the efficiency of the administration require that the latter use its resources and taxpayers' money in pursuing current infringements and not past ones. Accordingly, after a certain time, not only should undertakings not be fined but they also should not have to worry about receiving a decision finding an infringement with the punitive effects which follow therefrom.

25 It follows that, under Regulation No 2988/74, not only could the Commission not impose fines on the applicants but it could no longer adopt a prohibition decision finding that they had committed an infringement.

26 The defendant submits that Article 1(1) of Regulation No 2988/74, read in context and in the light of the drafting history of that regulation, cannot be interpreted as applying to fines or penalties other than those purely pecuniary penalties referred to in the legislation cited in the preamble to that regulation. That article uses the two terms 'fines' and 'penalties' precisely so as to subject all the pecuniary penalties

envisaged, whether called 'fines' or 'penalties' by that legislation, to the same limitation system. The initial draft of the regulation submitted by the Commission, by using the dual term 'fines (penalties)', and the two amended drafts which succeeded it, clearly show that the two terms were used synonymously. The opinion of the Economic and Social Committee (now the European Economic and Social Committee, EESC) of 29 June 1972 in turn shows, in its first sentence ('The draft regulation concerns only the power to impose and recover fines for infringement of measures adopted under the EEC Treaty in the areas of transport and competition law'), that that committee had understood the draft regulation as referring exclusively to fines in the broad sense, including periodic penalty payments.

27 The defendant considers in any event that any penalty imposed by a competition authority of a third country or any order of a national court to pay damages cannot be regarded as a penalty imposed by the Commission. Moreover, damage to reputation is at most an indirect consequence of the adoption of the Decision and cannot be regarded as a penalty. Furthermore, the applicants confuse the adoption and the publication of a decision finding an infringement. Only the publication can constitute a potential risk to the addressee's interests, but is not thereby a penalty.

28 In their reply, the applicants submit that if, pursuant to Regulation No 2988/74, the Commission no longer has the power to require undertakings to bring to an end any infringement which it establishes and to impose fines and periodic penalty payments in respect of an infringement, it necessarily follows that it no longer has the implied power to find the infringement in question (Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraph 23).

29 The applicants point out that, when the Court of Justice interprets Community law, it has recourse to the clear meaning of the words, the legislative context, the purpose

of the measure and, only in the alternative, to the legislative history (Opinion of Advocate General Tizzano in Case C-133/00 *Bowden and Others* [2001] ECR I-7031, I-7033, points 28 to 30). The legislative history cannot itself be considered to express clearly the intention of the authors of a regulation (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 128 and 129). What matters in the present case is therefore not the way in which the EESC understood the draft regulation but the express wording of the final text of the regulation.

30 The wording of Article 1 of Regulation No 2988/74 is clear and unequivocal. It leaves no doubt that because of its punitive effects and the classic criminal law purpose which it pursues, the decision finding an infringement in fact constitutes a penalty within the meaning of that article. The defendant itself admits as much in recognising that it adopted a decision serving the interest of 'promoting exemplary behaviour' and of 'discouraging recidivism', two interests which, according to the applicants, are the classic objectives of all penalties. They stress, first, that it is further apparent from the Opinion of Advocate General Reischl in *GVL* v *Commission* (at 510 and 516) that the defendant had already admitted in that case that a decision finding an infringement also has a penalty effect by its publication in the Official Journal and, second, that the Court, in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 104, recognised that the publication of a decision has the effect of a supplementary penalty.

31 The applicants stress in particular that a national court of a Member State or a third country could use the Commission's findings as 'prima facie sufficient evidence' that the applicants would have the greatest difficulties in refuting in particular in the Member States of the European Union. They cite in that respect decisions of the judicial bodies of Australia, the United States and Canada, and the judgment in Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraphs 49 to 52). They point out that in its pleadings the defendant itself implicitly acknowledges such a possibility in so far as it cites in its reply to the second plea in law, 'the interest in

assisting the taking of national civil proceedings by injured parties' as a legitimate interest entitling it to adopt a decision finding an infringement (see paragraph 122 below).

32 The applicants add that the applicability of Regulation No 2988/74 to decisions finding an infringement is not called into question by the legislative context either. They submit that the use in Article 1 of that regulation of the term 'penalty' is not explained, as the defendant alleges, by the need to submit variously named pecuniary penalties to a common limitation period. The term 'fines' also clearly included the pecuniary penalty laid down by Council Regulation No 11 of 27 June 1960 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty establishing the European Economic Community (OJ, English Special Edition 1959-1962, p. 60).

33 In its rejoinder the defendant challenges the argument which the applicants base on *GVL* v *Commission* and states in particular that in that judgment the Court did not find that the implied power to adopt decisions finding an infringement flowed directly from the powers, expressly provided for by the legislation, to order that those infringements be brought to an end and to impose fines, but that all those powers had as their common bases Article 83 EC and 85 EC. Furthermore, the defendant disputes the applicants' interpretation of *ACF Chemiefarma* v *Commission*.

Findings of the Court

34 It should be noted as a preliminary point that the Commission is responsible for the implementation and orientation of Community competition policy. Thus, Article 85 (1) EC which, in that domain, constitutes a specific expression of the general

supervisory task entrusted to the Commission by Article 211 EC, assigns it the task of ensuring the application of the principles laid down in Articles 81 EC and 82 EC and the provisions adopted on the basis of Article 83 EC confer extended powers on it (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 44; *Masterfoods and HB*, paragraph 46; and Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 73 and 74).

35 The purpose of the powers conferred on the Commission by Council Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), applicable to the present case *ratione temporis*, is therefore to enable the Commission to carry out its task under Article 85 EC of ensuring that the rules on competition are applied in the common market (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 54, and Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraphs 61 and 66). It is consistent with the general interest to avoid anti-competitive practices and agreements, to discover them and to impose sanctions (*Aalborg Portland and Others* v *Commission*, paragraph 54).

36 Thus, Regulation No 17 has authorised the Commission to require undertakings to bring to an end any infringement which it establishes and to impose fines and periodic penalty payments in respect of an infringement. The power to take decisions of such a type necessarily implies a power to make a finding that the infringement in question exists (*GVL* v *Commission*, paragraph 23).

