JUDGMENT OF THE COURT (Grand Chamber)

28 June 2005 *

Table of contents

* Languages of the case: Danish, German and English.

In Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P,

APPEALS under Article 49 of the EC Statute of the Court of Justice, lodged on 17 May 2002 in the first case, 29 May 2002 in the second, 3 June 2002 in the next four cases and 5 June 2002 in the last case,

Dansk Rørindustri A/S, established in Fredericia (Denmark), represented by K. Dyekjær-Hansen and K. Høegh, advokaterne (C-189/02 P),

Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, established in Rosenheim (Germany),

Isoplus Fernwärmetechnik Gesellschaft mbH, established in Hohenberg (Austria),

Isoplus Fernwärmetechnik GmbH, established in Sondershausen (Germany),

represented by P. Krömer, Rechtsanwalt, with an address for service in Luxembourg (C-202/02 P),

KE KELIT Kunststoffwerk GmbH, established in Linz (Austria), represented by W. Löbl, Rechtsanwalt, with an address for service in Luxembourg (C-205/02 P),

LR af 1998 A/S, formerly Løgstør Rør A/S, established in Løgstør (Denmark), represented by D. Waelbroeck, avocat, and H. Peytz, advokat (C-206/02 P),

Brugg Rohrsysteme GmbH, established in Wunstorf (Germany), represented by T. Jestaedt, H.-C. Salger and M. Sura, Rechtsanwälte, with an address for service in Luxembourg (C-207/02 P),

LR af 1998 (Deutschland) GmbH, formerly Lögstör Rör (Deutschland) GmbH, established in Fulda (Germany), represented by H.-J. Hellmann, Rechtsanwalt, with an address for service in Luxembourg (C-208/02 P),

ABB Asea Brown Boveri Ltd, established in Zurich (Switzerland), represented by

A. Weitbrecht, Rechtsanwalt, J. Ruiz Calzado, abogado, and M. Bay, avvocato, with an address for service in Luxembourg (C-213/02 P),

appellants,

the other parties to the proceedings being:

Commission of the European Communities, represented by W. Mölls, P. Oliver and H. Støvlbæk, acting as Agents, assisted by A. Böhlke, Rechtsanwalt (C-189/02 P, C-202/02 P, C-205/02 P and C-208/02 P), and R. Thompson QC (C-206/02 P and C-213/02 P), with an address for service in Luxembourg,

defendant at first instance,

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG,

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft,

represented by P. Krömer, Rechtsanwalt, with an address for service in Luxembourg (C-202/02 P),

applicants at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur) and R. Silva de Lapuerta, Presidents of Chamber, C. Gulmann, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: H. von Holstein, Deputy Registrar, and M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 March 2004,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 July 2004,

gives the following

Judgment

1 The present appeals were brought by Dansk Rørindustri A/S ('Dansk Rørindustri') (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, Isoplus Fernwärmetechnik Gesellschaft mbH and Isoplus Fernwärmetechnik GmbH

(together 'the Henss/Isoplus group') (C-202/02 P), KE KELIT Kunststoffwerk GmbH ('KE KELIT') (C-205/02 P), LR af 1998 A/S, formerly Løgstør Rør A/S ('LR A/S') (C-206/02 P), Brugg Rohrsysteme GmbH ('Brugg') (C-207/02 P), LR af 1998 (Deutschland) GmbH, formerly Lögstör Rör (Deutschland) GmbH ('LR GmbH') (C-208/02 P) and ABB Asea Brown Boveri Ltd ('ABB') (C-213/02 P).

2 By their appeals, those undertakings requested the Court to set aside the judgments of the Court of First Instance of the European Communities of 20 March 2002 concerning them, namely the judgments in Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647, Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633 and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881 (hereinafter, for example, 'the judgment in *Dansk Rørindustri* v *Commission*', where the reference is to one of those judgments, or 'the judgments under appeal', where the reference is to all of the judgments).

3 By the judgments under appeal, the Court of First Instance, inter alia, reduced the fine imposed on ABB by Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (IV/35.691/E-4 — Pre-insulated pipes) (OJ 1999 L 24, p. 1) ('the contested decision') and essentially dismissed the actions for annulment of that decision.

I — Legal framework

The European Convention for the Protection of Human Rights and Fundamental Freedoms

4 Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), entitled 'No punishment without law', provides in paragraph 1:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

Regulation No 17

5 Article 15 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

'1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

...

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5), or do not supply information within the time-limit fixed by a decision taken under Article 11(5);

...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article 85(1) or Article 86 of the Treaty; ...

...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

The Guidelines

6 The Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 of the ECSC Treaty', published in the *Official Journal of the European Communities* of 14 January 1998 (OJ 1998 C 9, p. 3; 'the Guidelines'), states in the preamble:

'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of

aggravating circumstances or reduced to take account of attenuating circumstances.'

The Leniency Notice

7 In its Notice on the non-imposition or reduction of fines in cartel cases, published in the *Official Journal of the European Communities* on 18 July 1996 (OJ 1996 C 207, p. 4; 'the Leniency Notice'), a draft of which had been published on 19 December 1995 (OJ 1995 C 341, p. 13; 'the draft Leniency Notice'), the Commission defined the conditions under which an undertaking which cooperates with the Commission during its investigation may be exempted from a fine or be granted a reduction in the amount of the fine which would otherwise have been imposed on it, as indicated in Section A, paragraph 3, of that notice.

8 Section A, paragraph 5, of the Leniency Notice provides:

'Cooperation by an [undertaking] is only one of several factors which the Commission takes into account when fixing the amount of a fine. ...'.

9 Section E, paragraph 3, of the Leniency Notice, on procedure, provides, in particular:

'The Commission is aware that this notice will create legitimate expectations on which [undertakings] may rely when disclosing the existence of a cartel to the Commission.'

II — Facts

10 The facts giving rise to the actions before the Court of First Instance, as set out in the judgments under appeal, may for the purposes of the present judgment be summarised as follows.

11 The appellants are companies operating in the district heating sector. They produce, or market, pre-insulated pipes for that sector.

12 Following a complaint lodged on 18 January 1995 by the Swedish undertaking Powerpipe AB ('Powerpipe'), the Commission and representatives of the Competition Authorities of the Member States concerned carried out, on 28 June 1995, certain investigations, on the basis of Article 14 of Regulation No 17, at the premises of 10 undertakings or associations in the district heating sector, including the applicants, or certain establishments belonging to them.

13 The Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to most of the undertakings involved in the facts in issue.

14 On 20 March 1997, the Commission sent a statement of objections to certain of the applicants and to the other undertakings concerned, in accordance with Article 2(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1969, p. 47).

15 A hearing of the undertakings concerned took place on 24 and 25 November 1997.

16 On 21 October 1998, the Commission adopted the contested decision, in which it found that various undertakings, and in particular certain of the appellants, had participated in a series of agreements and concerted practices within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC) ('the cartel').

17 According to the decision, an agreement was concluded in late 1990 between the four Danish producers of district heating pipes on the principle of general cooperation on their national market. That agreement involved ABB IC Møller A/S, the Danish subsidiary of ABB, Dansk Rørindustri, also known as Starpipe, LR A/S and Tarco Energi A/S ('Tarco', the four companies being referred to collectively as 'the Danish producers').

18 One of the first measures was found to have consisted in coordinating in a price increase both on the Danish market and on export markets. In order to protect the Danish market, quotas were set, then implemented and monitored by a contact group composed of the senior sales staff of the undertakings concerned.

19 According to the contested decision, two German producers, the Henss/Isoplus group and Pan-Isovit GmbH (which subsequently became Lögstör Rör (Deutschland) GmbH and then LR GmbH), joined from autumn 1991 in the regular meetings with the Danish producers. In the context of those meetings, negotiations on dividing the German market took place. Those negotiations led, in August 1993, to agreements fixing sales quotas for each participating undertaking.

20 According to the decision, an agreement was reached between all those producers in 1994 to fix quotas for the whole of the European market. That Community-wide cartel was structured on two levels. The directors' club, consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each undertaking both on the market as a whole and on each of the national markets, in particular the Danish, German, Italian, Netherlands, Austrian, Finnish and Swedish markets. For certain national markets, a contact group was set up, composed of local sales managers, who were given the task of administering the agreements by assigning projects and coordinating the bids.

