JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

15 March 2006 *

In Case T-26/02,

Daiichi Pharmaceutical Co. Ltd, established in Tokyo (Japan), represented by J. Buhart and P.-M. Louis, lawyers,

applicant,

v

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

defendant,

APPLICATION for annulment or reduction of the fine imposed on the applicant by Article 3(f) of Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1),

* Language of the case: English.

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

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

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2005,

gives the following

Judgment

Background

1 By Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty 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 a number of 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 separate agreements affecting 12 different markets for vitamin products, namely vitamins A, E, B1, B2, B5 and B6, folic acid, vitamins C, D3 and H, beta-

carotene and carotinoids. In particular, it is clear from recital 2 of the Decision that, as part of those agreements, the undertakings concerned had 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 the agreements, and participated in a structure of regular meetings to implement their plans.

2 Those undertakings include the Japanese undertaking Daiichi Pharmaceutical Co. Ltd ('Daiichi' or 'the applicant'), which was held responsible for infringements affecting the Community and EEA markets for vitamin B5 and for vitamin B6 (Article 1(1)(g) of the Decision).

3 In Article 1(2)(f) of the Decision, the Commission found that the infringements in which Daiichi participated had lasted from September 1991 to February 1999 and from January 1991 to June 1994 respectively.

4 By Article 2 of the Decision, the undertakings held responsible for the infringements found were ordered to bring them to an end immediately, in so far as they had not already done so, and to refrain from repeating any offending act or conduct established on their part and from adopting any measure having the same or equivalent object or effect.

5 Whilst the Commission imposed fines for the infringements found in the markets for vitamins A, E, B2, B5, C, D3, beta-carotene and carotinoids, it imposed no fines for the infringements found in the markets for vitamins B1, B6, H and folic acid (Article 3 of the Decision).

6 It is apparent from recitals 645 to 649 of the Decision that the infringements found in the latter markets ceased more than five years before the Commission started its investigation and that, consequently, 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) applied to those infringements.

7 Thus, Daiichi, in particular, was not fined for its involvement in the infringement relating to vitamin B6.

8 On the other hand, Daiichi, like the other two undertakings held responsible for the infringement relating to vitamin B5 (pantothenic acid, also known as 'calpan'), F. Hoffmann-La Roche AG ('Roche') and BASF AG, was fined for its participation in that infringement (Article 3(f) of the Decision).

9 The Commission determined that fine by applying its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines'), and its Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

10 At recitals 657 and 658 of the Decision, the Commission set out the general criteria on the basis of which it determined the amount of the fines. It stated that it must have regard to all relevant circumstances and particularly the gravity and duration of an infringement — which are the two criteria explicitly referred to in Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing

Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) —, assess on an individual basis the role played by each undertaking party to the infringements, take particular account, in setting the fine, of any aggravating or attenuating circumstances and apply, as appropriate, the Leniency Notice.

11 As regards the gravity of the infringements, the Commission found, in view of their nature, their impact on the various relevant vitamin product markets and the fact that each one covered the whole of the common market and, following its creation, the whole of the EEA, that the undertakings to which the Decision was addressed had committed very serious infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement, for each of which the likely fine would be at least EUR 20 million (recitals 662 to 674 of the Decision).

12 For the purpose of determining the starting amount of the fines, the Commission, after noting that it was taking into consideration the size of the different vitamin product markets concerned, observed that '[w]ithin the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures it has sufficient deterrent effect'. The Commission stated that 'this exercise seems particularly necessary where, as in the present case, there is considerable disparity in the size of the undertakings participating in an infringement'. It then stated that '[i]n the circumstances of this case, which involves several undertakings, it is necessary in setting the basic amount of the fines to take account of the specific weight and therefore the impact of each undertaking's offending conduct on competition' (recitals 675, 678 and 679 of the Decision).

13 For that purpose, the Commission considered that the undertakings concerned could be divided into different categories 'according to their relative importance in each of the relevant vitamin product markets concerned', while adding that '[t]he

placement of an undertaking in a particular grouping is subject to adjustment, where appropriate, to take into account in particular the need to ensure effective deterrence'. In order to appraise the relative importance of the different undertakings in each of the vitamin product markets concerned, the Commission considered it appropriate to take as a basis the worldwide turnover in the relevant product. The Commission observed that 'each cartel was global in nature, the object of each was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market' and that 'the worldwide turnover of any given party to a particular cartel also gives an indication of its contribution to the effectiveness of that cartel as a whole or, conversely, of the instability which would have affected that cartel had it not participated'. The Commission also stated that, in order to determine the turnover in question, it referred to 'the last complete calendar year of the infringement' (recitals 680 and 681 of the Decision).

14 Thus, the Commission found, as regards the vitamin B5 infringement, that 'Roche and Daiichi were the two major producers of vitamin B5 in the worldwide market' and therefore placed them in the first category, whereas BASF, 'which had significantly lower market shares in the worldwide market, almost half ... that of Roche', was placed in the second category. The starting amount of the fine for that infringement, 'taking account of the categories identified as a result of applying the criterion of an undertaking's relative importance in the market concerned', was therefore set at EUR 20 million each for Roche and Daiichi and at EUR 14 million for BASF (recitals 689 and 690 of the Decision).

15 In order to ensure that the fines had a sufficient deterrent effect, the Commission increased the starting amounts of the fines calculated for Roche and BASF by 100% to take account of their size and their overall resources (recitals 697 to 699 of the Decision).

16 In order to take account of the duration of the infringement, the Commission, which considered that Roche, Daiichi and BASF had committed a long-term infringement

of eight years, applied, for each undertaking, an increase of 80% of the amount arrived at following the operations referred to in the two preceding paragraphs. The basic amount of the fine imposed on the applicant thus came to EUR 36 million (recitals 706 and 711 of the Decision).

17 While in the case of Roche and BASF account was taken of an aggravating circumstance based on their having played the role of leader and instigator in the context, in particular, of the vitamin B5 infringement, so that the basic amount of their fines was increased by 50% and 35% respectively (recitals 712 to 718 of the Decision), no aggravating or attenuating circumstance was established by the Commission in the applicant's case.

18 The applicant claimed in the course of the administrative procedure that it was entitled to benefit from an attenuating circumstance, on the ground that it had not systematically complied with the agreed prices and volumes, with the consequence that the impact of the agreements on the market was mitigated. At recitals 728 and 729 of the Decision, the Commission rejected the applicant's claim, on the following grounds:

'(728) The Commission notes that the implementation of agreements on target prices does not necessarily require that these exact prices be applied. The agreements can be said to be implemented when the parties fix their prices in order to move them in the direction of the target agreed upon. This was the case for the cartels affecting the vitamin C and B5 markets. The fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230).

(729) With regard to the implementation of the agreements on quantities, it is clear that the members of the cartels considered the quantities allocated to them as the minimum quantities. As long as every party was able to sell at least the quantities allocated, the agreement was respected. This was the case for the cartels affecting the vitamin C and B5 markets.'

19 Last, as regards the application of the Leniency Notice, the Commission considered that Roche and BASF, through the documents submitted to the Commission between 2 June and 30 July 1999, had been the first to provide the Commission with decisive evidence of the existence of the cartel arrangements relating, in particular, to vitamin B5, thereby preventing the applicant from satisfying the condition in Section B(b) of the Leniency Notice. Nevertheless, since Roche and BASF had been the instigators or played a determining role in the illegal activities concerning in particular vitamin B5, they did not in the Commission's view satisfy the condition in Section B(e) of the Leniency Notice. Therefore, none of the three undertakings concerned by the agreements in respect of vitamin B5 was granted a reduction in its fine on the basis of Section B or C of that notice (recitals 743 to 745 of the Decision).

20 However, each of them was granted a reduction in its fine under Section D of the Leniency Notice. The Commission considered that eight of the undertakings to which the Decision was addressed — including Roche, BASF and Daiichi — '[had] cooperated with the Commission before the statement of objections was adopted, [had] materially contributed to establishing the existence of the infringements they [had been] a party to and/or [had] not substantially [contested] the facts on which the Commission based its allegations' (recital 754 of the Decision).

21 In particular, the Commission stated that, as Roche and BASF had provided detailed evidence of the organisation structure of the cartel arrangements affecting the vitamin B5 market, they had contributed decisively to establishing or confirming essential aspects of that infringement. Thus, the Commission concluded that Roche

and BASF satisfied the conditions set out in Section D 2, first indent, of the Leniency Notice and granted them a reduction of 50% of the fine that would have been imposed if they had not cooperated with the Commission (recitals 747, 748, 760 and 761 of the Decision).

22 In the applicant's case, the Commission found that, by a statement of 9 July 1999, it gave details of the organisation and structure of the vitamin B5 cartel which contributed substantially to establishing or confirming important aspects of the infringement. Thus, the Commission concluded that the applicant satisfied the conditions set out in Section D 2, first indent, of the Leniency Notice and granted it a 35% reduction of the fine that would have been imposed if it had not cooperated with the Commission (recitals 749, 750 and 764 of the Decision).

23 Thus, the fines imposed in Article 3 of the Decision for the infringement relating to vitamin B5 were set as follows:

— Roche: EUR 54 million;

— BASF: EUR 34.02 million;

— Daiichi: EUR 23.4 million.

Procedure and forms of order sought

24 By application lodged at the Registry of the Court of First Instance on 8 February 2002, the applicant brought the present action.

25 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, put certain questions in writing to the parties who replied within the prescribed period.

26 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 23 February 2005.

27 The applicant claims that the Court should:

— annul Article 3(f) of the Decision;

— in the alternative, substantially reduce the amount of the fine imposed on it;

— order the defendant to pay the costs.

28 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

29 The applicant does not dispute the facts found in regard to it in the Decision or the Commission's conclusion that those facts constitute infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement. It states that its application seeks, principally, the annulment of Article 3(f) of the Decision, since the Commission ought to have granted it total exemption on the basis of Section B of the Leniency Notice and since the Commission's determination of the amount of the fine imposed on the applicant is vitiated by numerous errors. Alternatively, the applicant claims that these errors justify, at the least, a substantial reduction in the fine, through the exercise by the Court of its unlimited jurisdiction.