37 The cessation of an infringement prior to the adoption of a decision by the Commission does not in itself constitute an obstacle to the Commission's exercise of its powers to find and penalise an infringement of the competition rules. In that respect, the Court of Justice has already held, first, that the Commission's power to

impose penalties is in no way affected by the fact that the conduct constituting the infringement has ceased and that it can no longer have detrimental effects (*ACF Chemiefarma* v *Commission*, paragraph 175) and, second, that the Commission may take a decision finding an infringement which the undertaking has already terminated, on condition, however, that the institution has a legitimate interest in so doing (*GVL* v *Commission*, paragraph 24).

38 In the present case, in the Decision, the Commission merely found, in relation to the applicants, that they had infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by entering into agreements affecting the Community and EEA markets for vitamin H (in the case of Sumitomo, from October 1991 to April 1994) and folic acid (in the case of Sumika, from January 1991 to June 1994) and required them to refrain from repeating any such act or conduct or adopting any measure having the same or equivalent object or effect. By contrast, the Commission did not impose any fines on the applicants, on the ground that they had brought to an end their participation in those agreements more than five years before the Commission began its investigation, which meant, in accordance with Article 1 of Regulation No 2988/74, that the power of the institution to impose fines was time-barred.

39 By the first limb of their first plea in law, the applicants essentially complain that the Commission infringed Article 1 of Regulation No 2988/74 in so far as the limitation period which it lays down also, in their view, covers the power to find the infringement in question. In particular, they argue, first, that a decision finding an infringement falls within the meaning of 'penalties', which the Commission cannot impose once the limitation period referred to in that provision has expired and, second, that when the power to impose fines has become time-barred the implied power to find an infringement is necessarily time-barred.

40 It is therefore necessary in the first place to determine whether, as the applicants allege, the limitation period laid down by Article 1(1) of Regulation No 2988/74 applies to the Commission's power to find an infringement of Article 81(1) EC.

41 Article 1(1) of Regulation No 2988/74 provides that '[t]he power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying-out of investigations;

(b) five years in the case of all other infringements'.

42 For the purposes of a literal interpretation of that provision, it must be borne in mind that Community legislation is drafted in various languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions (Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 18).

43 In that respect, it should be noted that the wording of Article 1(1) of Regulation No 2988/74 in almost all its language versions states that what is subject to limitation is the Commission's power to impose fines or penalties. None of the language versions refers to a limitation period for acts or infringements or the Commission's power to find infringements. It is appropriate therefore to consider the scope of the term 'penalties', which appears alongside the term 'fines' in that provision, to determine whether, as the applicants submit, that term also covers a decision finding an infringement.

44 Whilst in the majority of language versions that term, considered on its own, is capable of bearing a wider meaning than the term 'fines', which only refers to pecuniary penalties, there are language versions (namely, the Finnish and Swedish versions) in which that term, like the term 'fines' which precedes it, necessarily refers to pecuniary penalties.

45 An interpretation based on the title of Article 1 is also somewhat problematic in view of contradictory indications. In certain language versions of Regulation No 2988/74, that title refers to the limitation period in respect of the action or procedures, which could suggest that the scope of the limitation period referred to in the provision in question exceeds the mere power to penalise the infringements, so as to cover the possibility even of bringing an action or initiating a procedure seeking merely to establish infringements. In other versions, the title contains terms — such as *'poursuites'* (French version) or *'vervolging'* (Dutch version) — which, unlike the terms 'action' or 'procedures', clearly evoke the idea of punishment. In the Danish language version, the title refers to the limitation period of the power to impose 'economic' penalties.

46 According to settled case-law, whilst the need for a uniform interpretation of Community regulations means that a particular provision should not be considered in isolation but, in cases of doubt, should be interpreted and applied in the light of the other official languages, in the case of divergence between language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case 9/79 *Koschniske* [1979] ECR 2717, paragraph 6; Case 100/84 *Commission* v *United Kingdom* [1985] ECR 1169, paragraph 17; Case C-152/01 *Kyocera Electronics Europe* [2003] ECR I-13821, paragraph 33; and Case T-80/97 *Starway* v *Council* [2000] ECR II-3099, paragraph 81).

47 More generally, however, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs, the objects of the rules of which it is part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12), and the provisions of Community law as a whole (*CILFIT*, paragraph 20).

48 With regard to contextual and teleological interpretation, it should be noted that, as is clear from draft COM(71) 1514 final of the Commission of 23 December 1971, placed on the file by the defendant, the adoption of Regulation No 2988/74 was the Community legislature's response to the indications given in the judgments of the Court of Justice delivered in 1970 in the cases concerning the cartel in the quinine market (see, in particular, *ACF Chemiefarma* v *Commission*, paragraphs 18 to 20), repeated in 1972 in the cases on the cartel in the dyestuffs market (see, in particular, Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 21), in which the Court, after noting that the provisions governing the power of the Commission to impose fines in cases of infringement of the rules on competition did not provide for a limitation period, emphasised that in order to fulfil its function of ensuring legal certainty a limitation period must be fixed in advance and that the fixing of its duration and the detailed rules for its application fall within the competence of the Community legislature.

49 It should be pointed out that the first recital of Regulation No 2988/74 states that, under 'the rules of the European Economic Community relating to transport and competition the Commission has the power to impose fines, penalties and periodic penalty payments on undertakings or associations of undertakings which infringe Community law relating to information or investigation, or to the prohibition on discrimination, restrictive practices and abuse of dominant position'; it is also stated there that 'those rules make no provision for any limitation period'.

50 Moreover, in the second recital of that regulation it is stated, inter alia, that 'it is necessary in the interests of legal certainty that the principle of limitation be introduced and that implementing rules be laid down and that, for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions, imposing fines, penalties or periodic penalty payments'.

51 The third recital states that the regulation 'must apply to the relevant provisions of Regulation No 11 ... Regulation No 17 ... and of Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302)'.