21 As regards the German market, the contested decision states that following a meeting on 18 August 1994 of the six main European producers, namely ABB,

Dansk Rørindustri, the Henss/Isoplus group, LR A/S, LR GmbH and Tarco, and also Brugg, a first meeting of the contact group for Germany was held on 7 October 1994. The meetings of that group continued long after the Commission's investigations, at the end of June 1995, although from that time they were held outside the European Union, in Zurich (Switzerland). The meetings in Zurich continued until 25 March 1996, or some days after certain of the undertakings received the requests for information sent by the Commission.

22 As an element of the cartel, the decision refers, in particular, to the adoption and implementation of concerted measures designed to eliminate the only large undertaking not forming part of the cartel, Powerpipe. The Commission explains that certain participants in the cartel recruited 'key employees' from that company and gave it to understand that it must withdraw from the German market.

23 When Powerpipe was awarded a large German project in March 1995, a meeting was held in Düsseldorf (Germany), attended by the seven undertakings which had met on 18 August 1994. It was decided at that meeting to establish a collective boycott of Powerpipe's customers and suppliers. That boycott was then implemented.

24 In the contested decision, the Commission sets out the reasons why not only the express market-sharing arrangement concluded between the Danish producers at the end of 1990 but also the arrangements concluded after October 1991 may together be regarded as forming an agreement prohibited by Article 85(1) of the Treaty.

25 Furthermore, the Commission states that the cartel in Denmark and the Community-wide cartel are merely the expression of a single cartel which began in Denmark but which from the outset had the long-term objective of extending the participants' control to the entire common market. According to the Commission, the continuous agreement between producers had a significant effect on trade between Member States.

26 In the judgments under appeal, the Court of First Instance observed that it was not disputed that in the contested decision the amount of the fines was calculated according to the method laid down in the Guidelines, as indicated in particular at paragraphs 222 and 275 of the judgment in *LR AF 1998* v *Commission*.

27 It is common ground, moreover, that the contested decision makes no reference to the Guidelines, that the undertakings were not informed during the administrative procedure that the method set out in those Guidelines would be applied to them and that that method was not mentioned in the statement of objections or referred to at the hearings of the undertakings.

28 It should further be noted that, with the exception of the Henss/Isoplus group, all the undertakings concerned by the contested decision had their fines reduced by the Commission pursuant to the Leniency Notice. That reduction, in the form of a percentage applied to the amount of the fine which would be payable in principle, was granted in return for their cooperation during the administrative procedure. That cooperation consisted in having agreed not to dispute the essential elements of the infringements or in having contributed, to varying degrees, to establishing the proof of the infringements.

29 The contested decision contains the following provisions:

'Article 1

ABB ..., Brugg ..., Dansk Rørindustri ..., Henss/Isoplus Group, [KE KELIT], Oy KWH Tech AB, Løgstør Rør A/S, Pan-Isovit GmbH, Sigma Tecnologie di rivestimento S.r.l. and Tarco ... have infringed Article 85(1) of the Treaty by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the pre-insulate pipes sector which originated in about November/December 1990 among the four Danish producers, was subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market.

The duration of the infringements was as follows:

— in the case of ABB, Dansk Rør[industri], Løgstør, Pan-Isovit ... from about November/December 1990 to at least March or April 1996,

— in the case of [the] Henss/Isoplus [Group], from about October 1991 up to the same time,

— in the case of Brugg from about August 1994 up to the same time,

— in the case of [KE KELIT] from about January 1995 up to the same time,

...

The principal characteristics of the infringement consisted in:

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

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

— agreeing prices for the product and for individual projects,

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

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

...

Article 3

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

(a) ABB ..., a fine of ECU 70 000 000;

(b) Brugg ..., a fine of ECU 925 000;

(c) Dansk Rørindustri ..., a fine of ECU 1 475 000;

(d) [the] Henss/Isoplus [group], a fine of ECU 4 950 000, for which the following companies are jointly and severally liable:

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG,

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft,

— Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH (formerly Dipl.-Kfm Walter Henss GmbH Rosenheim),

— Isoplus Fernwärmetechnik GmbH, Sondershausen,

— Isoplus Fernwärmetechnik Ges.mbH — stille Gesellschaft,

— Isoplus Fernwärmetechnik Ges mbH, Hohenberg;

(e) [KE KELIT], a fine of ECU 360 000;

...

(g) Løgstør Rør A/S, a fine of ECU 8 900 000;

(h) Pan-Isovit GmbH, a fine of ECU 1 500 000;

...'

III — The actions before the Court of First Instance and the judgments under appeal

30 By applications lodged at the Registry of the Court of First Instance, eight of the 10 undertakings fined by the contested decision, including the seven present appellants,

brought actions for annulment of that decision in whole or in part and, in the alternative, for annulment of or a reduction in the fine imposed on them.

31 By the judgment in *Dansk Rørindustri* v *Commission*, the Court of First Instance:

— annulled Article 1 of the contested decision in that it found that Dansk Rørindustri had participated in the infringement between April and August 1994;

— dismissed the remainder of the application;

— ordered Dansk Rørindustri to bear its own costs and to pay 90% of those incurred by the Commission;

— ordered the Commission to bear 10% of its own costs.

32 By the judgment in *HFB and Others* v *Commission*, the Court of First Instance:

— annulled Articles 3(d) and 5(d) of the contested decision as regards HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft;

— dismissed the remainder of the application;

— ordered the companies in the group to bear their own costs, including those relating to the interlocutory proceedings, and to pay 80% of the costs incurred by the Commission, including those relating to the interlocutory proceedings;

— ordered the Commission to bear 20% of its own costs, including those relating to the interlocutory proceedings.

33 By the judgments in *KE KELIT* v *Commission*, *LR AF 1998* v *Commission*, *Brugg Rohrsysteme* v *Commission* and *Lögstör Rör* v *Commission*, the Court of First Instance:

— dismissed the actions;

— ordered the applicants to pay the costs.

34 By the judgment in *ABB Asea Brown Boveri* v *Commission*, the Court of First Instance:

— ordered that the fine imposed on ABB in Article 3 of the contested decision be reduced to EUR 65 million;

— dismissed the remainder of the application;

— ordered the applicant to bear its own costs and pay 90% of the costs incurred by the Commission;

— ordered the Commission to bear 10% of its own costs.

IV — Forms of order sought by the parties to the appeal

35 Dansk Rørindustri claims that the Court should:

— reduce the amount of the fine imposed on it by the contested decision;

— in the alternative, set aside the judgment in *Dansk Rørindustri* v *Commission* and refer the case back to the Court of First Instance for a fresh adjudication on the amount of the fine;

— order the Commission to pay the costs incurred by the appellant in the proceedings before the Court of First Instance and before the Court of Justice.

36 The Henss/Isoplus Group claims that the Court should:

— set aside the judgment in *HFB and Others* v *Commission*, with the exception of the first paragraph of the operative part, and annul the contested decision;

— in the alternative, set aside the judgment under appeal with the exception of the first paragraph of the operative part and refer the case back to the Court of First Instance so that the latter may complete the proceedings and give judgment afresh;

— further in the alternative, set aside the judgment under appeal in the second paragraph of the operative part and reduce the amount of the fine imposed on the companies in the group by the contested decision;

— order the Commission to pay the costs incurred by those companies in the proceedings before the Court of First Instance and before the Court of Justice.

37 KE KELIT claims that the Court should:

— set aside the judgment in *KE KELIT* v *Commission*;

— in the alternative, set aside that judgment and refer the case back to the Court of First Instance for reconsideration;

— further in the alternative, reduce the amount of the fine imposed on it by the contested decision;

— in any event, order the Commission to pay the costs incurred by the appellant in the proceedings before the Court of First Instance and before the Court of Justice.

38 LR A/S claims that the Court should:

— set aside the judgment in *LR AF 1998* v *Commission*;

— annul the contested decision imposing a fine on the appellant or, at least, substantially reduce the amount of the fine, or, in the alternative, refer the case back to the Court of First Instance;

— declare the Guidelines illegal pursuant to Article 184 of the EC Treaty (now Article 241 EC);

— order the Commission to pay the costs.

39 Brugg claims that the Court should:

— set aside the judgment in *Brugg Rohrsysteme* v *Commission* and annul Articles 1 and 3 of the contested decision;

— in the alternative, reduce the amount of the fine imposed on Brugg by that decision;

— in any event, order the Commission to pay the costs incurred by the appellant in the proceedings before the Court of First Instance and before the Court of Justice.

40 LR GmbH claims that the Court should:

— set aside the judgment in *Lögstör Rör* v *Commission* and make a definitive determination as follows: annul the contested decision in so far as it concerns Brugg and, on a subsidiary basis, reduce the amount of the fine and order the Commission to pay the costs;

— very much in the alternative, set aside the judgment under appeal and refer the case back to the Court of First Instance for a determination.