30 The applicant raises three pleas in law in support of its claims. By its first plea, it submits that the setting of the starting amount at EUR 20 million for its fine is flawed by manifest errors of assessment, '[erroneous application of] the law to the facts', infringement of the Guidelines and breach of the principles of equal treatment and proportionality. By the second plea, the applicant submits that the Commission manifestly erred in its assessment, 'erroneously applied the law to the facts' and

infringed the Guidelines by refusing to acknowledge that there was an attenuating circumstance by reason of the applicant's only partial implementation of the vitamin B5 cartel. By the third plea, the applicant raises manifest errors of assessment, 'erroneous application of the law to the facts', infringement of the Leniency Notice and breach of the principle of equal treatment when the Commission assessed the applicant's cooperation during the administrative procedure.

1. *First plea: starting amount of the fine*

Arguments of the parties

31 This plea relates to the setting, at EUR 20 million, of the starting amount of the applicant's fine (see paragraphs 12 to 14 above), and is subdivided into three parts.

32 By the first part of the plea, the applicant submits that the Commission made a manifest error of assessment, 'erroneously applied the law to the facts' and infringed the Guidelines in failing to place the applicant in a third category after Roche and BASF when setting the starting amount of the fine determined for gravity.

33 In particular, the applicant observes that, in the words of the Guidelines (Section 1A, fourth paragraph), when assessing the gravity of the infringement, it is 'necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers'.

34 The applicant complains in that regard that the Commission set the same starting amount for the applicant as for Roche, which is higher than the starting amount for BASF, without taking into account the fact that Roche and BASF were both in a position to inflict much more significant damage on competitors than the applicant, even though the Commission was aware of this fact.

35 First, it is clear from recital 592 of the Decision itself that Roche and BASF, as producers of 'pre-mixes' (a downstream product used in the production of animal feeds and of which vitamins are an essential ingredient) and as suppliers of vitamins to other producers of pre-mixes, were in a position to squeeze the margins of their pre-mix-producer customers and, actually or potentially, to damage their business by increasing the price of the vitamins they sold to them. Second, BASF and, more importantly, Roche, as producers of the whole range of vitamins, were in a position to threaten to drive the producers of a single vitamin from the market by lowering the price of that vitamin to a predatory level and to cross-subsidise the difference through the price of other vitamins. It is clear from the Decision (recital 716) that the overall capacity of Roche and BASF to implement and maintain the anti-competitive agreements was considerably increased as a result of having a broad range of products available, covering separate but closely related markets. However, the applicant, since it was not vertically integrated and did not possess the portfolio of vitamins which Roche and BASF had, ought to have been placed by the Commission in a third category, after those two companies, and the starting amount of its fine ought to have been lower than for those two companies.

36 By the second part of the plea, which is put forward in the alternative, the applicant submits that the Commission manifestly erred in its assessment, 'erroneously applied the law to the facts' and infringed the principle of equal treatment by not placing the applicant in the second category with BASF when setting the starting amount of the fine for gravity.

37 The applicant observes that, at recital 680 of the Decision, the Commission placed the undertakings concerned in different categories on the basis of a comparison of the worldwide turnover in the relevant product in the last complete calendar year of the infringement which, in the case of vitamin B5, was 1998.

38 However, in the first place, a comparison of the worldwide turnovers and worldwide market shares of Roche, BASF and the applicant for vitamin B5 in 1998 shows that Daiichi ought to have been placed in the same category as BASF and that the Commission thus manifestly erred in its assessment.

39 The applicant points out, first, that according to the table relating to vitamin B5 at recital 123 of the Decision, the worldwide turnover of the respective producers of that vitamin in 1998 was as follows: Roche: EUR 57 million, Daiichi: EUR 43 million, BASF: EUR 34 million and others: EUR 32 million. The applicant observes that its turnover for vitamin B5 was EUR 14 million less than that of Roche and only EUR 9 million more than that of BASF, so that Roche's turnover was 33% more than the applicant's and BASF's turnover was 21% less than the applicant's.

40 Second, the applicant states that the worldwide market shares for 1998, calculated on the basis of the turnover figures in the previous paragraph, were as follows: Roche: 34.3%, Daiichi: 25.9%, BASF: 20.5% and others: 19.3%. The applicant therefore draws attention to the fact that its worldwide market share in 1998 was 8.4 percentage points less than that of Roche and scarcely 5.4 percentage points more that that of BASF.

41 Moreover, even if other criteria, like EEA turnover in 1998, EEA market shares in 1998 or during the period of the infringement (1991 to 1998), were applied, the only

possible conclusion would be that the applicant should not have been placed in the same category as Roche, but rather in that of BASF. Only on the basis of worldwide market shares for the infringement period (1991 to 1998) is the applicant's position closer, by one single percentage point, to that of Roche than to that of BASF.

42 In view of the relative proximity of the turnover and the market shares of the applicant and BASF, the starting amount for the applicant's fine should not have been more than EUR 14 million.

43 In the second place, the applicant submits that the Decision infringes the principle of equal treatment: first, it deals at the same time with different situations (the applicant's and Roche's) in the same way and with similar situations (the applicant's and BASF's) differently, with no possible objective justification; second, the applicant was placed in the first category of the vitamin B5 cartel (with a starting amount for the fine of EUR 20 million) whereas, in relation to essentially similar facts, BASF was placed in the second category of the vitamin B2 cartel (with a starting amount for the fine of EUR 10 million).

44 On that last point, the applicant draws attention to the fact that its turnover and market share in the worldwide market for vitamin B5 in 1998 were less than the turnover and market share of BASF in the worldwide market for vitamin B2 taken into account in the Decision for the purpose of the division into categories of the members of the cartel relating to that latter vitamin. Furthermore, even if the basis were the worldwide market shares for the relevant product during the whole period of the infringement — a criterion not used in the Decision — the applicant should, in the light of the principle of equal treatment, have been placed in the second

category as regards the vitamin B5 infringement. It points out that its average market share during the period of the infringement (29%) was the same as the average share of BASF in the vitamin B2 market during the period of the infringement relating to that market and that both it and BASF were, in those respective markets, approximately half way between the first and third operators.

45 By the third part of this plea, advanced in the further alternative, the applicant submits that, when the Commission set the starting amount of the fine for gravity, it infringed the principle of proportionality by failing to place the applicant in a separate category, between Roche and BASF, with a starting amount for the fine between that for Roche and that for BASF, but closer to that of BASF.

46 The applicant observes that in Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown Company Ltd, Case IV/F-3/33.711 James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1, 'the British Sugar decision') the Commission did not hesitate to distinguish three categories of producers for the purpose of setting the starting amount of the fine for gravity. In particular, the applicant notes that Tate & Lyle was placed in a second category, after British Sugar, although the two together accounted for 90% of the market share in both the relevant markets (industrial and retail sugar in Great Britain), British Sugar accounting for between 51 and 54% and Tate & Lyle between 38 and 40%, and their respective competitive positions were much closer compared with the positions of the two other companies on the market, which together held 6 to 11% of the market and were placed in a third category.

47 The defendant contends that, by placing the applicant in the first category for the vitamin B5 infringement with Roche, it did not make errors of assessment, did not infringe the Guidelines and did not violate the principles of equal treatment and proportionality.

Findings of the Court

Preliminary observations

48 As a preliminary point, it is to be noted that it is clear from recitals 655 to 775 of the Decision that the fines imposed by the Commission in respect of the infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement were imposed pursuant to Article 15(2) of Regulation No 17 and that the Commission — even though the Decision does not expressly refer to the Guidelines — applied the method set out in the Guidelines when it set the fines.

49 Although the Commission has a discretion when determining the amount of each fine, and is not required to apply a precise mathematical formula (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59), it may not depart from the rules which it has imposed on itself (see, by analogy, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, upheld on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235). Since the Guidelines are an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion when determining fines, the Commission must in fact take account of the Guidelines when determining fines, in particular the elements which are mandatory under the Guidelines (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 537).

50 According to the method laid down by the Guidelines, the Commission takes as its starting point for calculating the amount of the fines to be imposed on the undertakings concerned an amount determined by reference to the gravity of the

infringement. 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 (Section 1 A, first paragraph). Within that context, infringements are put into one of three categories, namely 'minor infringements', for which the likely fine will be between EUR 1 000 and EUR 1 000 000, 'serious infringements', for which the likely fine will be between EUR 1 000 000 and EUR 20 000 000, and 'very serious infringements', for which the likely fine will be above EUR 20 000 000 (Section 1 A, second paragraph, first to third indents). Within each of these categories, the proposed scale of fines makes it possible, according to the Guidelines, to apply differential treatment to undertakings according to the nature of the infringements committed (Section 1 A, third paragraph). It is also necessary, according to the Guidelines, 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 (Section 1 A, fourth paragraph).

51 Within each of the three categories of infringement thus defined, it may be necessary, according to the Guidelines, to apply weightings in certain cases to the amounts determined 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 and, consequently, to adjust the starting point for the basic amount according to the specific nature of each undertaking (Section 1 A, sixth paragraph).

52 In this instance, the applicant disputes neither the very serious nature of the vitamin B5 infringement which the Decision imputes to it nor the findings on which the Commission relied to conclude that the infringement was very serious, which concern the nature of the infringement, its actual impact on the market and the size of the relevant geographic market (recitals 662 to 674 of the Decision).

53 Nor does the applicant put in doubt the criterion, employed by the Commission (recital 675), which entails taking into account, for the purposes of determining the starting amount of the fines, the size of each of the different vitamin product markets concerned. That criterion was, in essence, applied by adjusting, by reference to the size of each market concerned, the starting amount of the fine for the first category of undertakings established by the Commission for each infringement.

54 The criticisms advanced by the applicant in this plea concern the differential treatment applied, for the purposes of determining the individual starting amounts, to the members of the vitamin B5 cartel pursuant to Section 1 A, fourth and sixth paragraphs, of the Guidelines.