52 As the defendant rightly pointed out, Regulations No 17 and No 1017/68 lay down the Commission's power to impose 'fines' (see Article 15 of Regulation No 17 and Article 22 of Regulation No 1017/68), whereas Regulation No 11 empowers the Commission to impose 'penalties' (see Articles 17 and 18 of Regulation No 11). The 'penalties' referred to by the latter regulation are furthermore exclusively pecuniary, as is clear, first, from the fact that a maximum amount of the penalty is always expressed in units of account or as a multiple of the price of the transport charged or asked by the infringing party and, second, from the fact that it is laid down that those penalties 'shall be enforced in the conditions laid down in Article 192 of the Treaty [now Article 256 EC]', relating to 'decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States' and which, according to that article, are 'enforceable' (see Articles 17, 18 and 23 of Regulation No 11).

53 In those circumstances, the use in Article 1(1) of Regulation No 2988/74 of the word 'penalties' in addition to the word 'fines' is justified by the need to clarify the fact that the limitation period laid down by that provision also concerns the power to impose pecuniary penalties not classified as fines, such as those referred to in Regulation No 11.

54 The applicants' argument — that that clarification was not necessary since the term 'fines' can also cover the penalties under Regulation No 11, so that the Commission's interpretation of the term 'penalties' in Article 1(1) of Regulation No 2988/74 renders that latter term ineffective — is not convincing.

55 It should be noted that, applying a contextual interpretation, the provisions of Regulation No 2988/74 concerned with the limitation period for 'enforcement', namely the limitation period for 'the power of the Commission to enforce decisions imposing fines, penalties or periodic payments for infringements of the rules of the European Economic Community relating to transport or competition' (Article 4), show that the Community legislature, in adopting that regulation, did not use the term 'fines' to refer to all penalties of a pecuniary nature. In particular, according to Article 5, the limitation period for the enforcement of sanctions is interrupted either by notification of a decision varying the original amount of the fine, penalty or periodic penalty payments or refusing an application for variation, or by any action of the Commission, or of a Member State at the request of the Commission, for the purpose of enforcing payments of a fine, penalty or periodic penalty payment. The references to the amount and enforcement of payment of the penalty show that the Community legislature did not use the term 'penalties' to refer to non-pecuniary penalties.

56 It cannot be inferred in this respect from the third recital of Regulation No 2988/74, which states that that regulation 'must also apply to the relevant provisions of future regulations in the fields of European Economic Community law relating to transport and competition', that by mentioning 'penalties' alongside 'fines' in Article 1(1) of Regulation No 2988/74 the Community legislature intended to make subject to the limitation period all powers which may be conferred on the Commission under the rules on transport and competition to impose penalties, including non-pecuniary penalties.

57 Such an inference is precluded when other provisions of Community law are taken into consideration as part of a systematic interpretation of that article. It is appropriate in that regard to analyse the recitals and provisions of Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ 1978 L 94, p. 22).

58 The recitals and provisions of that decision, adopted some four years after the adoption of Regulation No 2988/74, are clearly modelled on those of the earlier regulation. It should be noted that the limitation period in respect of proceedings laid down by Article 1(1) of that decision concerns only 'the Commission's power to impose fines', the term 'penalties' not appearing in that provision. Generally, where a recital or provision of Regulation No 2988/74 refers to 'fines or penalties', the corresponding recital or provision of Decision No 715/78 refers merely to 'fines', and the term 'penalties' does not appear anywhere in that decision. It should be added that the recitals of that decision refer to the articles of the ECSC Treaty which confer on the Commission the power to impose fines and periodic penalty payments, articles which do not include the term 'penalties'. However, as in the case of Regulation No 2988/74, the legislature did not want to restrict the scope of the rules on the limitation period for proceedings merely to 'provisions relating to fines and periodic penalty payments laid down in the Treaty and in implementing measures taken [until then] thereunder', but also expressly mentioned 'the relevant provisions of future implementing measures'. Nevertheless, it did not use the term 'penalties', so that the scope of the decision in question cannot in principle cover penalties other than fines (see the first and fifth recitals).

59 If the term 'penalties' in Regulation No 2988/74 had to be interpreted as also referring to decisions finding infringements, such decisions would be subject to the system of limitation under the EC Treaty but not under the ECSC Treaty, even though the limitation rules under the ECSC Treaty are clearly based, down to the

last detail, on that introduced shortly before in the context of the EC Treaty. There would be no rationale for such a difference.

60 In the light of the foregoing considerations, it should be held that, as the defendant submits, the term 'penalties' in Article 1(1) of Regulation No 2988/74 seeks merely to make the Commission's power to impose pecuniary penalties for infringements of the rules of the European Economic Community relating to transport or competition subject to one and the same system of limitation, regardless of the name adopted for those penalties in the texts establishing them.

61 A decision finding an infringement is not a penalty within the meaning of Article 1 (1) of Regulation No 2988/74 and is not therefore covered by the limitation period laid down by that provision.

62 Second, the applicants' argument that, in any event, the expiry of the limitation period for the power to impose fines and periodic penalty payments necessarily implies the extinction of the implied power to find the infringement (paragraph 28 above) cannot succeed either.

63 Whilst under the system established by Regulation No 17 the Commission's power to find an infringement arises only implicitly, inasmuch as the express powers to order cessation of the infringement and to impose fines necessarily imply this power (*GVL* v *Commission*, paragraph 23), such an implied power is not however dependent solely on the exercise by the institution of those express powers. The

Court acknowledged the existence of that implied power in a judgment — *GVL* v *Commission* — which concerned the legality of a Commission decision finding an infringement which had been brought to an end and imposing no fine. It is not therefore possible to deny that the power in question is autonomous, or that this autonomy is unaffected by the fact that the exercise of that power was made subject to the existence of a legitimate interest of the Commission.

64 It follows that the first limb of the present plea in law is unfounded.

Second limb: application of the general principles of Community law

Arguments of the parties

65 The applicants submit that the Commission could not adopt the Decision against them, as the Commission was time-barred by reason of various general principles of Community law.

66 First, they refer to the principle of legal certainty. They submit that the fundamental reason for limitation periods in the European Union is that after a certain period it is in the interests of the proper functioning of the legal system that infringements should no longer be the subject of legal proceedings or no longer give rise to any 'penalty'. They point out, moreover, that, according to both the Commission's *Fourth Report on Competition Policy* and the preamble to Regulation No 2988/74, the introduction by the latter regulation of a limitation period in respect of proceedings and enforcement seeks to ensure legal certainty, which, according to the applicants, is an essential requirement which must have a bearing not only on the Commission's power to impose fines, but also on its power to impose any type of penalty, such as a prohibition decision.