41 ABB claims that the Court should:

— set aside paragraphs 2 and 3 of the operative part of the judgment in *ABB Asea Brown Boveri* v *Commission*;

— annul Article 3 of the contested decision in so far as it concerns ABB;

— further reduce the amount of the fine imposed on it by that decision;

— in the alternative, refer the case back to the Court of First Instance for a determination in accordance with the judgment of the Court of Justice;

— order the Commission to pay all the costs of the proceedings, including those incurred by ABB in connection with the appeal.

42 The Commission contends, in all of the present cases, that the Court should:

— uphold the judgments under appeal;

— order the applicants to pay the costs of the proceedings.

V — The grounds for setting aside the judgments under appeal

43 Dansk Rørindustri puts forward three pleas in law:

— breach of Regulation No 17 and of the principles of proportionality and equal treatment, in that the Court of First Instance did not condemn the fact that the amount of the fine imposed on it is disproportionate to the infringement;

— breach of Regulation No 17 and of the principles of protection of legitimate expectations and non-retroactivity, in that the Court of First Instance did not condemn the fact that the fine imposed on the appellant was determined on the basis of the principles of the Guidelines, when they are appreciably different from the principles in force at the time of the infringements, of the statement of objections and of the hearing;

— breach of the rights of defence, in that the Court of First Instance did not condemn the fact that Dansk Rørindustri was not given the opportunity during the administrative procedure to comment on the changes made by the Guidelines to the Commission's practice in determining the amount of the fine for infringement of the competition rules.

44 The Henss/Isoplus Group puts forward seven pleas in law, some of which contain a number of parts:

— unlawfulness of the Guidelines owing to:

— the Commission's lack of competence;

— breach of the principle of equal treatment;

— breach of the rights of defence;

— breach of the principle of non-retroactivity;

— breach of the right to be heard in respect of the application of the Guidelines when setting the amount of the fines;

— breach of Article 15(2) of Regulation No 17 when setting the amount of the fines, owing to:

— failure to apply the Leniency Notice to the companies concerned;

— breach of the rights of defence as a fundamental right when assessing aggravating circumstances;

— breach of Article 85(1) of the Treaty owing to the consequences drawn from the participation of the companies concerned in a meeting having an anti-competitive object;

— breach of Article 85(1) of the Treaty on account of the fact that the companies concerned were deemed to constitute the Henss/Isoplus group and the infringement was imputed to that group as an 'undertaking';

— procedural defect owing to the Court of First Instance's refusal to order the hearing of witnesses as a measure of investigation, as requested by the applicant;

— procedural defect owing to contradictions between the judgment under appeal and the case-file.

45 KE KELIT puts forward five pleas in law:

— breach of the principles of equal treatment and protection of legitimate expectations owing to the determination of the fine according to the Guidelines;

— breach of the principle of equal treatment as regards the duration of the infringement;

— breach of the principle of non-retroactivity;

— breach of the rights of the defence;

— breach of the obligation to state reasons.

46 LR A/S puts forward four pleas in law:

— breach of the principles of proportionality and equal treatment and also of Regulation No 17, owing to the excessive and discriminatory nature of the fine and, in the alternative, unlawfulness of the Guidelines;

— breach of the principles of protection of legitimate expectations and of non-retroactivity and also of Article 190 of the EC Treaty (now Article 253 EC), in that the Commission wrongly departed from its previous practice in relation to cooperation and retroactively applied the Guidelines and also a stricter code on cooperation and, at the very least, failure to state the reasons for such retroactive application;

— failure to take sufficient account of the attenuating circumstances applicable to the appellant;

— failure to take sufficient account of the appellant's cooperation.

47 Brugg puts forward five pleas in law:

— breach of the principles of non-retroactivity, protection of legitimate expectations and good administration, owing to the application of the Guidelines in determining the amount of the fine;

— breach of the principle of protection of legitimate expectations owing to the change in the method of calculating the fine after the appellant had cooperated;

— breach of the rights of defence owing to the application of the Guidelines without the appellant having been heard;

— breach of the principle of equal treatment owing to the non-reduction of the basic amount used in setting the appellant's fine;

— errors in the application of Article 85(1) of the Treaty as regards the appellant's participation in the boycott of Powerpipe.

48 LR GmbH puts forward four pleas in law:

— breach of the principles of non-retroactivity and protection of legitimate expectations owing to the retroactive application of the Guidelines;

— breach of Article 15(2) of Regulation No 17 and of the principle of the lawfulness of administrative action owing to the Commission's failure, in the exercise of its discretion, to observe the limits on the use of that power laid down in that provision and also misuse of that power in applying that provision in the present case, owing to breach of the principles of proportionality and equal treatment, to the appellant's detriment;

— breach of the obligation to state reasons referred to in Article 190 of the Treaty, in that the contested decision contains no reasoning in relation to the retroactive application of the Guidelines;

— breach of the rights of defence owing to the Commission's failure to respect the appellant's right to be heard in relation to the retroactive application of the Guidelines.

49 ABB puts forward three pleas in law:

— breach of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance as regards the Court's decision to dismiss as inadmissible a legal opinion annexed to the reply;

— breach of the principle of protection of legitimate expectations in that, particularly in the light of the Leniency Notice, the applicant was entitled to rely on the Commission's established practice in calculating the amount of the fine, so that the Commission could not arbitrarily depart from such a practice;

— breach of Article 15(2) of Regulation No 17, in that the Court of First Instance approved the Commission's determination of the gravity of the infringement committed by ABB without taking account of its turnover on the relevant market.

VI — The appeals

50 The parties and the Advocate General having been heard on that point, it is appropriate, on account of the connection between them, to join the present cases for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure of the Court.

A — The procedural pleas

51 It is appropriate first of all to deal with the pleas whereby the Henss/Isoplus group and ABB allege a number of breaches of the Rules of Procedure of the Court of First Instance.

1. The plea alleging breach of Article 68(1) of the Rules of Procedure of the Court of First Instance, in that the Court rejected the Henss/Isoplus group's application for certain witnesses to be heard by way of a measure of investigation

52 By its sixth plea, the Henss/Isoplus group complains that the Court of First Instance, at paragraphs 36 to 38 of the judgment in *HFB and Others* v *Commission*, dismissed

its application to order that Mr Boysen, Mr B. Hansen, Mr N. Hansen, Mr Hybschmann, Mr Jespersen and Mr Volandt be heard as witnesses, in accordance with Article 68(1) of the Rules of Procedure of the Court of First Instance. It submits that the substance of those paragraphs is vitiated by a procedural defect.

53 Contrary to what is stated at paragraph 37 of that judgment, the application for the six persons in question to be heard did state the facts in respect of which proof by witnesses should be ordered. At paragraph 72 of the application which the Henss/Isoplus Group lodged before the Court of First Instance, it was stated that the application that witnesses be heard had been made in order to prove that the undertakings of the group had not participated in the cartel before October 1994.

54 That plea must be rejected.

55 It follows from paragraph 34 of the judgment under appeal that the Court of First Instance did indeed take note of the fact that a hearing had been requested 'in order to prove that neither the applicants nor the Henss/Isoplus group participated in an illegal practice or measure or in any other similar conduct for the purposes of Article 85(1) of the ... Treaty before October 1994'.

56 However, the Court of First Instance observed at paragraph 36 of that judgment that, according to the final subparagraph of Article 68(1) of its Rules of Procedure, an application by a party for the examination of a witness is to state precisely about what facts and for what reasons the witness should be examined.

57 At the following paragraph of that judgment, the Court noted that, particularly at paragraphs 20, 40, 50, 66 to 71, 94, 96, 125 and 142 of the application, there were references to certain persons who could act as witnesses in relation to the facts set out in each of the paragraphs in question but that the names of the six persons whom the Henss/Isoplus group expressly requested be called as witnesses before the Court of First Instance were not to be found in those paragraphs. The Court of First Instance therefore found that, for those six persons, the Henss/Isoplus group had failed to state the facts in respect of which proof by witnesses should be ordered.

58 The Court of First Instance concluded, at paragraph 38 of the judgment, that without there being any need to consider whether it was appropriate to hear the six persons in question, the application for witnesses to be heard should not be granted.

59 The Court of First Instance was faced, first, with a significant body of precise facts in respect of which the Henss/Isoplus group had offered to provide proof in its application by having a series of persons called for examination and, second, with a formal request that six different persons be called as witnesses pursuant to Article 68(1) of the Rules of Procedure of the Court of First Instance, also formulated in that application, in order to prove generally that the group undertakings concerned had not participated in the agreement before October 1994, although the application did not refer to the precise facts in respect of which proof was being offered.