55 It is clear from recitals 679 to 681 of the Decision that the Commission, in this case, applied this differential treatment using the method of dividing undertakings into categories, that it adopted, as a criterion for division, that of the relative importance of the undertakings in the market concerned and that, in order to apply that criterion, it used data relating to the worldwide turnover in the relevant product.

56 The applicant does not challenge the principle that the members of a cartel may be divided into a number of categories and that the same starting amount may be set for members placed in the same category. What it contests is its specific placement in this case, namely the fact that it was placed in the first category with Roche, whilst BASF was placed in the second category. It submits, principally, that it should have been placed in a third category behind Roche and BASF (first part of the plea), in the alternative, that it should have been placed in the second category with BASF (second part) and, in the further alternative, that it should have been placed in an intermediate category between Roche and BASF (third part).

First part of the plea

57 By the first part of this plea, the applicant complains in essence that the Commission made a manifest error of assessment and misapplied the criterion of effective economic capacity to cause significant damage to other operators, referred to in Section 1A, fourth paragraph, of the Guidelines, when it divided the members of the vitamin B5 cartel into categories. The Commission failed to take into account two factors which, in the applicant's view, were of vital importance for the purpose of comparing the capacity of the three undertakings concerned to cause damage: first, the fact that Roche and BASF, being vertically integrated, were in a position, by increasing the price of vitamin B5, to squeeze the margins of their competitors in the downstream market for pre-mixes; second, the fact that Roche and BASF, since they produce a huge range of vitamins, were able to carry out predatory pricing in the vitamin B5 market, cross-subsidising the ensuing losses by increasing the prices of other vitamins.

58 On this point, it should be noted that the analysis of the 'effective economic capacity of offenders to cause significant damage to other operators, in particular consumers' — an analysis which the Commission is bound to carry out, by virtue of Section 1 A, fourth paragraph, of the Guidelines as a 'necessary' part of the assessment of the gravity of an infringement — involves an assessment of the actual importance of the undertakings concerned on the market affected, in other words, of their influence on that market. In this context, the market shares, in terms of volume or value, of the undertakings in question on the market concerned are relevant to that assessment, since they allow the relative importance of each of the undertakings to be determined on that market (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 88).

59 The applicant does not dispute the relevance, for the purposes of applying Section 1 A, fourth paragraph, of the Guidelines in the present case, of the relative importance of the undertakings on the market concerned or the consideration given,

in the assessment of that importance, to turnover or corresponding market shares relating to the worldwide vitamin B5 market. It merely challenges, in the first part of the first plea, the Commission's failure to take account of the vertical integration of Roche and BASF and the extent of their range of vitamins.

60 In this connection, it is true that an undertaking's market share gives an approximate indication of its influence on the market and that, as is the case, for example, in the analysis of a dominant position under Article 82 EC, other factors may be significant for a fuller and more precise understanding of such influence (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 48).

61 Nevertheless, the Commission may, when assessing the gravity of the infringement and setting the starting amount of the fine, base its assessment of the effective economic capacity of offenders to cause significant damage to other operators on data relating to turnover and market share in the market concerned, unless there are particular circumstances, such as the characteristics of that market, which are such as appreciably to diminish the significance of those data and to require, for the assessment of the influence of the undertakings on the market, other relevant factors to be taken into account.

62 However, in this instance, the applicant — which, indeed, acknowledged at the hearing that the division into categories on the basis of worldwide turnover in vitamin B5 fell within the Commission's discretion — has not mentioned any such particular circumstances.

63 Although vertical integration and the extent of the product range may, depending on the circumstances, be relevant factors in the assessment of the influence which an undertaking may exercise on the market, and provide a further indication of that influence in addition to market shares (see, for example, as regards vertical integration, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 67 to 72 and 78 to 81, and, as regards the extent of the product range, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 55 and 56), it must be noted that, in this instance, the applicant's arguments concerning the vertical integration of Roche and BASF and the extent of their product range do not show that those undertakings enjoyed any particular and significant competitive advantages in the market concerned.

64 As regards vertical integration, the applicant merely alleges that Roche and BASF could, by increasing the price of vitamin B5, squeeze the margins of producers of pre-mixes, who purchase that vitamin and are competitors of Roche and BASF on the downstream pre-mix market. In that regard, it is to be noted that the applicant too, as a supplier of vitamin B5, was in a position to do the same, the only difference being that, since it is not itself active on the pre-mix market, it could not benefit from doing so in order to strengthen its position on that downstream market. However, that difference pertains more to the incentives which the three manufacturers might have had to raise the price of vitamin B5 than to the influence which they could exercise on the market for that product.

65 In relation to the wide range of vitamins offered, the applicant maintains that Roche and BASF had the ability to carry out predatory pricing in respect of vitamin B5 owing to the revenue that they could derive from the markets for other vitamins, which were distinct but closely related markets. In this respect, it is sufficient to observe that there are no grounds for presuming an undertaking has the ability to engage in predatory pricing merely because the undertaking in question manufactures a wider range of related products than its competitors. Moreover, since the applicant states in the course of its arguments that it produced only two vitamins, it should be observed that, as is clear from recitals 107 and 108 of the Decision, the applicant's production was not limited to vitamins B5 and B6, but covered 'a wide range of ethical pharmaceuticals, over-the-counter health products

and veterinary products' and that, in 1998, the last complete calendar year of the vitamin B5 infringement, its total sales amounted to ECU 1 920 million, of which only 43 million was attributable, according to the tables at recital 123 of the Decision, to vitamin B5. However, the applicant has offered no explanation as to why a possible price war on one product could be subsidised solely by revenue from the sale of related products.

66 In those circumstances, the applicant has not established that the Commission, in not taking into account, when dividing the members of the vitamin B5 cartel into categories, the presence of Roche and BASF on the pre-mix market and on a large number of vitamin product markets, made a manifest error of assessment or infringed the Guidelines. The first part of this plea must therefore be rejected.

Second and third parts of the plea

67 In the second part of the plea, the applicant submits that the application of the criterion relied on in the Decision, namely the assessment of the relative importance in the market of the members of the cartel concerned by reference to their worldwide turnover and worldwide market shares for the product concerned in the last complete calendar year of the infringement, should have led the Commission to place Daiichi in the second category with BASF. The fact that it was placed in the first category with Roche stems from a manifest error of assessment and is incompatible with the principle of equal treatment.

68 In this connection, it must be noted that the applicant's contentions are based, to a large extent, on the incorrect premiss that the Commission, in the Decision, assessed the relative importance of the undertakings in the market concerned on the basis of data relating to 1998.

69 It is the case that, at recital 681 of the Decision, the Commission stated that it was taking into account 'the worldwide product turnover in the last complete calendar year of the infringement', in this instance 1998 for vitamin B5.

70 Nevertheless, it is evident, in the light of other passages of the Decision — and the defendant confirmed this, in substance, in its answer to a written question put by the Court in the context of measures of organisation of procedure — that, for the purpose of placing the undertakings in categories for each of the various infringements for which a division into categories was made in the Decision, the Commission in actual fact took as its basis these undertakings' worldwide market shares throughout the period of the infringement.

71 Recital 682 of the Decision states that 'the relevant factors for establishing the category applicable to each producer' are set out 'separately for each vitamin' at recitals 683 to 696.

72 It is clear from those recitals that, as regards each of the infringements relating to vitamins A, E, B2, B5, C and D3, the Commission established two categories 'applying the criterion of an undertaking's relative importance in the market' and set the starting amounts 'taking account of [those] categories'. In order to place each undertaking in the first or second category for each infringement, the Commission relied on data relating to market shares. However, in the light of the data referred to at recitals 691 and 693 of the Decision, it can be seen that those market shares were not based on worldwide product turnover in the last complete calendar year of the infringement (the figures not in brackets in the second column of the tables relating to the various vitamin products markets at recital 123 of the Decision), but are the average market shares of the undertakings throughout, in substance, the period of the infringement (average market shares being those shown in brackets in the second column of the abovementioned tables).

73 In those circumstances, it must be held that the reference to the last complete calendar year of the infringement, at recital 681 of the Decision, as it is the result of a clerical error, is of no consequence and therefore does not form an integral part of the reasoning underpinning the placement of the undertakings in one category or the other.

74 It should also be observed that the applicant has not challenged the relevance, for the purpose of the division of the undertakings into categories on the basis of their relative importance on the market concerned, of the use of data relating to the whole period of the infringement. In any event, that relevance cannot be seriously denied, since the Commission was concerned with assessing the gravity of the infringement committed by each undertaking over a period of a number of years. Thus, in its pleadings, whilst observing that the division into categories made in the Decision was not founded on data relating to the whole period of the infringement, the applicant has none the less maintained, without disputing the correctness of the data, that use of those data still leads to the conclusion that the principle of equal treatment requires it to be placed in the second category with BASF (see paragraph 44, in fine, above).

75 At the hearing, the applicant questioned the reliability of the figures in the Decision relating to the undertakings' market shares over the whole period of the infringement. Pointing out that the origin of the figures was not known, since they had never been provided to the Commission, the applicant submitted that they were at most estimates made by the Commission, which should not, in the absence of verification, be used as evidence.

76 That objection is out of time and therefore inadmissible, pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance. The applicant could have raised it already in its application, where it relied instead on, inter alia, data relating to the whole period of the infringement — and, more specifically, on EEA-wide market shares throughout the period 1991 to 1998, shown in the third column of the

table concerning vitamin B5 at recital 123 of the Decision — in order to support its argument, advanced in the second part of this plea, that there had been a manifest error of assessment (see paragraph 41 above). In any event, were this objection admissible, the Court could not accept it, since the applicant has, in the end, merely made a vague criticism of the reliability of the data concerned and has not produced anything which suggests that doubt should be cast on their accuracy.

77 It follows from the foregoing that the Court must reject the arguments which the applicant bases, in the second part of this plea, on the comparison, in turn, of the worldwide turnover, worldwide market shares, EEA-wide turnover and EEA-wide market shares of the members of the vitamin B5 cartel for 1998 (see paragraphs 38 to 41 above).