67 Second, by adopting the Decision against them, the Commission infringed the general principles of law of the Member States. Citing in particular passages from decisions of national courts or academic works on limitation in the law of various Member States, the applicants assert that it is also clear from the rationale for the limitation rules in the legal systems of the Member States that those rules must be applied so as to avoid any legal proceedings and penalty in respect of infringements committed a long time before.

68 Third, the Decision is contrary to the presumption of innocence enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter'), and Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (ECHR), under which everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

69 Respect for that presumption is required of the Commission, first, by virtue of Article 51(1) of the Charter, requiring in particular the institutions of the Union to respect the rights and observe the principles set out in the Charter and, second, by virtue of the fact that it is a fundamental right guaranteed by the ECHR and therefore a general principle of Community law pursuant to Article 6(2) EU and the settled case-law of the Community Courts (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 713, and *Mannesmannröhren-Werke* v *Commission*, paragraph 60).

70 The applicants stress, as regards the scope of the presumption of innocence, that the European Court of Human Rights has held that any ground of a judicial decision bringing a procedure to an end on account of the expiry of the limitation period

infringes Article 6(2) of the ECHR if it suggests merely that the accused acted illegally and thus committed a fault (see ECHR judgment of 26 March 1982 *Adolf* Series A no. 49, § 38) or if it gives the impression that the judge considers the accused to be guilty (ECHR judgment of 25 March 1983 *Minelli* Series A no. 62, § 37).

71 Therefore, according to the applicants, the Commission in the present case could not, without infringing the presumption of innocence, either suggest that the applicants had acted illegally or adopt a decision the effect of which was to establish that illegality.

72 The defendant submits that the present limb can be treated only as a further argument in support of the first limb of the first plea in law and that it is unfounded. It states in particular that the applicants seem to presume that a limitation period of five years applies also by virtue of general principles but they do not explain why that should be so or why the interest in legal certainty is so undermined by a decision finding an infringement, adopted some seven years after the end of the infringement to defend a legitimate interest, that the Decision should be annulled. Moreover, it observes that it follows from the applicants' argument that the Member States which have limitation periods longer than five years for administrative decisions or civil actions in the field of competition infringe the general principles of Community law.

73 It challenges the relevance of the case-law of the European Court of Human Rights cited by the applicants, which concern cases of the expiry of time-limits in circumstances in which their applicability was not in issue and throw no light on the scope of the time-limits set out in the Community legislation. According to the defendant, the presumption of innocence applies only prior to the adoption of a

decision (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 281) and cannot dictate whether or not a decision can be adopted, having regard to the principle of legal certainty and any relevant rules on limitation.

74 In their reply, the applicants repeat their assertion that 'the Commission would also have been time-barred from adopting the contested Decision under general principles of Community law'. They state that they did not allege that the general principles of Community law establish a limitation period similar to that in Article 1 (1) of Regulation No 2988/74, but rather that 'they have shown that this limitation period follows directly from the EC Treaty, particularly Article 85(2) EC, in conjunction with Articles 3(1) and 15(2) of Regulation No 17 and Article 1(1) of Regulation No 2988/74, and has — at the same time — its legal basis, in particular, in general principles of law, such as the principles of legal certainty and the proper administration of the law'.

75 In its rejoinder, the defendant stresses the fact that the applicants' argument that Regulation No 2988/74 is based on general principles of law demonstrates nothing as regards the scope of that regulation. It is for the Community legislature, within the limits applicable according to the subject, to fix different limitation periods for different types of procedure. That applies even to the various procedures relating to penalties, as shown by Article 1 of Regulation No 2988/74 itself and, a fortiori, to the measures which do not impose penalties, in any sense of the term. In the case of a decision finding an infringement which, in the defendant's eyes, does not fall within the scope of that regulation, there is nothing to suggest that the adoption of a decision finding an infringement which ceased five years and a few weeks before the Commission began its investigation is contrary to any rule on limitation that might be inferred directly from general principles of law.

Findings of the Court

76 Given a certain ambiguity in the arguments which they put forward in their pleadings on the present limb, the applicants were requested at the hearing to specify the scope of those arguments. They thus stated that they relied on certain general principles of Community law, first, in support of their interpretation of Regulation No 2988/74 under the first limb of the present plea and, second, in support of their submission that by adopting the Decision against them, the Commission directly infringed those principles, independently of the alleged infringement of Regulation No 2988/74.

77 First, the present limb thus raises the question whether the Court's interpretation of Article 1(1) of Regulation No 2988/74 in its analysis of the first limb of the present plea in law is contrary to the general principles of Community law cited by the applicants. Indeed, in interpreting a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law (Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 17; Joined Cases C-90/90 and C-91/90 *Neu and Others* [1991] ECR I-3617, paragraph 12; and Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 9).

78 Second, the present limb raises the question of whether or not those principles directly preclude the adoption of a decision finding an infringement against the applicants, adopted approximately seven and a half years after the alleged infringing conduct came to an end and on the basis of an investigation begun approximately five years and four or five months after that cessation.

79 The Court considers it appropriate to examine those two questions sequentially in the light of each of the principles invoked by the applicants in the context of the present limb.

— Principle of legal certainty

80 The principle of legal certainty aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case T-206/00 *Hult* v *Commission* [2002] ECR-SC I-A-19 and II-81, paragraph 38).

81 According to the Court's case-law, in order to fulfil its function of ensuring legal certainty, a limitation period must be fixed in advance and the fixing of its duration and the detailed rules for its application fall within the competence of the Community legislature (*ACF Chemiefarma* v *Commission*, paragraphs 19 and 20; *Geigy* v *Commission*, paragraph 21; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 139; and Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others* v *NALOO* [2003] ECR I-11421, paragraph 106).

82 The limitation period, by preventing situations which arose a long time previously from being indefinitely brought into question, tends to strengthen legal certainty but can also allow the acceptance of situations which at least in the beginning were unlawful. The extent to which provision is made for it is therefore the result of a choice between the requirements of legal certainty and those of legality, on the basis of the historical and social circumstances prevailing in a society at a given time. It is therefore a matter for the legislature alone to decide.