60 Faced with the manifest lack of clarity on that point of what was a voluminous application, the Court of First Instance correctly held that the request that the six persons concerned be examined did not indicate precisely the facts in respect of which those persons should be heard as witnesses.

61 The Henss/Isoplus group further submits that the examination of persons other than those six persons should be taken not as a mere offer of proof but as a request that they be examined as witnesses, within the meaning of Article 68(1) of the Rules of Procedure of the Court of First Instance.

62 By that complaint, the Henss/Isoplus group therefore criticises the Court of First Instance for having distorted the scope of its application on that point.

63 That complaint is unfounded.

64 It follows from that application, and in particular from paragraph 145, to which the appellant makes specific reference, moreover, that the appellant itself drew a distinction between the evidence offered within the meaning of Article 44(1) of the Rules of Procedure of the Court of First Instance and its formal request for the measure of investigation consisting in the examination of six other persons pursuant to Article 68(1) of the Rules of Procedure. The appellant has thus failed to demonstrate any distortion on this point.

65 In the alternative, the Henss/Isoplus group maintains that, even on the assumption that its request for the persons concerned to be examined as witnesses was not submitted in accordance with Article 68(1) of the Rules of Procedure, the Court of First Instance should in any event have ordered their examination of its own motion.

66 It submits that, since fines imposed under competition law must be classified as 'criminal' for the purposes of Article 6 of the ECHR, the Court of First Instance is in any event required, pursuant to paragraph 3 of that provision and to the general principle of Community law of the right to a fair hearing, to summon and hear the witnesses for the defence designated by name by the defendant.

67 In that regard, it should be borne in mind that the Court of First Instance is the sole judge of whether the information available concerning the cases before it needs to be supplemented (see, in particular, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 47, and Case C-136/02 P *Mag Instrument* v *OHIM* [2004] ECR I-9165, paragraph 76).

68 Furthermore, as the Court has held in another case concerning competition law, even where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it falls to the Court of First Instance to assess the relevance of the application to the subject-matter of the dispute and the need to examine the witnesses named (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 70).

69 The existence of a discretion in that regard on the part of the Court of First Instance cannot be challenged on the basis, relied on by the Henss/Isoplus group, of the general principle of Community law inspired by Article 6(1) of the ECHR, which

provides that everyone is entitled to a fair hearing, and, more particularly, the principle laid down in paragraph 3(d) of that article, which provides that everyone charged with a criminal offence has the right to obtain the attendance and examination of witnesses on his behalf on the same conditions as witnesses against him, a principle that constitutes a particular aspect of the right to a fair hearing.

70 It follows from the case-law of the European Court of Human Rights that that provision does not confer on the accused an absolute right to obtain the attendance of witnesses before a court and that it is in principle for the national court to determine whether it is necessary or appropriate to call a witness (see, among other authorities, *Pisano* v *Italy*, judgment of 27 July 2000, unreported, § 21; *S.N.* v *Sweden*, judgment of 2 July 2002, *Reports of Judgments and Decisions*, 2002-V, § 43; and *Destrehem* v *France*, judgment of 18 May 2004, unreported, § 39).

71 According to that case-law, Article 6(3) of the ECHR does not require that every witness be called but is aimed at full equality of arms, ensuring that the procedure in issue, considered in its entirety, gave the accused an adequate and proper opportunity to challenge the suspicions concerning him (see, in particular, *Pisano* v *Italy*, § 21).

72 In the present case, it is common ground, as may be seen from paragraph 21 of the judgment in *HFB and Others* v *Commission*, that the Court of First Instance, by way of a measure of organisation of procedure, requested the Henss/Isoplus group to answer certain written questions and to produce certain documents and that the parties complied with those requests. The Court of First Instance cannot therefore be accused of having been in breach of its duty to investigate the facts (see, to that effect, *Baustahlgewebe* v *Commission*, paragraph 76).

73 At paragraphs 137 to 181 of that judgment, moreover, the Court of First Instance examined a large number of documents on the file and concluded that the Commission was entitled to find that the Henss/Isoplus group had participated in a cartel from October 1991 until October 1994.

74 It follows that the appellant had ample opportunity to demonstrate that the undertakings belonging to it had not participated in the cartel before October 1994.

75 Contrary to what the Henss/Isoplus group contends, therefore, the Court of First Instance was not required to order of its own motion the examination of the witnesses for the defence concerned.

76 In the light of the foregoing, the plea must be rejected.

2. The plea whereby ABB alleges a breach of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance owing to its refusal to consider a legal opinion annexed to the reply

77 By its first plea in law, ABB maintains that, in holding at paragraphs 112 to 114 of the judgment in *ABB Asea Brown Boveri* v *Commission* that the legal opinion of

Professor J. Schwarze ('the legal opinion') annexed to the reply which it lodged at the Court of First Instance could not be taken into consideration in whole or in part, the Court of First Instance infringed Articles 44(1)(c) and 48(2) of the Rules of Procedure.

78 By the first part of this plea, ABB criticises the Court of First Instance for having erred in law in finding, at paragraph 112 of the judgment under appeal, that, in accordance with Article 48(2) of the Rules of Procedure of the Court of First Instance, the legal opinion was inadmissible since it contained certain general principles which supported pleas in law that had not been raised in the application before the Court of First Instance.

79 Since paragraphs 115 to 136 of the judgment deal only with the principle of protection of legitimate expectations, the Court of First Instance relied in that regard on the assumption that the plea was confined to that principle, so that any other principle of administrative law analysed in the legal opinion constitutes a new plea and is therefore inadmissible within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance.

80 However, ABB maintains that the legal opinion, in referring in particular to certain principles of administrative law, develops only arguments which clarify the precise legal basis and in particular the scope of the principle of protection of legitimate expectations. Those arguments seek essentially to demonstrate that the Commission's discretion in fixing the amount of the fine was limited in the circumstances of the present cases.

81 The appellant submits that the legal opinion therefore contains only arguments set out in support of a plea already raised in the application before the Court of First Instance, and no new plea in law.

82 In that regard, it must be held that the legal opinion, which amounts to 101 paragraphs in all, examines, inter alia, six principles of Community law, namely the principle of protection of legitimate expectations, the principle that the administration is bound by its own acts, the principle of estoppel, the principle of fair administration, the principle *venire contra factum proprium* and the right to a fair hearing, and indeed the protection of the rights of the defence.

83 It follows from paragraph 19 of the legal opinion that those principles are examined for the purposes of establishing whether Community law includes rules that limit the Commission's discretion when imposing fines in the field of competition law and that preclude it from altering its established practice in determining the amount of fines and from applying its new practice in a case such as this.

84 Paragraph 43 of the legal opinion states that, from various aspects and possibly to varying degrees, none of those principles may restrict the Commission's discretion.

85 At paragraphs 44 to 96 of the legal opinion, each of those principles is examined individually and applied to the present case.

86 At paragraphs 97 to 101 of the opinion, the conclusion is drawn that in the present case the Commission's discretion was in fact limited in that it could not depart from its previous practice.

87 At paragraph 98 of the opinion, it is stated that in so far as those principles are binding, they are similar.

88 It follows from the structure and the content of the legal opinion that, although there are certain points of correspondence between the principles of administrative law set out in that opinion and the pleas in law raised in the application, the object of the opinion is clearly not limited to an account of the arguments clarifying or amplifying the plea relating to protection of legitimate expectations, as ABB contends, but consists in developing a number of autonomous principles intended to demonstrate that in the present case the Commission could not depart from its previous practice in determining the amount of fines. In that regard, it must be held that the principle of protection of legitimate expectations constitutes only one of the six principles developed for that purpose.

89 Accordingly, as the Commission maintained, it follows from the wording of the legal opinion that the latter sought to refer for the first time to certain principles not raised in the application before the Court of First Instance.

90 In the light of the foregoing, the first part of the first plea in law put forward by ABB must be rejected.

91 By the second part of its first plea in law, ABB maintains that the Court of First Instance erred in law in holding, at paragraph 113 of the judgment in *ABB Asea Brown Boveri* v *Commission*, that the legal opinion could not be taken into consideration in whole or in part, since under Article 4(1)(c) of the Rules of Procedure of the Court of First Instance, the application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

92 ABB submits that the Court of First Instance found no defect in the application or in the reply that could justify the application of that provision. Consequently, it was wrong to hold that ABB sought to compensate for an inadequate plea in law by making a general reference to the legal opinion. Nor was there any basis for relying by analogy on that provision of the Rules of Procedure of the Court of First Instance, as the Court of First Instance did at paragraph 113 of the judgment under appeal.