78 The applicant's comparison in the same context of EEA-wide market shares for the period of the infringement 1991 to 1998 (see paragraph 41 above) is also irrelevant, since the applicant does not challenge the fact that the Commission chose to take as its basis in the present case, when applying differential treatment at the stage of setting the starting amounts, the worldwide turnover and market share for the vitamin product concerned. Indeed, no fault can be found with such a choice, given, first, the worldwide scale of the relevant geographic market (see recital 73 of the Decision), which is not disputed by the applicant, and, second, the worldwide scale of the cartel itself. Moreover, it can be seen that one of the objects of the cartel in question was the allocation of sales quotas on a worldwide and regional basis (including a European quota) to the various members (see recitals 301 and 305 of the Decision), which would have rendered the selection of EEA-wide turnover or market share of little relevance even if the geographic extent of the relevant product market had been restricted to the EEA (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraphs 195 to 200).

79 It must be noted that the applicant does not maintain that a correct assessment of the relative importance of the undertakings on the worldwide vitamin B5 market in the light of those undertakings' average worldwide market shares throughout the period of the infringement required it to be placed in the second category with BASF. Instead, it has itself had to acknowledge that, on the basis of those data, its position (29%) was nearer, albeit by only one percentage point, to that of Roche (36%) than to that of BASF (21%) (see paragraph 41 above).

80 The applicant has therefore not established that, in not having placed it in the second category with BASF, the Commission made a manifest error of assessment.

81 The Court must then examine together the complaints alleging, in the second part of this plea, infringement of the principle of equal treatment and, in the third part of this plea, infringement of the principle of proportionality. Those complaints shall be considered only in so far as they are effective, that is to say only to the extent that they are based, in the alternative claim, on the data relating to the undertakings' worldwide market shares throughout the period of the infringement.

82 The applicant concludes that there was an infringement of the principle of equal treatment from the fact that, as regards the vitamin B5 infringement, it was placed in the first category with Roche, although its situation was not comparable to that of Roche, and that it was treated differently from BASF, although BASF's situation was comparable to its own. The principle of equal treatment was also infringed by BASF being placed in the second category for the vitamin B2 infringement although its situation in relation to that infringement was comparable to that of the applicant in relation to the vitamin B5 infringement (see paragraph 44 above). Finally, the infringement of the principle of proportionality stems from the fact that the applicant was not placed in an intermediate category between Roche and BASF.

83 It is to be noted in this connection that the applicant does not challenge the actual method of dividing the members of a cartel into categories in order to apply differential treatment at the stage of setting the starting amounts of the fines. That method, the principle of which has in fact been approved by decisions of the Court of First Instance even though it ignores the differences in size between undertakings in the same category (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385, and *Tokai Carbon and Others* v *Commission*, paragraph 217), has the consequence that a flat-rate starting amount is fixed for all the undertakings in the same category.

84 It is true that such a division into categories must comply with the principle of equal treatment, which prohibits similar situations from being treated differently and different situations from being treated in the same way, unless such treatment is objectively justified. Furthermore, according to the case-law, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement (see *Tokai Carbon and Others* v *Commission*, paragraph 219, and the case-law cited).

85 In order to ascertain whether a division of the members of a cartel into categories is in keeping with the principles of equal treatment and proportionality, the Court, as part of its review of the lawfulness of the exercise of the Commission's discretion in the matter, must none the less confine itself to checking that the division is coherent and objectively justified (*CMA CGM and Others* v *Commission*, paragraphs 406 and 416, and *Tokai Carbon and Others* v *Commission*, paragraphs 220 and 222) and not immediately substitute its own assessment for that of the Commission.

86 In the present case, with the exception of the infringements relating to beta-carotene and carotinoids, in respect of which it took the view that it was not suitable to make separate categories (see recitals 695 and 696 of the Decision), the Commission, for each of the infringements found in the Decision, divided the undertakings into two

categories: a first category including the major producer or producers of the vitamin concerned on the worldwide market and a second category including the other producer or producers of that vitamin 'which had significantly lower market shares' (see recitals 683, 685, 687, 689, 691 and 693 of the Decision).

87 It must be held that a division of producers into two categories, the major producers and the others, is not an unreasonable way of taking account of their relative importance on the market in order to adjust the starting amount, provided that it does not produce a grossly distorted picture of the markets in question. That conclusion is not undermined by the fact that in the British Sugar decision (paragraph 46 above) the Commission, in the exercise of its broad discretion, employed another method of division and decided to establish three categories instead of just two — the number of operators who formed the subject of that decision and the distribution of their market shares having in any event been different from those which feature in the present case.

88 As regards the application, infringement by infringement, of the method of division employed in the Decision, the Commission, using worldwide market shares, drawn directly from worldwide product turnover for the whole period of the infringement, placed the operators in the two abovementioned categories, as follows:

Vitamins	First category Major producer(s) (market share)	Second category Other producer(s) (market share)
Vitamin A	44%	32% - 20%
Vitamin E	43% - 29%	14% - 10%
Vitamin B2	47%	29% - 12%
Vitamin B5	36% - 29%	21%
Vitamin C	40% - 24%	8% - 6%
Vitamin D3	40% - 32%	15% - 9%

89 It is clear from those figures that the Commission consistently set the threshold at the point of maximum difference, even if the difference was one percentage point. The category of major producers was limited to one undertaking only where the latter had very large market shares (44% and 47%). It is true that market shares of 29% were held to fall both in the first and the second category but the relative positions of the undertakings with the 29% market share were different in each case: the placement in the second category reflected an 18-percentage-point difference in relation to the major producer (vitamin B2), as opposed to a difference of just 7 and 14 percentage points in respect of placement in the first category (vitamins B5 and E). The only case in which a market share of 24% warranted an undertaking being classified as a 'major producer' (vitamin C) was where there was only a 16-percentage-point difference between that undertaking and the market leader and a very marginal (8% and 6%) position of the other producers.

90 As regards, more particularly, the vitamin B5 infringement, the narrow difference between Roche, the first operator, and the applicant (7 percentage points), and Roche's not particularly high market share meant that the Commission could, coherently and objectively — and thus without infringing the principles of equal treatment or proportionality — treat the applicant in the same way as the first operator (and differently from the third operator) as a 'major producer' and accordingly set the same starting amount for it as for Roche, which was higher than the starting amount set for BASF.

91 As regards more specifically the comparison drawn by the applicant between its situation in relation to the vitamin B5 infringement and that of BASF in relation to the vitamin B2 infringement, it cannot be found — as the defendant has rightly submitted — that those situations were comparable either on the ground that each undertaking had, in the vitamin B5 market and vitamin B2 market respectively, the same market share (29%) throughout the period of the infringement or on the ground that each of them was, in the vitamin B5 market and vitamin B2 market respectively, approximately half way between the first and third operators.

92 Since the Commission was assessing the importance of the undertakings on each market in relative terms, the two circumstances raised by the applicant cannot be appraised without account being taken of the distribution of market shares. That distribution was not comparable in the two cases considered. First, the position of the first operator was clearly stronger in the case of the vitamin B2 infringement. Second, in the case of the vitamin B2 infringement, BASF's market share (29% as in the case of Daiichi for vitamin B5) was closer to that of the third operator (12%) than to that of the first operator (47%), 17 and 18 percentage points separating it from the third and first operator respectively; by contrast, in relation to the vitamin B5 infringement (as has been stated above) Daiichi's market share (29%) was closer to that of the first operator (Roche 36%) than to that of the third operator (BASF, 21%), 7 and 8 percentage points separating Daiichi from the first and third operator respectively.

93 Therefore, even supposing that, when Article 81 EC is being applied, an infringement of the principle of equal treatment could be pleaded otherwise than in the case where the members of one and the same cartel are treated differently, the fact that the applicant, in relation to the vitamin B5 infringement, and BASF, in relation to the vitamin B2 infringement, were subject to different classification does not appear to lack objective justification and therefore does not infringe the principle of equal treatment.

94 The second and third parts of the present plea must therefore be rejected.

95 In the light of all the foregoing considerations, the first plea must be rejected in its entirety.

2. *Second plea: only partial implementation of the agreements by the applicant as an attenuating circumstance*

Arguments of the parties

96 In the applicant's submission, the Commission made a manifest error of assessment, 'erroneously applied the law to the facts' and infringed the Guidelines in not taking into account Daiichi's only partial implementation of the vitamin B5 cartel agreements as an attenuating circumstance justifying a substantial reduction in the basic amount of the fine (see paragraph 18 above).

97 It observes that according to the Guidelines the 'non-implementation in practice of the offending agreements or practices' is an attenuating circumstance which logically results in a smaller fine. It is good policy for the Commission to impose a comparatively smaller fine on an undertaking which has thwarted the cartel in whole or in part than on an undertaking which complied fully with the cartel's terms and therefore caused greater damage to competition.

98 In the first place, the applicant submits that, in the statement which it sent voluntarily to the Commission on 9 July 1999 and in its reply to the statement of objections, it showed that it had mitigated the effects of the price increases agreed upon — in particular by not implementing, or by delaying the implementation of, those increases.

99 In the second place, the applicant submits that it did not restrict production as planned within the cartel but instead regularly exceeded the budgets allocated to it for Europe to a greater extent than Roche or BASF, thereby helping to meet customer demand and to reduce pressure on prices. In addition, over several years, it

exported more D-calcium pantothenate (a pure form of pantothenic acid, 'D-Calpan') to Europe than it reported to Roche and BASF in the framework of information exchanged in the cartel.

100 The applicant disputes the Commission's finding at recital 729 of the Decision that the members of the cartels considered the quantities allocated to them to be minimum quantities. With regard to vitamin B5, this finding is contradicted by the evidence submitted by the applicant to the Commission in its statement of 9 July 1999, which shows that the allocated quantities were quotas which could not be significantly exceeded.