83 It is not therefore open to the Community judicature to criticise the Community legislature for the choices it makes concerning the introduction of rules on limitation and the setting of the corresponding time-limits. The failure to set a limitation period for the exercise of the Commission's powers to find infringements of Community law is not therefore in itself unlawful from the point of view of the principle of legal certainty.

84 Thus, the principle of legal certainty does not preclude the interpretation of Article 1(1) of Regulation No 2988/74 adopted in the assessment of the first limb of the present plea in law, namely that the limitation period referred to in that article applies only to the power to impose pecuniary penalties and, in particular, does not cover the Commission's power to find an infringement.

85 Consequently, in so far as, by invoking the principle of legal certainty, the present limb seeks to support the contrary interpretation pleaded by the applicants in the context of the first limb of the present plea in law, it must be rejected.

86 As for the applicants' reliance on the principle of legal certainty as a parameter for assessing the legality of the Decision separately from the application of Regulation No 2988/74, it should be stressed that the applicants' arguments are essentially based on the notion that mere consideration of the time elapsed since the infringements imputed to the applicants came to an end precluded any action and the adoption of the Decision against them. More particularly, the applicants do not allege that the Commission was aware or that it could and should have been aware of the infringements in question at a time which would have enabled it to act sooner. They submit quite simply that the Commission's action in relation to the finding of

those infringements, in that it began, when the first requests for information in respect of vitamin H and folic acid were sent, five years and four or five months after those infringements came to an end and resulted in a decision finding an infringement adopted approximately seven and a half years after that cessation, was too late in the light of the requirements of legal certainty.

87 It should be noted in that regard that it is not for the Community Courts to fix the time-limits, scope or detailed rules for the application of the limitation period in respect of an infringement, whether generally or in relation to specific cases of which they are seised. It is however clear from the case-law of the Court of Justice that the absence of legislative limitation does not preclude censure of the Commission's action, in a specific case, in the light of the principle of legal certainty. According to the Court of Justice, in the absence of any provision laying down a limitation period, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers (*Geigy* v *Commission*, paragraph 21; *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 140; *International Power and Others* v *NALOO*, paragraph 107; Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 116; and Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 90).

88 Accordingly, the Community judicature, when examining a complaint alleging that the Commission's action was too late, must not merely find that no limitation period exists, but must satisfy itself that the Commission did not act excessively late (see, to that effect and by analogy, Case T-307/01 *François* v *Commission* [2004] ECR II-1669, paragraph 46).

89 However, it does not follow from the above case-law of the Court of Justice that the question whether the Commission acted excessively late must be assessed solely on the basis of the time which elapsed between the events which form the subject-matter of the action and the commencement of the action itself. On the contrary, it

may be inferred from this case-law that the Commission cannot be regarded as having acted excessively late if there is no delay or other negligent act imputable to it and that account should be taken in particular of the time when the institution became aware of the acts constituting the infringement and of the reasonableness of the duration of the administrative procedure (see, in particular, *Geigy* v *Commission*, paragraph 21, in which the Court of Justice asked if the institution's 'conduct in the present case' could be regarded 'as constituting a bar to the exercise of [its] power [to impose fines]'; *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 144, read in the light of paragraph 132; Case C-372/97 *Italy* v *Commission*, paragraphs 118 and 119; and Case C-298/00 P *Italy* v *Commission*, paragraphs 91 and 92; see also Case T-369/00 *Département du Loiret* v *Commission* [2003] ECR II-1789, paragraph 56, and *François* v *Commission*, paragraphs 48 to 54).

90 In the present case, it is not a question of negligence on the part of the Commission in initiating or completing the administrative procedure, but of the mere and actual elapse of time from the cessation of infringements, it not being alleged that the Commission was aware, or even could and should have been aware of them, at a time which would have enabled it to act sooner. It is indeed apparent from the Decision that the Commission received information about the infringements in question during 1999, that during that year it sent requests for information, that the statement of objections was adopted on 6 July 2000 and the Decision adopted on 21 November 2001. There is nothing in that chronology to suggest that the procedure was unreasonably long.

91 Since the mere fact that the Commission did not discover an unlawful cartel, which for obvious reasons is intentionally secret, cannot be treated as negligence on its part in the light of the supervisory task entrusted to it by the Treaty, it must be held that the fact that, in the present case, the Commission only began the investigation into the relevant infringements five years and a few months after those infringements had come to an end, and that the Decision was not adopted until seven and a half years after that date, does not prove any infringement of the principle of legal certainty.

— Principles common to the laws of the Member States

92 Under this second part of the present limb, the applicants gather together a series of references to academic works or decisions of national courts dealing with limitation, extracted from the law of certain Member States, with which they seek to demonstrate essentially that the rationale for the limitation periods set in the laws of the Member States requires that those periods, once elapsed, preclude not only the imposition of penalties but also the finding of infringements.

93 However, the applicants have fallen far short of demonstrating the existence of principles common to the laws of the Member States concerning limitation.

94 In the academic writing and case-law cited in the applications, relating to limitation in both civil and criminal law, other reasons for setting limitation periods are given besides legal certainty: the requirement to prevent actions which are brought late and are motivated more by an intention to cause harm than by justice; the deterioration of evidence; the need to penalise a lack of diligence on the part of the person bringing the action; the eventual disappearance of the public interest in pursuing infringements and the requirement that the public authorities focus on current matters.

95 It follows from those very references that various requirements may underlie the laying down of rules on limitation. The Court considers that it is for each legislature to decide, in the various areas in which it is competent to legislate, whether one or

other of those requirements calls for the setting of limitation periods and to adjust the scope and rules for the application of those time-limits on the basis of its objectives in introducing them.

96 In particular, the applicants have not established the existence of a rule of law common to the Member States, under which, where a limitation period is fixed for a particular infringement, it must be applied both to the power to penalise the infringement and to the power to find it.

97 Moreover, even if the legal systems of all the Member States in fact apply one and the same limitation period to the power to find infringements and the power to impose penalties, such a rule would not thereby apply in the Community legal system. It would still be necessary for that rule to be essential in those legal systems as a genuine general principle of law and not merely to derive from the specific provisions adopted by the legislature in the exercise of its wide discretion.