93 In that regard, it is necessary to retrace the reasoning followed by the Court of First Instance at paragraph 113 of the judgment in *ABB Asea Brown Boveri* v *Commission*.

94 The Court of First Instance pointed out that it follows from Article 44(1)(c) of the Rules of Procedure that the essential facts and law on which an application is based must be apparent from the text of the application itself, even if only stated briefly, and that a reference in the application to such elements in an annex to the application is therefore not sufficient.

95 The Court of First Instance referred, in particular, to the settled case-law of the Court of Justice on the Commission's obligation, in any application lodged under Article 226 EC, to state the precise facts on which the Court of Justice is to adjudicate and also, at least briefly, the elements of law and of fact on which those complaints are based.

96 In that regard, it follows from that case-law that that obligation is not satisfied if the Commission's complaints are set out in the application only in the form of a reference to the grounds stated in the formal letter and in the reasoned opinion, or again in the part of the application devoted to the legal background (see, to that effect, inter alia, Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraphs 17 and 18; Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 35; and Case C-202/99 *Commission* v *Italy* [2001] ECR I-9319, paragraphs 20 and 21).

97 The Court of First Instance also observed that it is not for it to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and ancillary purpose.

98 In the light of those elements, the Court of First Instance, since part of the legal opinion in question could not be taken into consideration, concluded that it was not for it to seek and identify in that opinion the passages that might be taken into account qua annexes supporting and supplementing ABB's pleadings on specific points.

99 Regard being had to the grounds preceding it, that conclusion must be taken to mean that the purely probative and instrumental purpose of the annexes means that, in so far as the legal opinion contains, in addition to the new, and therefore inadmissible, pleas in law, elements of law on which certain pleas expressed in the application are based, those elements must be set out in the actual body of the reply to which that opinion is annexed or, at the very lest, be sufficiently identified in that reply.

100 In adopting those criteria and in holding that they were not satisfied in the present case, the Court of First Instance did not err in law.

101 Nor did the Court of First Instance distort the scope of the reply lodged before it. Paragraph 31 of the reply merely makes a general reference to the legal opinion. Furthermore, the fact, relied on by ABB, that in certain paragraphs of the reply references are made, in the form of footnotes, to passages in the legal opinion is not capable of calling in question the conclusion at which the Court of First Instance arrived on that point.

102 In those circumstances, the plea must be rejected.

B — The substantive pleas in law, relating to the imputability of the infringement

103 It is appropriate to examine, second, the substantive pleas in law raised by the Henss/Isoplus group and by Brugg, whereby the appellants challenge the judgments

concerning them on certain points relating to the imputability of the infringement as found against them in the contested decision and confirmed by the Court of First Instance.

1. The plea in law alleging infringement of Article 85(1) of the Treaty owing to the fact that certain undertakings in the Henss/Isoplus group were taken into account and that the infringement was imputed to that group as an 'undertaking' within the meaning of that provision

104 By its fifth plea in law, the Henss/Isoplus group criticises the Court of First Instance for having held, at paragraphs 54 to 68 of the judgment in *HFB and Others* v *Commission*, that the Commission was correct in the contested decision to take into account certain undertakings in the Henss/Isoplus group and to impute the infringement to that group.

105 The appellant maintains, first of all, that at paragraph 66 of the judgment the Court of First Instance erred in law when it rejected its argument that an undertaking for the purposes of the Treaty provisions on competition must necessarily have legal personality.

106 That, in the appellant's submission, is not the case for either the 'Henss/Isoplus' group, on the assumption that it constitutes an economic entity, or Mr Henss as the person who, according to the judgment, controlled the various undertakings belonging to the group.

107 The Henss/Isoplus group claims that its argument finds support in Article 1 of Protocol 22 to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), which provides that 'undertaking' for the purposes of the Treaty provisions on competition designates any entity ('Rechtssubjekt' in the German version) carrying out activities of a commercial or economic nature.

108 That is borne out, in particular, by the case-law of the Court of Justice on the provisions of the ECSC Treaty on competition (Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 325 and Case 19/61 *Mannesmann* v *High Authority* [1962] ECR 357).

109 In other judgments, notably those cited by the Court of First Instance at paragraph 66 of the judgment under appeal, the Court of Justice did not yet definitively settle the question of principle as to whether the classification of undertaking for the purposes of competition law requires in all circumstances that the entity concerned must have legal personality (Case 48/69 *ICI* v *Commission* [1972] ECR 619; Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215; Case 170/83 *Hydrotherm* [1984] ECR 2999; and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979).

110 While it is true, in the Henss/Isoplus group's submission, that the infringement committed by an undertaking having its own legal personality may be imputed to its parent company, a holding company, where the latter controls it and they therefore form the same economic unit (see, in particular, *ICI* v *Commission*, cited above, and also *Europemballage and Continental Can* v *Commission*, cited above), such imputation none the less requires that the controlling entity itself must have legal personality.

111 A natural person, such as Mr Henss in the present case, cannot, in his sole capacity as a member or shareholder, be classified as an undertaking within the meaning of Article 85(1) of the Treaty. Accordingly, that case-law is not relevant in this case.

112 In that regard, it should be observed that, according to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 46 and the case-law cited).

113 It follows clearly from that case-law that the concept of an undertaking for the purposes of the Treaty provisions on competition does not require that the economic unit concerned have legal personality. Nor, as the Henss/Isoplus group maintains, is that interpretation confined to the particular cases in which the Court of Justice gave judgment, such as the judgments in *Hydrotherm* or *Höfner and Elser*; it is an interpretation of general application.

114 The argument based on the German version of Article 1 of Protocol 22 to the Agreement on the European Economic Area and, in particular, the concept of a 'subject of law' ('Rechtssubjekt') in that article does not allow that interpretation to be called into question.

115 The concept of a 'subject of law' does not necessarily exclude natural persons. In any event, such a concept is lacking in all the other language versions, which contain only the concept of 'entity'.

116 The Henss/Isoplus group contends, next, that undertakings which are not linked either from the point of view of capital or from the aspect of company law and which therefore are not dependent on a controlling undertaking cannot become a group merely because of the existence of possible links between natural persons who are not undertakings.

117 In that regard, it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (see, in particular, Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27).

118 It is true that the mere fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those companies are a single economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay the fine for the other (see Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 99).

119 However, in the present case the Court of First Instance did not infer the existence of the economic unit constituting the Henss/Isoplus group solely from the fact that the undertakings concerned were controlled from the viewpoint of their share capital by a single person, in this case Mr Henss.

120 It follows from paragraphs 56 to 64 of the judgment in *HFB and Others* v *Commission* that the Court of First Instance reached the conclusion that that economic unit existed on the basis of a series of elements which established that Mr Henss controlled the companies concerned, including, in addition to the fact that he or his wife held, directly or indirectly, all or virtually all the shares, the fact that Mr Henss held key functions within the management boards of those companies and also the fact that he represented the various undertakings at meetings of the directors' club, as indicated at paragraph 20 of this judgment, and that the undertakings were allocated a single quota by the cartel.

121 The Henss/Isoplus group maintains, finally, and in the alternative, that the various undertakings grouped together by the Commission do not belong to the same economic entity since they are not deprived of autonomy and do not depend on outside instructions. By that argument, the appellant maintains that the undertakings concerned were not, in one way or another, under the de facto control of Mr Henss.

122 In that regard, it should be observed that considerations such as those set out by the Court of First Instance at paragraphs 56 to 64 of the judgment in *HFB and Others* v *Commission*, which seek to establish the existence of an economic unit, are based on a series of findings of fact which are not amenable to discussion on appeal, unless

the relevant facts or evidence adduced before the Court of First Instance have been distorted or the material inaccuracy of the findings of the Court of First Instance is apparent from the documents placed on the case-file (see, to that effect, in particular, *Metsä-Serla and Others* v *Commission*, paragraph 37, and *Mag Instrument* v *OHIM*, paragraphs 39 and 76).

123 As regards paragraph 57 of the judgment, the Court of First Instance did not hold, as the Henss/Isoplus group maintains, that during the reference period, i.e. the infringement period established by the Commission, namely October 1991 to March/April 1996, Mr Henss was not only the director of but also a shareholder in Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH. On that point, there is no inconsistency with the case-file, so that the procedural defect alleged in that regard by the appellant, as part of the seventh plea in law, must be rejected.