101 In the third place, to corroborate its arguments concerning the only partial implementation of the agreements and to show that this was not an attempt to exploit the cartel for its own benefit, but an attempt to limit the adverse effects of the volume and price initiatives, the applicant states that it had no direct economic motive for participating in the cooperation in relation to vitamin B5 and that, if it did so, that was because it feared retaliation by Roche, which could have attempted to drive it out of the vitamin B5 market. The applicant did not particularly wish to increase the prices of its D-Calpan. It feared, first, that pre-mixers would turn to D-Calpan imported from China or to calcium-DL-pantothenate (a substitute product, consisting as to 45% of D-Calpan and used only in animal feed) imported from Japan or Eastern Europe. It feared, second, that the capacity of independent pre-mix producers to compete with Roche and BASF in sales of pre-mixes to animal feed manufacturers would be weakened, thus accelerating the already existing trend towards driving from the market those producers, who were the applicant's main customers for D-Calpan sold in Europe.

102 The defendant contends that in the Decision it rightly refused to recognise the attenuating circumstance put forward by the applicant and refers to the findings

made at recitals 728 and 729 of the Decision (see paragraph 18 above). It adds that the Guidelines list 'non-implementation in practice of the offending agreements or practices' as an attenuating circumstance and observes that the applicant's conduct in the present case cannot be described as such because, on its own admission, the applicant partially implemented the price increases agreed upon in the framework of the cartel.

Findings of the Court

103 By this plea, the applicant seeks a reduction in its fine on the ground of non-implementation in practice of the agreements, which constitutes an attenuating circumstance under Section 3, second indent, of the Guidelines. It claims to have implemented the agreements on price and quantity only partially, thereby seeking to mitigate their effects out of fear that its pre-mix-producer customers would turn to other sources of supply or that those customers' capacity to compete with Roche and BASF would be weakened and that they would thus be driven out of the pre-mix market. The applicant maintains that, in refusing to grant it a reduction in the fine on that account, the Commission made a manifest error of assessment and infringed the Guidelines.

104 At recital 728 of the Decision, the Commission referred to Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230, in which the Court held that the fact that an undertaking which has been proved to have participated in a price cartel did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as an attenuating circumstance when determining the amount of the fine to be imposed.

105 It should be observed that in the judgment in *Cascades* v *Commission* the Court exercised its power of review in respect of a Commission decision which, as it pre-

dated their adoption, had not applied the Guidelines, which have since then expressly contemplated that non-implementation in practice of an offending agreement should be taken into account as an attenuating circumstance. As has already been stated at paragraph 49 above, it is settled case-law that the Commission may not depart from the rules which it has imposed on itself. Moreover, the greater or lesser degree of implementation by a member of the cartel of the measures agreed with the other members, although not relevant to the establishment of its liability, may have a bearing on the extent of that liability and thus on the severity of the penalty (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 508 to 510; and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 145).

106 Therefore, in holding that it was not required to take into account, as an attenuating circumstance, the breach of the obligations assumed by the applicant in the vitamin B5 cartel, the Commission infringed the Guidelines.

107 However, with a view to discounting vis-à-vis the applicant the attenuating circumstance advanced by it, the Commission also found, in the Decision, that it was not apparent from the case-file that the applicant had in fact breached such obligations, since (i) the members of the cartel reached agreements on target prices and fixed their prices in such a way as to move them in the direction of the target agreed upon and (ii) the volumes allocated were minimum volumes and if they were exceeded, that did not therefore infringe the agreements.

108 If such findings were to prove relevant and well founded, the infringement of the Guidelines found at paragraph 106 above would be immaterial, since the Commission's rejection of the attenuating circumstance in question would in any event be justified from the standpoint of the Guidelines themselves because, in the present case, there would in fact have been no 'non-implementation in practice' of the agreements on the applicant's part.

109 In this regard, it must first be noted that, although it is true — as the defendant maintains — that implementation of the agreements on target prices does not necessarily require exact prices to be applied, as the agreements can be regarded as implemented when the parties fix their prices so as to move towards the agreed target, that argument is, however, not such per se as to rule out any breach by the applicant of the pricing obligations agreed upon with the other members of the cartel, since it follows from the Decision (see recital 304) that the members of the vitamin B5 cartel agreed not only target ('list') prices but also minimum ('lowest') prices.

110 Second, it should also be noted that nothing in the file suggests that the budgets allocated to members of the vitamin B5 cartel were regarded as minimum quantities. On the contrary, it appears that they were quotas which, in principle, were not to be exceeded. It is clear from the Decision that the setting of the quotas went hand in hand with the attribution to the cartel members of market shares expressed as a percentage and that those budgets were intended to ensure the preservation of those market shares (recitals 296, 297, 300 to 302 and 305).

111 The findings of the Commission mentioned at paragraph 107 above are therefore quite clearly not such as to justify its refusal to recognise that the applicant could benefit from the attenuating circumstance pleaded.

112 Since the Decision is thus unlawful, it is for the Court to exercise its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17, in order to determine whether the applicant, by reason of the circumstances that it puts forward, should have been granted a reduction in its fine on account of the non-implementation in practice of the offending agreements.

113 To that end, the Court considers it necessary to determine whether those circumstances are capable of showing that, during the period in which the applicant was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, whether it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.

114 The Court notes that the material in the file does not allow those questions to be answered in the affirmative.

115 Firstly, as the defendant observes, the applicant does not claim that it avoided all implementation in practice of the unlawful agreements.

116 Secondly, in so far as the applicant relies on only partial implementation of the unlawful agreements, the matters which it puts forward are not such as to establish that it clearly and substantially departed from those agreements to the point of having disrupted the very operation of the vitamin B5 cartel.

117 As regards, in the first place, its non-implementation in practice of the agreements on prices, the applicant points to the following circumstances:

(a) on 5 April 1997 Roche announced a price increase of more than 4%; however, the prices of the applicant's European subsidiary, Daiichi Pharmaceutical Europe ('DPE'), started to rise above the April 1997 level only in July 1997 and the full price increase to the Roche level was fully reflected in DPE's prices only from October 1997, that is to say, some six months after Roche's announcement;

(b) at a meeting with Roche and BASF in November 1997 or January 1998, the applicant unsuccessfully opposed a price increase in Europe sought by BASF;

(c) BASF announced a price increase of 5% on 25 February 1998; however, DPE's prices were increased (by less than 5%) only in May and then dropped back in June to below the February level;

(d) the applicant did not follow the price increase announced by BASF in April 1998 or the price increase announced by Roche on 13 June 1998;

(e) the applicant's D-Calpan was regularly sold to end users at prices below the 'list' prices and the 'lowest' prices specified in the framework of the cartel, because the applicant did not implement price increases or staggered or delayed them and allowed discounts on published prices; more precisely, the prices of the applicant's D-Calpan to end users were on average more than 10% below the 'list' prices and lower than the 'lowest' prices.

118 The Court must reject at the outset the circumstance set out in subparagraph (b), which is referred to at recital 323 of the Decision, since it merely indicates that the applicant, during a meeting of cartel members in November 1997 or January 1998, expressed its opposition to a price increase sought by BASF but does not predetermine the position which the applicant might actually have adopted on the market after that meeting.

119 As regards the circumstances referred to in subparagraph (d), the applicant's contention that it did not follow a price increase announced by BASF in April 1998 is not proved, since the matters mentioned by the applicant do not even allow the Court to identify such an increase. The applicant's reference in this regard to point 103 of the statement of objections suggests that the increase is in fact the one announced by BASF on 25 February 1998, to which the circumstance raised in subparagraph (c) refers. In addition, it is also clear from the same point in the statement of objections that the price increase announced by Roche on 13 June 1998 was intended merely to act upon and support BASF's initiative of 25 February 1998. It is thus evident that all the circumstances referred to in subparagraphs (c) and (d) ultimately amount to no more than a very limited alignment with one and the same price-increase initiative taken by the other cartel members.

120 As regards the circumstance referred to in subparagraph (a), although it appears to be confirmed by a table concerning DPE's average selling prices, calculated on a monthly basis, for the period 1996 to 1999 ('the DPE table', produced by the applicant during the administrative procedure and placed on the file in these proceedings), its significance is diminished to a considerable degree in view of two other documents produced by the applicant before the Commission and placed on the file, reporting, inter alia on a quarterly basis, the average end-user selling prices of the applicant itself in Europe throughout the period of the infringement. Those documents — a graph showing the development of Daiichi's average selling prices in Europe for the period 1985 to 1998 and a table showing Daiichi's average selling prices in Europe, calculated on an annual and quarterly basis, for the period 1991 to 1998 (respectively 'the Daiichi graph' and 'the Daiichi table') — show that the level of those prices was markedly higher than that of DPE's prices as shown in the DPE table. The Daiichi graph shows, in particular, that the average price of the applicant itself at the start of the second quarter of 1997 was DEM 36 as opposed to DEM 32.05 shown by the DPE table for DPE at the same time. The Daiichi table shows in turn that the average price of the applicant itself during the second quarter of 1997 was 4.3% higher than its average price for the preceding quarter, which seems wholly consistent with the assumption that Daiichi followed the 4% price increase announced by Roche on 5 April 1997.

121 Asked at the hearing to explain the difference in level of those prices and to indicate why it is appropriate, in the examination of this plea, to refer sometimes to DPE's prices and sometimes to Daiichi's prices, the applicant stated that from time to time DPE had been allowed a degree of latitude by its parent company and that, in order to decide whether the partial non-implementation of the agreements was established, the prices imposed by the parent company, in other words the applicant itself, would have to be taken into account. In those circumstances, the comparison between the prices agreed within the cartel and DPE's prices cannot be genuinely representative of the extent to which the applicant followed the vitamin B5 price agreements.