98 Since limitation itself does not constitute a general principle of law (see paragraphs 82 and 83 above), that same status cannot a fortiori be accorded to a rule requiring the application of one and the same limitation period to the power to find infringements and the power to impose penalties.

99 Therefore no such rule is imposed on the Community legislature and administration as a general principle of Community law. Accordingly, the applicants' argument must be rejected both in so far as it seeks, by arguing that provisions of Community law must be interpreted so as to comply with the general principles of Community

law, to support the interpretation of Regulation No 2988/74 which they put forward under the first limb of the present plea in law, and in so far as it seeks a declaration that, by adopting with regard to the applicants a decision which departs from that alleged rule common to the laws of the Member States, the Commission has directly infringed general principles of Community law.

100 Furthermore, in so far as the applicants rely on that alleged common rule even independently of its status as a general principle of Community law, it should be noted that, according to the case-law, the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community and that interpretation must take into account the context of the provision and the purpose of the relevant regulations (Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case T-41/89 *Schwedler* v *Parliament* [1990] ECR II-79, paragraph 27; Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraph 36; and Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 39).

101 In particular, in the absence of an express reference, the application of Community law may necessitate a reference to the laws of the Member States where the Community judicature cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of a Community provision by way of independent interpretation (Case T-85/91 *Khouri* v *Commission* [1992] ECR II-2637, paragraph 32, and *Díaz García* v *Parliament*, paragraph 36).

102 In the present case, the Court held, in its analysis of the first limb of the present plea in law, that the meaning and scope of Article 1(1) of Regulation No 2988/74, with regard to the question raised by the applicants, emerge from an independent

interpretation of that provision, carried out according to the literal, contextual, teleological and systematic methods of interpretation. Accordingly, there is no need to refer to the laws of the Member States in interpreting that provision.

— Presumption of innocence

103 The applicants further invoke the presumption of innocence as set out in Article 48 (1) of the Charter and Article 6(2) of the ECHR.

104 It should be emphasised first of all in that regard that the presumption of innocence as contained in particular in Article 6(2) of the ECHR is among the fundamental rights which, according to Article 6(2) EU and the Court's settled case-law, are protected in the Community legal order (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 149, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 175).

105 It is also clear from the case-law that the presumption of innocence applies to the procedures relating to infringement of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, *Hüls* v *Commission*, paragraph 150; *Montecatini* v *Commission*, paragraph 176; and *Volkswagen* v *Commission*, paragraph 281).

106 The presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a

particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of the defence in the normal course of proceedings resulting in a decision on the merits of the case.

107 It follows that the presumption of innocence does not, on the other hand, preclude a person accused of a particular infringement being found liable at the end of proceedings which have taken place fully, in accordance with the rules prescribed and in the course of which the rights of the defence could thus be fully exercised, and this is so even if a penalty cannot be imposed on the person committing the infringement because the relevant power of the competent authority is time-barred.

108 The case-law of the European Court of Human Rights cited by the applicants (see paragraph 70 above), assuming it applies to the present case, merely confirms the considerations set out in paragraphs 106 and 107 above.

109 Accordingly, it must first be stated that the interpretation of Regulation No 2988/74 adopted by the Court in examining the first limb of the present plea in law is not precluded by compliance with the presumption of innocence. It does not follow from that interpretation that the Commission is empowered to find an infringement by a decision prematurely terminating the procedure laid down by Regulation No 17 on the ground of the expiry of the limitation period set by Article 1(1) of Regulation No 2988/74. According to that interpretation, since Regulation No 2988/74 does not concern the power of the Commission to find infringements, it does not preclude the Commission, when it concludes that the limitation period referred to in Article 1 (1) of that regulation applies, from nevertheless continuing the normal course of the procedure, in accordance with the guarantees laid down for ensuring the full exercise of the rights of the defence, solely in order to make a finding of an infringement.

110 Second, there is no evidence in the present case that the Commission infringed the presumption of innocence. The Decision did not terminate the proceedings instituted against the applicants on the ground of the expiry of the limitation period, but it was adopted at the end of proceedings which followed their ordinary course and in which the applicants enjoyed — as is confirmed by the absence of any challenge on their part in this respect — all procedural guarantees which should be granted to undertakings before a decision can be adopted finding that they have infringed the competition rules.

111 In those circumstances, the applicants cannot in the present case usefully invoke the presumption of innocence.

112 In the light of the foregoing considerations, it must be found that the present limb, like the first, is unfounded and, consequently, the first plea in law must be rejected in its entirety.

2. *The second plea in law: lack of competence on the part of the Commission*

Arguments of the parties

113 The applicants submit that the Commission had no power to adopt a decision declaring that they had infringed Article 81(1) EC. Neither Article 3 of Regulation

No 17 nor any other provision empowers the Commission to adopt a decision finding an infringement where that infringement has already come to an end outside the limitation period laid down in Article 1 of Regulation No 2988/74.

114 They stress that the provisions of the EC Treaty and Regulation No 17 expressly confer on the Commission only the power to adopt measures to bring to an end an existing infringement and to impose fines or periodic penalty payments. By contrast, neither the EC Treaty nor Regulation No 17 deals with the question whether the Commission has the power to declare, by means of a decision, that an undertaking has infringed the Treaty's competition rules in the past, where that infringement had clearly come to an end before the decision or even before the Commission began its investigation.

115 The applicants accept that in its judgment in *GVL* v *Commission*, the Court of Justice held that the Commission's power to adopt a decision requiring the undertakings to bring to an end an infringement found by it and to impose fines and periodic penalty payments in cases of infringement necessarily implies the power to find the infringement. However, they point out that in that judgment the Court also stated that, in order to adopt a decision which merely finds an infringement which has already come to an end, the Commission must demonstrate the existence of a 'legitimate interest' in taking such a decision and, more particularly, the existence of a genuine danger of a return to the practice in question, thereby justifying a clarification of the legal situation by a formal decision.

116 However, whilst recognising in its practice prior to the adoption of the Decision that a legitimate interest is necessary for adopting a decision finding an infringement which has come to an end, and whilst accepting that in the present case the infringements alleged to have been committed by the applicants had already clearly come to an end in 1994, the Commission has not demonstrated a legitimate interest in finding, by the Decision, that the applicants had infringed Article 81 EC.