124 As regards paragraph 58 of that judgment, the Court of First Instance did not hold what the appellant maintains, namely that during the reference period Mr Henss held the majority of the shares in Isoplus Fernwärmetechnik Gesellschaft mbH through a trustee but never acted as director.

125 It must be held, therefore, that the specific criticism of paragraphs 57 and 58 does not establish any distortion of the relevant facts or of evidence on the part of the

Court of First Instance or reveal the existence of a material inaccuracy in the findings of that court emerging from the documents placed on the case-file.

126 As regards Isoplus Fernwärmetechnik GmbH, the Henss/Isoplus group maintains that Mr Henss and Mr and Mrs Papsdorf were never directors and that the shares in that company, moreover, were held during the reference period on behalf of a third party by Isoplus Fernwärmetechnik Gesellschaft mbH in its own name, on behalf of a third party by Mr and Mrs Papsdorf through that company, acting as trustee, and for a third party by other natural persons, also through that trustee.

127 Those facts are the same as the facts found by the Court of First Instance at paragraph 59 of the judgment under appeal, so that a distortion of the relevant facts or of an item of evidence is not established on that point either. Nor is any material inaccuracy in the findings of the Court of First Instance apparent from the documents placed on the case-file.

128 The Henss/Isoplus group further maintains that it follows from those facts that Isoplus Fernwärmetechnik GmbH was outside the influence of both Mr Henss and Mr and Mrs Papsdorf.

129 That complaint is inadmissible, since it raises the question as to whether the conditions of the existence of an economic unit were satisfied in this case. Such an

examination, which is based on an appraisal of the facts, cannot as such be challenged in an appeal (see *Metsä-Serla and Others* v *Commission*, paragraph 30).

130 In those circumstances, the Court of First Instance cannot be criticised for having held, following an overall and, in principle, sovereign assessment of a range of facts, that the various undertakings constituting the Henss/Isoplus group must, for that purpose, be regarded as belonging to a single economic entity.

131 This plea must therefore be rejected.

2. The pleas in law alleging breach of Article 85(1) of the Treaty owing to the attribution to the Henss/Isoplus group and to Brugg of an infringement of the competition rules on account of their participation in a meeting having an anti-competitive object

132 By their fourth and fifth pleas in law respectively, the Henss/Isoplus group and Brugg each criticise the Court of First Instance for having found, at paragraphs 223 to 227 of the judgment in *HFB and Others* v *Commission* and paragraphs 52 to 66 of the judgment in *Brugg Rohrsysteme* v *Commission*, that the Commission was correct in the contested decision to impute the infringement or part thereof to them on account of their participation in meetings having an anti-competitive object.

133 The Henss/Isoplus group disputes, in particular, that Mr Henss's participation before October 1994 in meetings having an anti-competitive object justified the conclusion that the group should be regarded as having participated in the cartel resulting from those meetings, which concerned the period October 1991 to October 1994.

134 Brugg contends that the Court of First Instance was wrong to infer from its participation in the meeting held on 24 March 1995, during which the boycott of Powerpipe was discussed, proof that it actually participated in that boycott.

135 The Henss/Isoplus group relies, by analogy, on the principle established by the case-law that the Commission may refuse access to certain documents on the ground that an undertaking in a dominant position is capable of taking retaliatory measures against an undertaking who collaborated in the investigation carried out by the Commission (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraphs 26 and 27, and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 33).

136 It follows, in the appellant's submission, that even if the economically weak undertakings who did not publicly distance themselves from what was discussed at meetings whose object was manifestly anti-competitive and to which they were summoned by undertakings in a dominant or economically more powerful position than they, those undertakings must be relieved of their liability for participating in an unlawful cartel when they do not implement the decisions taken at those meetings.

137 In the present case, the Henss/Isoplus group did not denounce what was discussed at the meetings which it attended, owing to the participation, in particular, of ABB, an undertaking in a dominant position, and LR A/S, an undertaking much more powerful than the appellant.

138 However, the appellant did not implement the results of those meetings, which is shown by the continuous fall in prices on the pre-insulated pipes market between October 1991 and October 1994.

139 Brugg claims that, as a mere reseller of the products concerned, it was not capable of implementing a boycott.

140 It further submits that the Court of First Instance was wrong to find at paragraph 62 of the judgment in *Brugg Rohrsysteme* v *Commission* that, in so far as Powerpipe was a direct competitor of Brugg on the German market, Brugg had an interest in any boycott of Powerpipe by other participants in the cartel.

141 The Court finds that the Court of First Instance was correct to reject those complaints.

142 It is settled case-law that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the

requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 81 and the case-law cited).

143 In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement (see *Aalborg Portland and Others* v *Commission*, cited above, paragraph 84).

144 Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive object such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see *Aalborg Portland and Others* v *Commission*, paragraph 85 and the case-law cited).

145 For the purposes of applying Article 85(1) of the Treaty, it is sufficient that the object of an agreement should be to restrict, prevent or distort competition irrespective of the actual effects of that agreement. Consequently, in the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market. In such a case, the liability of a particular undertaking in respect of the infringement is properly established where it participated in those

meetings with knowledge of their object, even if it did not proceed to implement any of the measures agreed at those meetings. The greater or lesser degree of regular participation by the undertaking in the meetings and of completeness of its implementation of the measures agreed is relevant not to the establishment of its liability but rather to the extent of that liability and thus to the severity of the penalty (see 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).

146 It follows that the fact put forward by Brugg that it did not implement, and indeed was not capable of implementing, the boycott agreed at the meeting of 24 March 1995 cannot discharge its liability for having participated in that measure, unless it publicly distanced itself from what was agreed at the meeting, which Brugg does not claim to have done.

147 It is true, as Brugg maintains, and contrary to the finding made by the Court of First Instance at paragraph 62 of the judgment in *Brugg Rohrsysteme* v *Commission*, that it is irrelevant in that regard whether Brugg had an interest in any boycott of one of its direct competitors by other participants in the cartel (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 335).

148 However, that is a complaint directed against a ground included in the judgment purely for the sake of completeness which cannot lead to the judgment being set

aside and is therefore nugatory (see, in particular, Case C-184/01 P *Hirschfeldt* v *EEA* [2002] ECR I-10173, paragraph 48 and the case-law cited).

149 In Brugg's case, moreover, it is apparent from the contested decision that, contrary to Brugg's contention, the Commission did not regard its participation in the boycott of Powerpipe as an aggravating circumstance, since the only aggravating circumstance found in its case consisted in its having continued the infringement after the investigations.

150 Likewise, in the light of the case-law cited at paragraphs 142 to 145 of this judgment, the fact, put forward by the Henss/Isoplus group, that the participation in the cartel of dominant or particularly powerful undertakings in a position to take retaliatory measures against other, much less powerful, participants should the latter publicly distance themselves from what was decided at meetings having an anti-competitive object, has no effect on the liability of those undertakings for their participation in the anti-competitive measure, but may, where appropriate, have consequences for the determination of the level of the penalty.

151 As the Commission appositely observes, the opposite argument would be unacceptable, as the consequence would be that Article 85(1) of the Treaty would be applied differently depending on the size of the undertakings, since the less powerful undertakings would be favoured.

152 In the light of the foregoing, the pleas in law examined must be rejected.

C — Substantive pleas in law, relating to the determination of the amount of the fines

153 All of the appellants criticise the judgments under appeal as regards the calculation of the fines imposed on them.

154 The Court will deal, first, with the complaints alleging breach of certain principles owing to the application of the Guidelines to infringements such as those in the present case and, second, with those relating to the lawfulness of the method of calculating the fines set out in the Guidelines or applied in the contested decision.

1. Pleas in law relating to breach of the principles of protection of legitimate expectations and non-retroactivity owing to the application of the Guidelines to the infringements in issue

155 Most of the appellants criticise the Court of First Instance for having held that the Commission did not breach the principles of protection of legitimate expectations and non-retroactivity by applying the Guidelines to the present cases in the contested decision.

(a) Pleas in law alleging breach of the principle of protection of legitimate expectations

156 By their respective pleas in law, Dansk Rørindustri (second plea in law), KE KELIT (first plea in law), LR A/S (second plea in law), Brugg (first and second pleas in law), LR GmbH (first plea in law, second part) and ABB (second plea in law) claim, in essence, that they were entitled to found a legitimate expectation on the Commission's previous decision-making practice in calculating the amount of fines, as was apparent at the time when the infringements were committed.