122 As regards the circumstance referred to in subparagraph (e), it is clear from the table below, which has been produced by the applicant, is not disputed by the defendant and the data in which are drawn from recitals 304, 323 and 325 of the Decision and from the Daiichi graph and table, that, throughout the period from October 1991 until the end of 1994, the applicant's selling prices in Europe represented between 90% and 93% of the agreed minimum prices:

Date	'List' price for Europe (DEM)	Lowest price for Europe (DEM)	Daiichi average price to end-users in Europe (DEM)
1. 10. 1991	29.50	28.50	26.00
1. 4. 1992	32.50	31.00	28.50
1. 4. 1993	36.50	35.00	32.00
1994	39.00	37.50	35.01
1995	40.00	N/A	35.33
1996	N/A	N/A	34.33
1997	43.00	N/A	36.79
1998	46.00	N/A	39.98

123 However, it does not emerge clearly from the file that the minimum price of DEM 37.50 shown for 1994 was an average sum for the whole of that year. It is far from

impossible, particularly in the light of recital 304 of the Decision, that that figure represents no more than a level fixed at a given time in 1994, for example as at 1 April 1994, as appears to be established by document BASFAG 000301 attached to BASF's letter to the Commission of 23 June 1999, so that the average minimum price throughout 1994 could well have been lower than DEM 37.50. The applicant's average selling prices in 1994 could thus have represented even more than 93% of that average minimum price.

124 The difference between the applicant's selling prices and the agreed minimum prices does not appear substantial and is established, at the most, only in respect of a period of three years and three months, whilst the infringement lasted eight years in total (from January 1991 to February 1999, as is clear from recitals 2, 296 to 300, 312, 620 and 706 of the Decision, and not from September 1991 to February 1999, as stated, as the result of a clerical error, in Article 1(2)(f) of the Decision). Furthermore, it is clear from the table above that the way in which the applicant's selling prices evolved reflected, over that same period, the evolution of the agreed minimum prices and, throughout the period of the infringement, that of the list prices, and did so to a significant degree.

125 As regards, in the second place, the possible non-implementation in practice of volume agreements, the applicant claims, first, that it regularly exceeded the 'budgets' allocated to it for Europe to a greater extent than Roche or BASF and, second, that, for a number of years, it exported more D-Calpan to Europe than it reported to Roche and BASF as part of the cartel information exchange.

126 In relation to the fact that it exceeded the budgets, it must be noted — with the help of the table below, which is not put in doubt by the defendant and which the applicant drew up on the basis of data in the annexes to the statement of objections and in the documents put before the Commission by the applicant during the administrative procedure — that Roche and BASF themselves often exceeded their budgets and that the amounts by which the applicant exceeded its budgets were

significant only in the period 1991 to 1993, while it was precisely in the years 1991 and 1992 that Roche recorded its largest amounts in excess of its budgets:

Years	Daiichi budget for Europe*	Daiichi sales for Europe*	Daiichi index**	Roche index**	BASF index**
1991	370	411	111%	114%	86%
1992	435	567	130%	116%	102%
1993	470	646	137%	95%	104%
1994	635	670	106%	87%	90%
1995	640	607	95%	85%	78%
1996	550	560	102%	102%	121%
1997	585	606	104%	110%	86%
1998	580	438	78%	110%	103%

*: in millions of tons.

**: reported sales as a percentage of the individual budget for Europe.

127 In addition, the data on which the applicant relies concern European, rather than worldwide, budgets and sales. It is clear from the statements which the applicant itself made before the Commission and which are reiterated in point 88 of the application that if the regional budgets were exceeded, that did not give rise to any difficulties in the cartel, which was not the case if the worldwide budgets were exceeded by more than 2%.

128 In relation to the applicant's provision to the other cartel members, as part of the regular exchange of information within the cartel, of data under-reporting its actual sales in Europe, that circumstance, were it established, could not on its own have mitigated the harmful consequences for consumers of the anti-competitive

agreements at issue in this case. At the most, all it was able to do was to help the applicant to conceal, and therefore to support, its departures from the course of conduct agreed within the cartel in respect of prices and sales volumes.

129 Therefore, the Court cannot conclude from the circumstances advanced by the applicant in the framework of this plea, even when they are appraised as a whole, that the applicant clearly and substantially departed from the agreements entered into by the cartel members. In any event, nothing in the file shows that those circumstances actually disrupted the operation of the cartel at any given time.

130 Thus, the applicant is not entitled to a reduction in the fine on account of the non-implementation in practice of the offending agreements and consequently its claim to that effect must be rejected.

3. *Third plea: application of the Leniency Notice*

131 This plea concerns the application of the Leniency Notice to the applicant (see paragraphs 19 to 22 above) and is subdivided into four parts.

First and second parts of the plea: application of Sections B and C of the Leniency Notice respectively

132 By the first and second parts of this plea, the applicant maintains that the Commission should have granted it total exemption from, or a reduction of at least

75% in, the fine pursuant to Section B of the Leniency Notice or, in the alternative, a reduction of 50% to 75% in the fine pursuant to Section C of the notice.

Arguments of the parties

— First part of the plea

133 By the first part of this plea, the applicant submits that the Commission made a manifest error of assessment, 'erroneously applied the law to the facts' and violated the Leniency Notice by not granting the applicant total exemption from, or a very substantial reduction of 75% to 100% in, the fine pursuant to Section B of the Notice. The applicant claims that it fulfilled all the requirements of Section B.

134 As regards more specifically the condition mentioned in Section B(b), requiring an undertaking to be 'the first to adduce decisive evidence of the cartel's existence', the applicant submits that, at the time when it gave the Commission information relating to the vitamin B5 cartel, the Commission did not have sufficient evidence to prove the existence of the infringement.

135 The applicant observes that, in Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino acids) (OJ 2001 L 152, p. 24), the Commission found that evidence is decisive within the meaning of Section B(b) of the Leniency Notice when it is 'in itself sufficient to establish the existence of the cartel'. For evidence to be considered as establishing the infringement, it must,

according to the applicant, relate to and describe the elements constituting the cartel, namely: the identity of the companies and the names and positions of the persons participating in the infringement; details of each of the meetings or contacts among the participants; details of the subject of discussions at each meeting and of any common understanding; the basic scheme of the cartel or modus operandi (for example, frequency of meetings, existence of monitoring systems, structures or bodies monitoring arrangements) and the duration of the infringement.

136 The applicant observes that the evidence of the vitamin B5 cartel provided by Roche and BASF prior to its own statement of 9 July 1999 is that contained in a letter of 22 June 1999 from Roche to the Commission, filed on 24 June 1999, and in two documents from BASF filed on 15 and 25 June 1999 respectively. In the applicant's submission, this evidence cannot be described as decisive.

137 In particular, the applicant asserts that the evidence provided by Roche on 24 June 1999 contained statistical documents for the period 1995 to 1998. However, as the infringement in question lasted from January 1991 to February 1999, it could not be found that this evidence established the duration of the infringement. Likewise it did not describe the basic scheme of the infringement: it nowhere referred to coordinated price initiatives and referred only vaguely to 'agreed upon market shares', without giving information on particular meetings, the places where they were held, dates or participants. According to the applicant, the evidence provided by BASF on 15 and 25 June 1999 was slightly more detailed than that provided by Roche in June 1999 but, like the latter, was incomplete, particularly with regard to the duration of the infringement. It shows that 'an agreement' had been discussed for the first time in 1992 and that the 'arrangements concerning Calpan' had terminated at or about the end of 1998.

138 However, the applicant notes that it had no access to certain passages of BASF's information which were deemed to contain business secrets. While observing that 'it is highly unlikely that this omitted information would have rendered BASF's information "decisive"', the applicant asks the Court to order the Commission, as a measure of organisation of procedure, to provide the Court with the full text of the two abovementioned documents from BASF and to confirm that the information to which the applicant did not have access did not render BASF's evidence decisive.

139 In contrast, the evidence submitted by the applicant to the Commission on 9 July 1999 was decisive as it was exhaustive and detailed. In particular, it enabled the Commission to establish the history and the system of the cartel, its basic scheme, the timing and mechanism of budget adjustments, the details of meetings, the operation of the cartel from 1991 to 1997 and its duration. The decisive nature of the applicant's information is also clear from the fact that the Commission relied on it almost exclusively to describe the infringement in the Decision (Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 288). In particular, the part of the Decision relating to the description of the vitamin B5 cartel (recitals 292 to 329) included approximately 20 references to statements, declarations and documents produced by the applicant, whereas it referred only twice to statements and documents produced by BASF and only once to a statement by Roche.

140 The applicant submits that, in the Decision, the Commission did not state reasons, in respect of each cartel sanctioned, for the decisiveness of the evidence provided by Roche and BASF, but made an 'across-the-board determination regarding the submissions of Roche and BASF for all the different vitamin cartels'. In view of this 'across-the-board' approach, the question arises of whether the Commission correctly assessed and characterised the evidence produced by Roche and BASF in June 1999 as decisive for the purpose of proving the vitamin B5 infringement. Consequently the applicant requests the Court to review that evidence and to compare it with the 'detailed, comprehensive and voluntary' evidence submitted by the applicant on 9 July 1999.

141 The defendant denies that the applicant is entitled to the benefit of Section B of the Leniency Notice, since it was not the first to have provided the Commission with decisive evidence of the vitamin B5 cartel. It repeats the arguments set out in the Decision, according to which Roche and BASF provided it with the first decisive evidence — namely information on the identity of the companies and certain persons involved in the agreements, the subject of discussions, the basic plan of the cartel and the duration of the infringement — and adds that the information was provided by BASF on 15 and 23 June 1999 and by Roche in the letter of 22 June 1999.

142 As for the measure of organisation of procedure requested by the applicant, the defendant points out, first, that the applicant already has the documents production of which it seeks. They were sent to it when the statement of objections was adopted, with the exception of the sales information sent by BASF on page 4413 of the case-file, which the Commission allowed to be treated confidentially. Second, the defendant confirms that those documents were decisive for proving the existence of the vitamin B5 cartel.

143 As regards the request for measures of organisation of procedure, the applicant, in its reply, notes that the defendant confirms that page 4413 of the case-file was not made available to it in the course of the administrative procedure because it was treated confidentially. On this point the applicant adds that it does not seek to obtain a copy of this page itself, but rather seeks to have the Commission produce it to the Court, so that the Court can determine whether the information on that page was produced in response to the Commission's request under Article 11 of Regulation No 17 and whether it made BASF's evidence decisive within the meaning of Section B(b) of the Leniency Notice.