117 Whilst stressing that the requirement of legitimate interest must be interpreted restrictively (Opinion of Advocate General Reischl in *GVL* v *Commission*, at 512 to 521), the applicants emphasise the fact that during the administrative procedure they did not raise any legal question which needed to be clarified by a formal decision of the Commission, but merely denied, on the basis of the facts, their involvement in the alleged cartels.

118 Thus, according to the applicants, there was in the present case no genuine danger of a return to the practice in question, since it had come to an end more than five years before the Decision was adopted and the defendant had not identified any recidivism on their part since then or any reason why such recidivism was more likely than in other cases.

119 The defendant observes that the applicants are indeed obliged to admit that it has an implied competence to adopt decisions establishing an infringement of the competition rules where the infringement has come to an end and no fine is being imposed. It acknowledges that, in order to exercise that power, it must have a legitimate interest in so doing.

120 According to the defendant, there is however no reason to interpret restrictively the conditions in which the Commission exercises that competence. In particular, there is no reason to suggest that, in *GVL* v *Commission*, the Court intended to restrict the adoption by the Commission of decisions finding an infringement to situations of uncertainty as to the legality of the conduct in question. Furthermore, in that same judgment, the Court did not follow the Opinion of Advocate General Reischl, in particular as regards the existence of the implied competence in question, so that it would be wrong to rely on the arguments of the Advocate General in interpreting the scope of that judgment.

121 In the defendant's view, there is further no reason to conclude that an implied power is, *ipso facto*, exceptional. The implied power to adopt decisions finding an infringement in the pursuit of a legitimate interest concerning the application of competition law does not derogate in any way from the powers which Regulation No 17 confers on the Commission, but supplements them. The Commission's express powers are based on the idea, formulated in particular by Article 83(2)(d) EC and Article 85 EC, that it is for the Commission to ensure the rules on competition are applied by undertakings and to determine, where necessary, whether there has been an infringement of those rules (*GVL* v *Commission*, paragraph 22). It would therefore be inappropriate to adopt an a priori position on the question whether the scope of the Commission's implied competence must be interpreted widely or narrowly. What matters is to be satisfied that the circumstances exist in which it is necessary to find an infringement, so as to ensure that the rules on competition are applied by the undertakings. That underlying requirement is expressed by the test of legitimate interest.

122 Thus, other legitimate interests than that of clarifying the legal situation which might justify the adoption of a decision finding an infringement which has come to an end, such as:

— the interest in promoting exemplary behaviour on the part of undertakings, by exposing particularly serious infringements by a final decision after an administrative procedure in which the presumption of innocence and the rights of the defence were fully respected, a fortiori where, as in the present case, the undertakings contest the facts and the infringement during that procedure;

— the interest in discouraging recidivism, since a decision finding an infringement may provide the basis for increasing the fine to be imposed in the case of further infringement of the same type, because of the recidivism and in accordance with

paragraph 2 of the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3);

— the interest in assisting the bringing of national civil proceedings by injured parties who, without the assistance of the Commission's powers of obtaining evidence at Community level, would not necessarily be in a position to furnish all the requisite evidence in the case of a geographically large-scale infringement, the facts of which are contested by the undertakings involved.

123 Given the very serious nature of the infringements alleged against the applicants and their challenge of the facts, factors which clearly emerge from the wording of the Decision, those three legitimate interests are satisfied in the present case. In that regard, the defendant stresses that the applicants will also doubtless challenge, in the course of national proceedings, the facts alleged against them, that it was perfectly possible that there would be a repeat infringement if the infringements found had not been publicly condemned and that a cartel involving a fixing of prices and a sharing of information is a very serious infringement which must not be neglected in determining the fine which ought to be imposed in the case of a repeat infringement.

124 In their reply, the applicants state that the interests invoked by the defendant do not justify the adoption of the Decision against them.

125 As to the interest of promoting exemplary behaviour on the part of the undertakings and that of discouraging any recidivism, the applicants submit that the statement of objections had already had a dissuasive effect on them so that it was not necessary to adopt the Decision against them for that purpose, which essentially repeated the legal content of that statement. As to the dissuasive effect on the public, the decision addressed to the undertakings involved in the cartel in respect of which limitation

was not an issue was sufficient, according to the applicants. Moreover, they observe that to admit, in the absence of any genuine danger of a return to the practice in question, that there is a legitimate interest in discouraging any recidivism would mean that the Commission could adopt a decision finding an infringement in any event, independently of the circumstances of the case and of the date on which the infringement was committed.

126 As regards the interest in assisting the bringing of national civil proceedings by injured parties, the applicants consider that it cannot be regarded as legitimate. The defendant is not given any such function by the EC Treaty or by Regulation No 17.

127 In its rejoinder, the defendant states that its defence in the present cases is not based on the general allegation of the existence in all cases of a legitimate interest in adopting decisions finding an infringement. It stresses that the dangers linked to repeat infringement to the detriment of the public interest are particularly serious in cases of the most serious cartels and, more particularly, in the presence of types of infringement which, by their nature, are secret and therefore more difficult for the Commission to uncover. That is why the balance to be struck between the interests of the addressee undertakings and the public interest should be different in the case of very serious past infringements and in the case of minor infringements.

128 As to the interest of assisting the bringing of national civil proceedings, the defendant stresses the particular difficulty for injured parties of demonstrating the existence of an infringement committed on such a geographically vast scale, and the importance of the exercise by the Commission of its powers to obtain evidence in investigations into secret cartels. It stresses that it did not invoke the interest in question as systematically justifying the adoption of a decision finding an infringement but, as with the interest in discouraging repeat infringements, in relation to a particularly serious infringement. Furthermore, it adds that the

existence of remedies for civil damages may also fulfil a public interest, in so far as they are likely to dissuade infringement of the competition rules. Community law considers those remedies as vital in ensuring the full application of Articles 81 EC and 82 EC (Case C-453/99 *Courage and Crehan* [2001] ECR I-6297).

Findings of the Court

129 The applicants submit that the Commission was not competent to adopt the Decision against them in the absence of a provision empowering it to find, by means of a decision, infringements which had already come to an end, a fortiori where the limitation period referred to in Article 1(1) of Regulation No 2988/74 had expired, and without demonstrating a legitimate interest justifying the adoption of that Decision against them.