157 The appellants refer to a consistent and long-standing practice consisting in calculating the amount of fines on the basis of the turnover achieved with the relevant product on the relevant geographic market ('the relevant turnover'), an amount which, moreover, cannot in any event exceed the maximum amount of the fine referred to in Article 15(2) of Regulation No 17, namely 10% of the worldwide turnover of the undertaking for all of its products ('the worldwide turnover').

158 It also follows from that practice that the maximum amount of the fine would not exceed 10% of the relevant turnover.

159 According to those appellants, the Commission could not, without breaching their legitimate expectation in that previous practice, apply in their case the calculation

method set out in the Guidelines, which had been adopted both after the infringements and after the hearings, the final stage in the administrative procedure before the Commission, since that method is radically new.

160 The novelty of that method, in the appellants' submission, lies primarily in the fact that it consists in taking as a starting point for the calculation certain predetermined basic amounts which reflect the gravity of the infringement and which in themselves bear no relation to the relevant turnover; the basic amount may then be adjusted upwards or downwards, depending on the duration of the infringement and on any aggravating or attenuating circumstances and, finally, may be further reduced in order to take account of any cooperation with the Commission during the administrative procedure.

161 The appellants submit that the Commission could not depart arbitrarily from its previous practice in taking decisions or, at the very least, should have warned them of that change in good time or have specifically stated why it was applying that new method.

162 The appellants further maintain that the expectation which they were able to derive from the Commission's previous practice in taking decisions when calculating fines was all the more legitimate because their decision to cooperate with the Commission was necessarily based on that practice and, in particular, on the benefits which they could rely on obtaining by cooperating, in the light of that practice.

163 The legitimate expectation based on the Leniency Notice extends, according to the very wording of that notice, to the calculation of the amount of the fine which serves as the basis for the calculation, an amount to which the reduction granted for cooperation, expressed as a percentage, is then applied.

164 First of all, the pleas in law whereby Dansk Rørindustri and KE KELIT allege breach of the principle of protection of legitimate expectations must be rejected as inadmissible.

165 According to settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would mean allowing that party to bring before the Court, whose jurisdiction in appeals is limited, a wider case than that heard by the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it (see, in particular, Case C-458/98 P *Industrie des poudres sphériques* v *Council* [2000] ECR I-8147, paragraph 74).

166 Before the Court of First Instance, Dansk Rørindustri and KE KELIT did not put forward any plea alleging breach of the principle of protection of legitimate expectations owing to the application of the Guidelines.

167 So far as those appellants are concerned, therefore, the pleas are new pleas and are thus inadmissible in an appeal.

168 As regards the substance, LR A/S, Brugg, LR GmbH and ABB criticise the Court of First Instance for having, at paragraphs 241 to 248 of the judgment in *LR AF 1998* v *Commission*, paragraphs 137 to 144 of the judgment in *Brugg Rohrsysteme* v *Commission*, paragraphs 248 to 257 of the judgment in *Lögstör Rör* v *Commission* and paragraphs 122 to 136 of the judgment in *ABB Asea Brown Boveri* v *Commission*, breached the principle of protection of legitimate expectations by rejecting the pleas which they had put forward in reliance of that principle before the Court of First Instance.

169 In that regard, the Court of First Instance correctly observed that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109, and *Aristrain* v *Commission*, cited above, paragraph 81).

170 The supervisory task conferred on the Commission by Articles 85(1) and 86 of the EC Treaty (now Article 82 EC) not only includes the duty to investigate and punish individual infringements but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (see *Musique Diffusion française and Others* v *Commission*, paragraph 105).

171 As the Court of First Instance appositely observed, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the

Commission in the exercise of its discretionary power will be maintained (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33 and the case-law cited).

172 That principle clearly applies in the field of competition policy, which is characterised by a wide discretion on the part of the Commission, in particular as regards the determination of the amount of fines.

173 The Court of First Instance was also correct to infer that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed, so that in the present case the applicants could not, in particular, found a legitimate expectation on the level of fines imposed in Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1). As the Commission observes, it follows that a legitimate expectation cannot be based on a method of calculating fines either.

174 A number of the appellants submit that that case-law is called in question by the judgment in Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435, paragraphs 12 and 13. In that judgment, the Court of Justice held, in essence, that since the trader in question had not been individually warned in good time of the

termination of a practice which the Commission had followed for two years, consisting in tolerating deliveries in excess of quotas, the fine imposed by the Commission for exceeding a quota was contrary to the trader's legitimate expectation that the practice would be continued.

175 As the Commission observed, any information which might be derived from that judgment could not in any event be relied on in the specific context of the Commission's supervisory powers in the field of competition law, to which the principles set out at paragraphs 169 and 170 of the present judgment apply.

176 The Court of First Instance correctly held, moreover, that the Commission's previous practice in taking decisions was not based exclusively on relevant turnover and that, accordingly, a legitimate expectation could not be founded on such a practice.

177 In that regard, it must be borne in mind that the Court of First Instance has exclusive jurisdiction to find and appraise the relevant facts and also to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, in particular, *Mag Instrument* v *OHIM*, cited above, paragraph 39).

178 LR A/S, Brugg, LR GmbH and ABB do not dispute the existence of the decisions to which the Court of First Instance refers, but maintain that they relate to isolated cases. In that regard, they refer to a number of decisions and positions adopted by

the Commission which, in their submission, show that, on the contrary, a sufficiently consistent and clear practice in taking decisions was indeed established as regards the calculation of the amount of fines according to a percentage of relevant turnover.

179 Even if that argument were correct, however, it would not serve to show any distortion of the facts or the evidence adduced before the Court of First Instance. In reality, the appellants are criticising a factual, and therefore sovereign, appraisal by that Court. The argument cannot therefore succeed at the appeal stage.

180 As regards the appellants' claim that the Commission's previous practice in taking decisions shows that the maximum amount of the fine cannot exceed the limit of 10% of relevant turnover, that also relates to a question of a factual nature which the Court cannot settle in an appeal.

181 It should be pointed out, however, as the Commission, moreover, has observed, that such a limit does not in any event follow from Article 15(2) of Regulation No 17, since the limit provided for in that provision relates to overall turnover and not to the relevant turnover of the undertakings (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 119).

182 The same appellants further maintain that they were able to found a legitimate expectation on the Commission's previous practice in taking decisions when

calculating fines, in so far as their decision to cooperate with the Commission was necessarily based on that practice and, in particular, on the benefits which they could count on deriving from their cooperation in the light of that practice.

183 They submit, notably by analogy with Case 120/86 *Mulder* [1986] ECR 2321, paragraph 24, that the Commission encouraged that cooperation by publishing the Leniency Notice and would have benefited from it in the present case, so that it undertook not to modify afterwards the basis on which that cooperation had been offered.

184 They contend that if the Commission were entitled to change as it saw fit the method of calculating the amount of fines, the legitimate expectation that traders may count on deriving from the Leniency Notice, namely the right to benefit from a reduction in their fines, might well become illusory.

185 Traders should therefore be able to assess the benefits of cooperating and should be in a position to calculate in advance the absolute amount of the fine payable, depending on whether or not they decide to cooperate.

186 In that regard, it must be held, as the Court of First Instance held at paragraph 143 of the judgment in *Brugg Rohrsysteme* v *Commission* and at paragraphs 127 and 128

of the judgment in *ABB Asea Brown Boveri* v *Commission*, that it cannot be inferred from the Leniency Notice that that notice could found a legitimate expectation that the calculation will follow a particular method or that the fines will be set at a particular level.

187 It follows from Part E, point 3 of the Leniency Notice that the Commission is aware that the notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. Part A, point 5, of the Leniency Notice states that cooperation by an undertaking is only one of several factors which the Commission takes into account when fixing the amount of a fine.

188 When those points are read together, it is apparent that the legitimate expectation that traders are able to derive from the notice is limited to an assurance that their fines will be reduced by a certain percentage, but that the notice does not extend to the method of calculating fines or, *a fortiori*, to a specific level of the fine capable of being calculated at the time when the trader decides to implement his intention to cooperate with the Commission.

189 Furthermore, LR A/S and LR GmbH criticise the Court of First Instance for having held, at paragraphs 244 to 246 of *LR AF 1998* v *Commission* and at paragraphs 255 to 257 of *Lögstör Rör* v *Commission*, that the Commission was not required to follow its practice of reducing the fines imposed on those parties for cooperation as it existed at the time when they cooperated, that is to say, the practice set out in the

draft Leniency Notice, which was supposed to correspond to the practice already adopted in Decision 94/601. The appellants further criticise the Court of First Instance for having held at those paragraphs that the Commission was required to apply the Leniency Notice although it had been adopted after they had cooperated and was less favourable to the two appellants than that practice.