— Second part of the plea

144 If the Court finds that the applicant did not fulfil the condition laid down in Section B(a) of the Leniency Notice, the applicant submits, in the second part of the present

plea, that, since it fulfilled at least the conditions mentioned in Section B(b) to (e), the Commission manifestly erred in its assessment, 'erroneously applied the law to the facts' and infringed the Leniency Notice by not allowing the applicant a substantial reduction of 50% to 75% in the fine pursuant to Section C of that notice.

145 The defendant observes that, as the applicant was not the first to adduce decisive evidence of the existence of the cartel, it could not benefit from the application of Section C of the Leniency Notice either.

Findings of the Court

146 In its Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines or may be granted reductions in the fine which would otherwise have been imposed upon them (see Section A, paragraph 3, of the Leniency Notice).

147 As is stated in Section E, paragraph 3, of the Leniency Notice, the notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on an applicant, it assesses the applicant's cooperation (see, to that effect, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 608; and Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraphs 192 and 193).

148 In accordance with Section B of the notice, an undertaking 'will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if [it] had not cooperated' if it:

'(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

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

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

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

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

149 Furthermore, pursuant to Section C of the notice, '[e]nterprises which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine'.

150 The grant of total exemption from, or a reduction in, the fine under Section B or C of the Leniency Notice therefore requires, inter alia, that the undertaking concerned should have been the first to adduce decisive evidence of the cartel's existence (condition mentioned in Section B(b)).

151 In the first sentence of recital 743 of the Decision, the Commission stated that 'Roche and BASF, through the principal material submitted to the Commission between 2 June 1999 and 30 July 1999, [had been] the first to provide the Commission with decisive evidence of the existence of cartel arrangements affecting the vitamin B2, B5, C, D3, beta-carotene and carotinoids markets'. At recital 745, first sentence, it concluded from that that the other undertakings had thus been prevented from meeting that condition.

152 The applicant instead maintains that it did meet that condition. With its statement to the Commission of 9 July 1999 and the annexes thereto, it provided the Commission with decisive evidence of the vitamin B5 cartel. By contrast, the evidence provided on that matter by Roche and BASF prior to that statement, namely that provided by Roche by letter of 22 June 1999, registered on 24 June 1999, and by BASF by two letters of 15 and 23 June 1999 (registered on 15 and 25 June 1999 respectively), cannot be described as decisive.

153 It must be noted that it is not possible to ascertain from the terms in which the first sentence of recital 743 of the Decision is cast (i) whether the Commission took the view that Roche and BASF jointly met the condition in Section B(b) in respect of each of the infringements mentioned and (ii) whether, as regards the vitamin B5 infringement, the Commission's finding was based on all the evidence provided by those two undertakings in the period indicated (2 June to 30 July 1999), including therefore the material provided subsequent to the applicant's statement of 9 July 1999 (in particular the replies of Roche and BASF of 16 July 1999 to the requests for information concerning, inter alia, vitamin B5, which the Commission had sent to them on 26 May 1999: see recital 132 of the Decision).

154 For the purposes of the present case (in view of the wording of Section B(b) and Section C of the Leniency Notice, which provide for a very substantial or substantial reduction in the fine only for the undertaking which was genuinely the 'first' to adduce decisive evidence (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 365), it is, however, not necessary to consider whether the Commission held, and if it did whether it was correct in doing so, that, in relation to the vitamin B5 infringement, Roche and BASF both met the condition in Section B(b) of the Leniency Notice.

155 Moreover, the fact that recital 743 of the Decision is ambiguous in relation to the evidence taken into account by the Commission in reaching its finding under Section B(b) of the Leniency Notice did not prevent the applicant from evaluating the merits of that finding and challenging it before the Court, just as it does not prevent the Court from exercising its power of review in respect of that finding in the light of the arguments raised by these parts of the present plea.

156 As regards the notion of 'decisive evidence of the cartel's existence', first, it must be held, contrary to the applicant's contention, that the notion does not refer to

evidence which is sufficient in itself to establish the cartel's existence, as is shown by a comparison with the wording of Section B(a) of the Leniency Notice that specifically includes the adjective 'sufficient', which, by contrast, is not used in Section B(b) of the notice (see, to that effect, the judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 362).

157 Second, although the evidence referred to in Section B(b) of the notice need not be sufficient in itself to establish the cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as principal evidence supporting a decision finding an infringement.

158 In this instance, it cannot be denied that the applicant provided, by its 9 July 1999 statement, evidence of such a kind in relation to the vitamin B5 cartel. The statement included a detailed description of the cartel, including, in particular, details about the establishment and duration of the cartel, its members and their reasons for participating, its guiding principles (a budget system intended to achieve the division of sales, concerted price increases and the exchange of information), and a very detailed account of the numerous contacts and meetings to have taken place throughout the period of the infringement, showing where and when they took place, what they were about and who took part in them. It also attached documents showing, with examples and figures, the operation of the budget system and the concerted price increases. Indeed, as the applicant has rightly pointed out, the description of the vitamin B5 infringement in the Decision is essentially based on the material provided by the applicant.

159 In those circumstances, the applicant is justified in pointing out that the question whether the undertaking to have been the first to adduce decisive evidence was in fact Roche or BASF, rather than the applicant, is to be resolved by reference solely to the material which Roche and BASF had provided to the Commission as at 9 July

1999. The defendant itself, in its defence, explained the remark made in the first sentence of recital 743 of the Decision, claiming that the first decisive evidence of the vitamin B5 cartel's existence had been provided by BASF in its letters of 15 and 23 June 1999 and by Roche in its letter of 22 June 1999.

160 In that connection, it must be held that the material produced by BASF as at 25 June 1999 (that provided by the letters of 15 and 23 June 1999) as it appears from the file in these proceedings, can certainly be regarded as capable of constituting the principal evidence for a finding that a cartel existed in the vitamin B5 market and, consequently, as in any event preventing the applicant from meeting the condition in Section B(b) of the Leniency Notice.

161 Indeed, the letter of 15 June 1999 discloses, in addition to the members of the cartel, information about certain meetings in the initial phase of the cartel, including the places (Basel and Tokyo) where those meetings were held and the names of the persons who attended. It shows the names of the persons involved in the unlawful actions, the fact that the cartel had quarterly meetings and the general import of the agreements (quota allocation, monthly exchanges of information on sales volumes, price increases) and identifies as the infringement period the period running from 1992 until the end of 1998, in other words a period encompassing almost the whole of the period of the infringement as found in the Decision. Furthermore, the letter of 23 June 1999 provides, in its annexes, figures concerning, inter alia, the quotas allocated to the cartel members for the years 1995 and 1996 and a table of list prices and minimum prices as at 1 April 1994, figures which give further details about, and support, the description in the letter of 15 June 1999 of the unlawful actions.

162 The conclusion set out at paragraph 160 above is not undermined by the fact that the precise duration of the infringement as found in the Decision is not identified by

the material provided by BASF as at 25 June 1999, since the condition in Section B(b) of the Leniency Notice does not require the undertaking in question to provide evidence concerning all the findings of fact in the Commission's decision. Nor is that conclusion undermined by the fact that, in the Decision, the Commission made greater use of the material provided by the applicant than of that provided by BASF.

163 In those circumstances, there is no need either to order the defendant, in accordance with the applicant's request to that effect, to produce page 4413 or other documents from the case-file, or to examine whether the material provided by Roche by its letter of 22 June 1999, which is more limited than that provided by BASF, could also be classified as decisive evidence of the vitamin B5 cartel's existence, and the Court cannot but uphold the defendant's contention that the applicant, despite the fact that the material with which it provided the Commission on 9 July 1999 was certainly more extensive and detailed and better documented, did not meet the condition in Section B(b) of the Leniency Notice and that therefore neither Section B nor Section C of the notice could apply to it.

164 Since the applicant has not established that, in not allowing it the benefit of either Section B or Section C, the Commission made a manifest error of assessment or infringed the Leniency Notice, the first and second parts of the present plea must be rejected.

Third and fourth parts of the plea: application of Section D of the Leniency Notice

165 By the third and fourth parts of the present plea, advanced in the alternative, the applicant submits that the Commission should at the least have granted it a

reduction of 50%, or, in any event, of more than 35%, of the fine, pursuant to Section D of the Leniency Notice.

Arguments of the parties

— Third part of the plea

166 By the third part of this plea, the applicant submits that the Commission infringed the principle of equal treatment in not granting the applicant, as it did in the case of Roche and BASF, a 50% reduction in the fine pursuant to Section D of that notice, the applicant's cooperation having been at least as extensive and voluntary as that of Roche and BASF and having been given at the same stage of the administrative procedure.

167 According to the Court's judgments in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 245, and in Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 139, the extent of cooperation by the undertakings concerned must be regarded as comparable in so far as they provided the Commission, at the same stage of the administrative procedure and in similar circumstances, with similar information concerning the conduct imputed to them. In the present case, several factors show that the applicant's cooperation was comparable to, indeed more extensive than, that of Roche and BASF: the circumstances in which the companies concerned approached the Commission, the timing of their submissions of evidence, the voluntary nature of the provision of evidence and the value added by the evidence provided.

168 The defendant disputes that the principle of equal treatment requires that in the present case the applicant be granted a 50% reduction in the fine by virtue of Section D of the Leniency Notice, i.e. that it should be treated in the same way as Roche and BASF in that respect. In particular, the applicant contacted the Commission to indicate its intention of cooperating more than one month after Roche and BASF did so and its effective cooperation was not given until the Commission already had in its possession decisive evidence of the cartel from those two companies. Consequently the defendant exercised its discretion within the range of reduction (10% to 50%) laid down in Section D of the Leniency Notice in allowing the applicant a 35% reduction in its fine and, in doing so, did not breach the principle of equal treatment.

— Fourth part of the plea

169 In the further alternative, the applicant submits, in the fourth part of the present plea, that the Commission failed to observe the Leniency Notice and infringed the principle of equal treatment by not allowing it a reduction of more than 35% for having complied with Section D 2, first and second indents, of that notice.