130 As regards the applicants' arguments set out in paragraphs 113 and 114 above, it has already been noted in paragraph 37 of the present judgment that the cessation of an infringement of the competition rules before the adoption of a decision by the Commission is not in itself a factor precluding the exercise of the Commission's power to find that infringement since the Court of Justice has held that the Commission can adopt a decision declaring conduct which had already been terminated by the undertaking concerned to be an infringement, provided however that the institution has a legitimate interest in so doing (*GVL* v *Commission*, paragraph 24).

131 Moreover, it has been held at paragraph 63 above that whilst, under the system established by Regulation No 17, the Commission's power to find an infringement arises only implicitly, that is to the extent that the express powers to order cessation of the infringement and to impose fines necessarily implies it (*GVL* v *Commission*, paragraph 23), such an implied power is nevertheless not solely dependent on the exercise by the institution of those express powers. Accordingly, the fact that the

Commission no longer has the power to impose fines on persons committing an infringement on account of the expiry of the limitation period referred to in Article 1(1) of Regulation No 2988/74 does not in itself preclude the adoption of a decision finding that that past infringement has been committed.

132 As regards the applicants' arguments set out in paragraphs 115 to 118 above, the question which they raise is not in fact whether the Commission had the competence to find, by means of a decision, the past infringements alleged to have been committed by the applicants, but whether, in the present case, the Commission had a legitimate interest in adopting a decision finding those infringements (see, to that effect, *GVL* v *Commission*, paragraph 24). By those arguments, the applicants therefore in essence criticise the way in which that competence was exercised in the present case.

133 The Court must point out that it is not clear from the Decision that the Commission did in fact consider whether or not it had such an interest.

134 When questioned on this point at the hearing, the defendant relied upon paragraph 651 of the Decision, which they claim sets out the Commission's finding that it was appropriate to adopt a decision finding an infringement against the applicants, which, in its opinion, amounts essentially to saying that there was a legitimate interest in so doing.

135 However, it must be found that by asserting in that paragraph that '[t]he rules on limitation periods concern exclusively the imposition of fines or penalties' and that '[t]hey have no bearing on the entitlement of the Commission to investigate cartel cases and to adopt as appropriate prohibition decisions', the defendant merely replies to and rejects the argument raised by the applicants to the effect that, assuming the infringements in question are established, they could no longer be the subject of a decision because they were time-barred. It cannot be inferred from that

assertion that the Commission also considered whether it had a legitimate interest in adopting a decision finding infringements which the applicants had already brought to an end.

136 It follows from the foregoing that, as it failed to consider, when adopting the Decision, whether the finding of the infringements against the applicants was justified by a legitimate interest, the Commission committed an error of law justifying the annulment of the Decision in so far as it concerns the applicants.

137 Moreover, the defendant has not demonstrated to the Court the existence in the present case of such a legitimate interest. It is true that the defendant stated to the Court that, in addition to the interest of clarifying a legal situation, which was accepted as being legitimate in the circumstances of the case giving rise to the judgment in *GVL* v *Commission*, other interests could in the present case justify the adoption of the Decision against the applicants, namely the need to promote exemplary behaviour on the part of the undertakings, the interest in discouraging any repeat infringement, given the particularly serious nature of the infringements in question, and the interest in enabling the injured parties to bring matters before the national civil courts.

138 It must, however, be found that the defendant merely sets out in generic terms three premisses, without demonstrating, by reference to the particular circumstances of the present case relating to the very serious and extensive infringements alleged against the applicants, that those premisses are established and consequently establish its legitimate interest in adopting against the applicants a decision finding those infringements. The Commission has not specifically explained to the Court why the gravity and geographic scale of the infringements in question made it necessary to find, by the Decision, infringements which had come to an end in the particular case of the applicants. Further, it has adduced no evidence whatsoever of the risk of recidivism on the part of the applicants. Moreover, the defendant has not given any indication, relating to the particular circumstances of the present case, of legal proceedings undertaken or even capable of being envisaged by third parties injured by the infringements.

139 Furthermore, the applicants challenged the legitimacy of the interests referred to by the defendant before the Court, submitting that the statement of objections had been sufficiently dissuasive in their case, that there was no genuine danger of a return to the anti-competitive practices in question and that the desire to assist in the bringing of proceedings before national courts was in itself debateable. The defendant has not responded in detail to those objections so as to establish the legitimate interest alleged.

140 The second plea in law must therefore be upheld.

The applicants' request that certain information be omitted from the publications relating to the present cases

141 In their applications, each applicant requested that, given their subject-matter, the Court remove from the publications relating to these cases any reference to the goods and the periods covered by the infringements which they were found in the Decision to have committed.

142 It should be noted in that regard that it is clear from the documents adduced by the applicants as an annex to their reply that, after the introduction of the present actions, detailed discussions took place between the applicants and the Commission regarding the publication of the Decision. The applicants had in fact asked the

Commission to omit from the published version of the Decision any reference to their company names, the vitamin in respect of which they were found to have committed an infringement and other evidence enabling them to be identified as undertakings which had taken part in an illegal cartel.

143 However, the Commission ultimately rejected those claims and the non-confidential version of the Decision, published in the *Official Journal of the European Communities* of 10 January 2003, clearly mentions the information which formed the subject-matter of the applicants' requests referred to in paragraph 141 above (see, in particular, Article 1 of the Decision).

144 Since the fact that that information has become public after the present actions were instituted precludes confidential treatment of it (orders of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 9 November 1994 in Case T-7/93 *Langnese Iglo* v *Commission*, not published in the ECR, paragraph 11; of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance of 3 June 1997 in Case T-102/96 *Gencor* v *Commission* [1997] ECR II-879, paragraph 29; and of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 3 July 1998 in Case T-143/96 *Volkswagen and Volkswagen Sachsen* v *Commission*, not published in the ECR, paragraph 20), the applicants' request must be rejected.

Costs

145 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) in so far as it concerns the applicants;**

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

Legal Lindh Mengozzi

Wiszniewska-Białecka Vadapalas

Delivered in open court in Luxembourg on 6 October 2005.

H. Jung H. Legal

Registrar President