170 In this connection the applicant observes that it was granted a 35% reduction for having fulfilled the conditions set out under Section D 2, first indent, of the Leniency Notice, that is to say, for having provided the Commission, before the statement of objections was sent, with information, documents or other evidence which contributed to establishing the existence of the infringement. However, the Commission does not acknowledge anywhere in the Decision that the applicant also fulfilled the conditions of Section D 2, second indent, as it did not substantially contest the facts set out in the statement of objections.

171 It is clear from Section D 2 of the notice that the first and second indents refer to separate and distinct grounds for reducing the fine. Therefore the Commission's failure to allow the applicant a larger reduction, taking account of the fact that it fulfilled the conditions of the first and second indents of Section D 2, constitutes an erroneous application of the Leniency Notice or, at least, a failure to meet the legitimate expectations created by the notice.

172 Furthermore, the Commission's refusal to allow the applicant a reduction for fulfilling the requirements of the two indents of Section D 2 of the notice infringes the principle of equal treatment in so far as it is inconsistent with the Commission's past decisions. In this connection the applicant mentions the British Sugar decision (paragraph 46 above) and Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24), in which the undertakings British Sugar and Anek respectively were granted reductions of 50% and 45% in their fines for fulfilling simultaneously the conditions of the first and second indents of Section D 2 of the Leniency Notice.

173 The defendant contests the applicant's claim to a reduction in its fine of more than 35% under Section D of the Leniency Notice. The defendant contends that the 35% reduction allowed takes account also of the fact that the applicant did not contest the facts. In recital 754 of the Decision (see paragraph 20 above) it is stated that the applicant did not contest the facts. A correct reading of that recital shows that the two possibilities envisaged are, first, that an undertaking has contributed to establishing the existence of the infringements and did not substantially contest the facts, and, second, that it did not substantially contest the facts without contributing to establishing the existence of the infringements. That is the reading which must be followed in view of the context of the sentence and the Decision as a whole, from which it is clear that, whilst none of the companies substantially contested the facts,

some of them did not fulfil the condition of contributing to establishing the infringements in relation to certain vitamin products. Indeed, the level of the reduction granted to Roche and BASF confirms that the applicant's interpretation of the Decision is wrong. If it were correct, the reductions accorded to Roche and BASF would not have taken account of the fact that they did not substantially contest the facts relating to the infringements imputed to them and the Commission's grant of a 50% reduction to each of them would be illogical because they would have been given the maximum reduction on the basis of Section D even if not all the conditions set out in that section had been fulfilled.

174 The defendant merely omitted to refer once again, in recital 764, to Section D 2, second indent, but the terms of recital 764 refer generally to the applicant's cooperation with the Commission.

Findings of the Court

175 Section D of the Leniency Notice provides:

'1. Where 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 have been imposed if it had not cooperated.

2. 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.'

176 It is appropriate to consider first of all whether, as the applicant maintains, the reduction of 35% of the fine accorded to it by the Commission under Section D was given only in respect of the cooperation referred to in Section D 2, first indent, or whether, as the defendant contends, the reduction was also intended as recognition that the applicant had not substantially contested the facts set out in the statement of objections, given that the defendant does not deny that the applicant fulfilled the condition in Section D 2, second indent. Indeed, the fact that the applicant did not substantially contest the facts set out in the statement of objections is clearly shown by the wording of its reply of 2 October 2000 to the statement of objections.

177 As the defendant has pointed out, it does in fact emerge from the Decision (recital 148) that none of the eight undertakings fined under the Decision substantially contested the facts on which the Commission had based its statement of objections. Although recital 746 reproduces in essence the full text of Section D of the Leniency Notice and although the Commission expressly granted Merck KgaA and Aventis SA a reduction of 15% and 10% of the fine respectively under Section D 2, second indent, for not having contested the facts held against them, which related to the vitamin C infringement and the vitamin D3 infringement respectively (recitals 763 and 767), it refrained from applying that provision to the applicant and reduced the applicant's fine only under Section D 2, first indent (recital 764).

178 In its pleadings the defendant has sought to explain that omission by stating that, where the undertakings' cooperation had been limited to merely refraining from contesting the facts, it reduced the fine solely on the basis of that type of cooperation and referred expressly to Section D 2, second indent, of the Leniency Notice, whereas, for undertakings which had also cooperated under the first indent of the provision, namely Roche, BASF, Solvay Pharmaceuticals BV, Daiichi, Eisai Co. Ltd and Takeda Chemical Industries Ltd, it reduced the fine only once, combining the two types of cooperation; it had merely failed to refer, in relation to the latter reduction, to the second indent as well. In any event, it claims, it is quite clear from the context of the Decision that the applicant's reduction was based on the fact both that it had provided information and documents and that it had not contested the facts.

179 On this point, it is sufficient to note that the Commission put forward this explanation for the first time before the Court and that it does not appear anywhere in the Decision adopted by the College of Commissioners. The finding that the applicant had not contested the facts should have been included in the recitals relating to the undertaking's cooperation in the same way as it was expressly included — as well as in recital 148 concerning the description of the administrative procedure — in recitals 752, 753, 763 and 767 with regard to Merck and Aventis (see, to that effect, Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraphs 242 and 244; and the judgment of 29 April 2004, *Tokai Carbon and Others* v *Commission*, paragraphs 413 to 415, 439 and 453). In relation to recital 754, relied on by the defendant, it must be held, in view of its wording and, in particular, the use of the terms 'and/or', that it cannot be interpreted as indicating that the applicant had not substantially contested the facts on which the Commission had based its allegations, particularly since that recital follows the recitals of the Decision (747 to 753) in which the Commission examined the nature of the cooperation of each of the undertakings at issue and which, in the applicant's case — unlike in the case of Merck and Aventis —, do not mention that the facts were not contested.

180 In the light of recitals 749, 750 and 764 of the Decision, concerning the applicant (see paragraph 22 above), the Court thus cannot but note that the Commission has not allowed Daiichi the benefit of the provision of Section D 2, second indent, of the Leniency Notice, although the applicant fulfilled the conditions laid down in that provision.

181 It follows from the foregoing that the Commission failed to take full account of the significance of the cooperation provided by the applicant prior to adoption of the Decision and thereby unlawfully refused to allow the applicant the benefit of that provision. Since the Commission, in acting in that way, infringed the Leniency Notice, the Court must exercise its unlimited jurisdiction and, in doing so, safeguard the legitimate expectation which Section D of the notice caused the applicant to entertain.

182 In the exercise of that jurisdiction, and also taking account (i) of the extent of the applicant's cooperation before the statement of objections was dispatched — which is evident from the extensive documentation produced to the Commission on 9 July 1999 and from the fact that the Decision contains a great many references to the material produced in the framework of that cooperation — and (ii) of the fact that the cooperation was voluntary and was not prompted by the Commission exercising its powers of investigation with regard to the applicant, the Court finds that the applicant must be granted a further reduction of 15% of the fine, as calculated before application of the Leniency Notice, which is to be added to the 35% reduction already granted by the Commission.

183 Since the applicant is thus entitled to a reduction of 50%, in other words the maximum reduction provided for under Section D of the Leniency Notice, there is

no need to examine specifically the complaints advanced by the applicant in the third and fourth parts of this plea that the Commission infringed the principle of equal treatment.

184 It follows that the final amount of the fine imposed on the applicant must be reduced to EUR 18 million.

The confidential nature of certain data in the Decision

185 In the tables included in recital 123 of the published version of the Decision, certain data pertaining to the worldwide turnover in the relevant product in the last full calendar year of the infringement and to market shares throughout the period of the infringement are omitted or replaced with value brackets in order to safeguard business secrets. More specifically, the data concerned are those relating to the markets for vitamins A, E and B5, beta-carotene and carotinoids.

186 Initially, neither the applicant nor the Commission asked the Court for those data to be given confidential treatment.

187 Given that Article 17(4) of the Instructions to the Registrar of the Court of First Instance of 3 March 1994 (OJ 1994 L 78, p. 32), last amended on 5 June 2002 (OJ 2002 L 160, p. 1), provides that '[w]here a party so requests or the Court of its

own motion so decides, ... information may be omitted from the publications relating to a case if there is a legitimate interest in keeping ... [that] information confidential', the Court requested the parties, in the context of measures of organisation of procedure, to express their view on whether there was still a legitimate interest in the data referred to at paragraph 185 above continuing to be kept confidential in publications relating to this case.

188 The applicant replied that, in view of their age, the data concerning it no longer required confidential treatment in Court publications relating to the present case. The defendant, for its part, whilst agreeing to the publication of data relating to the applicant, in so far as the applicant consented thereto, specified that, in contrast, data relating to other undertakings should not be disclosed, since they constitute business secrets and those undertakings had requested confidential treatment in relation to the publication of the Decision.

189 Since the data at issue relate to periods (lasting until 1998) which had ended at least six years previously and since the data are of no strategic value either, the Court, taking the view that the data were thereafter historical (see, to that effect, the order of 19 June 1996 in Joined Cases T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537, paragraphs 25 and 32), decided that there was no need to keep the data confidential in the publications relating to the present case. That is why certain data relating to the vitamin B5 market, including those concerning undertakings other than the applicant, were to be found in the report for the hearing and why, like certain data pertaining to the vitamin A and E markets, they are also to be found in this judgment, making the Court's reasoning relating to the first plea in this action more readily comprehensible.

Costs

190 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 in the successful party's pleadings. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

191 In the present case, as the applicant has been unsuccessful in a significant part of its pleadings, the Court will make an equitable assessment of the case in holding that it is to bear four fifths of its own costs and pay four fifths of the costs incurred by the Commission and that the Commission is to bear one fifth of its own costs and pay one fifth of those incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Reduces to EUR 18 000 000 the fine imposed on the applicant by Article 3(f) of Commission Decision 2003/2/EC of 21 November 2001 relating to a

proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins);

2. Dismisses the remainder of the application;

3. Orders the applicant to bear four fifths of its own costs and to pay four fifths of the costs incurred by the Commission and the Commission to bear one fifth of its own costs and to pay one fifth of the costs incurred by the applicant.

Legal Mengozzi Wiszniewska-Białecka

Delivered in open court in Luxembourg on 15 March 2006.

E. Coulon H. Legal

Registrar President

Table of contents