190 Those appellants maintain, essentially, that they were able to found a legitimate expectation on the Commission's practice and that the Commission could not therefore apply the final version of the Leniency Notice, which was less favourable to them.

191 However, the Court of First Instance was correct to reject that plea, on the ground that traders could not place a legitimate expectation in such a practice being maintained when, in fixing the amount of fines, the Commission has a discretion which allows it to raise the general level of fines at any time, within the limits set out in Regulation No 17, if that is necessary to ensure the implementation of the Community competition policy, as observed at paragraphs 169 and 170 of this judgment.

192 It follows, as the Court of First Instance correctly held, that the mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure.

193 The Court of First Instance further stated, also correctly, that LR A/S and LR GmbH could not believe, at the time of making contact with the Commission, that the Commission would apply in their case the method set out in its draft Leniency Notice, since it was clear from that text that it was a draft.

194 Last, the Court of First Instance cannot be criticised for having held, at paragraph 245 of *LR AF 1998* v *Commission*, that the Leniency Notice could found a legitimate expectation and that the Commission would now be bound to apply it.

195 Part E, point 3, of the Leniency Notice expressly states that '[t]he Commission is aware that this notice will create legitimate expectations on which [undertakings] may rely when disclosing the existence of a cartel to the Commission'.

196 Paragraph 245 of the judgment in *LR AF 1998* v *Commission* must be taken to mean that traders could place a legitimate expectation in the application of the Leniency Notice although they were not entitled to place a legitimate expectation in what they alleged to be the Commission's previous practice.

197 It follows from the foregoing that the pleas in law considered must be rejected in their entirety.

(b) The pleas in law alleging breach of the principle of non-retroactivity

198 By their respective pleas, Dansk Rørindustri (second plea), the Henss/Isoplus group (first plea, fourth part), KE KELIT (third plea), LR A/S (second plea), Brugg (first plea) and LR GmbH (first plea) each criticise the Court of First Instance for having held, at paragraphs 162 to 182 of *Dansk Rørindustri* v *Commission*, paragraphs 487 to 496 of *HFB and Others* v *Commission*, paragraphs 108 to 130 of *KE KELIT* v *Commission*, paragraphs 217 to 238 of *LR AF 1998* v *Commission*, paragraphs 106 to 129 of *Brugg Rohrsysteme* v *Commission* and paragraphs 215 to 238 of *Lögstör Rör* v *Commission*, that in applying the method of calculating the fines as provided for in the Guidelines the Commission did not breach the principle of non-retroactivity.

199 It is appropriate to deal at the outset with the plea raised by LR A/S, in so far as it complains, in particular, that the Court of First Instance did not condemn the contested decision on account of the infringement consisting in what LR A/S alleges to be the retroactive application of the Leniency Notice.

200 It must be stated that that plea was not raised before the Court of First Instance. It is therefore, in accordance with the case-law cited at paragraph 165 of this judgment, a new plea and, accordingly, is inadmissible in an appeal.

201 In the various judgments under appeal, the Court of First Instance rejected those complaints on the basis of what was essentially the same reasoning. It may be summarised as follows.

202 The Court of First Instance held, first of all and correctly, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the ECHR as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed.

203 The Court of First Instance then held that the Guidelines remain within the legal framework governing the determination of the amount of fines, as defined, before the infringements took place, in Article 15 of Regulation No 17.

204 The method of calculating fines set out in the Guidelines continues to be based on the principles prescribed in that provision, since the calculation is still made on the basis of the gravity and the duration of the infringement and the fine cannot exceed a maximum of 10% of overall turnover.

205 The Guidelines therefore do not alter the legal framework of the penalties, which continues to be defined solely by Regulation No 17. The Commission's previous decision-making practice is not part of the legal framework.

206 Last, according to the Court of First Instance, there is no retroactive increase in the fines even though the Guidelines may in certain cases entail an increase in the fines. That follows from the margin of discretion in fixing the amount of the fines which the Commission enjoys under Regulation No 17. The Commission may thus, at any time, adjust the level of fines to the needs of its competition policy, on condition that it remains within the limits set out in Regulation No 17, as established in the case-law cited at paragraph 169 of this judgment.

207 In that regard, it must be noted that that analysis is based essentially on the premiss that the Guidelines do not form part of the legal framework that determines the amount of fines, which consists exclusively of Article 15 of Regulation No 17, so that the application of the Guidelines to infringements committed before they were adopted cannot run counter to the principle of non-retroactivity.

208 Such a premiss is incorrect.

209 The Court has already held, in a judgment concerning internal measures adopted by the administration, that although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures (see Case C-171/00 P *Libéros* v *Commission* [2002] ECR I-451, paragraph 35).

210 That case-law applies *a fortiori* to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders.

211 In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.

212 Furthermore, as the Advocate General observed in substance at point 59 of his Opinion, the case-law cited at paragraph 209 of this judgment on the legal effects of such rules of conduct confirms the correctness of the conclusion reached by the Court of First Instance at paragraph 420 of *HFB and Others* v *Commission* and paragraph 276 of *LR AF 1998* v *Commission* that even though the Guidelines do not constitute the legal basis of the contested decision, as that decision was based on Articles 3 and 15(2) of Regulation No 17, they may none the less form the subject-matter of an objection of illegality under Article 184 of the Treaty.

213 The Court of First Instance was also correct to observe, at paragraph 418 of *HFB and Others* v *Commission* and paragraph 274 of *LR AF 1998* v *Commission*, that although the Guidelines do not constitute the legal basis of the contested decision,

they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings.

214 Just as the admissibility of an objection of illegality raised against rules of conduct such as the Guidelines is not subject to the requirement that those rules constitute the legal basis of the act alleged to be illegal, the relevance of the Guidelines in the light of the principle of non-retroactivity does not presuppose that the Guidelines form the legal basis for the fines.

215 In that context, it is appropriate to refer to the case-law of the European Court of Human Rights on Article 7(1) of the ECHR, which, moreover, is cited by a number of the applicants (see, in particular, Eur. Court H.R., *S.W.* v *United Kingdom* and *C.R.* v *United Kingdom*, judgments of 22 November 1995, Series A Nos 335-B and 335-C, §§ 34 to 36 and §§ 32 to 34; *Cantoni* v *France*, judgment of 15 November 1996, *Reports of Judgments and Decisions*, 1996-V, §§ 29 to 32, and *Coëme and Others* v *Belgium*, judgment of 22 June 2000, *Reports*, 2000-VII, § 145).

216 It follows from that case-law that the concept of 'law' ('*droit*') for the purposes of Article 7(1) corresponds to 'law' ('*loi*') used in other provisions of the ECHR and encompasses both law of legislative origin and that deriving from case-law.

217 Although that provision, which enshrines in particular the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, it may, according to that case-law, preclude the retroactive application of a new interpretation of a rule establishing an offence.

218 That is particularly true, according to that case-law, of a judicial interpretation which produces a result which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.

219 It follows from that case-law of the European Court of Human Rights that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails (see *Cantoni* v *France*, cited above, § 35).

220 Those principles are also consistently reflected in the case-law of the Court to the effect that the obligation on the national court to refer to the content of the directive

when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity (see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13).

221 According to that case-law, such an interpretation cannot lead to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, a fortiori, have the effect of determining or aggravating, on the basis of the decision and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (see, in particular, *Kolpinghuis Nijmegen*, cited above, paragraph 14, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 42).

222 Like that case-law on new developments in case-law, a change in an enforcement policy, in this instance the Commission's general competition policy in the matter of fines, especially where it comes about as a result of the adoption of rules of conduct such as the Guidelines, may have an impact from the aspect of the principle of non-retroactivity.

223 Having particular regard to their legal effects and to their general application, as indicated at paragraph 211 of this judgment, such rules of conduct come, in principle, within the principle of 'law' for the purposes of Article 7(1) of the ECHR.

224 As stated at paragraph 219 of this judgment, in order to ensure that the principle of non-retroactivity was observed, it is necessary to ascertain whether the change in question was reasonably foreseeable at the time when the infringements concerned were committed.

225 In that regard, it should be noted that, as a number of the appellants have pointed out, the main innovation in the Guidelines consisted in taking as a starting point for the calculation a basic amount, determined on the basis of brackets laid down for that purpose by the Guidelines; those brackets reflect the various degrees of gravity of the infringements but, as such, bear no relation to the relevant turnover. The essential feature of that method is thus that fines are determined on a tariff basis, albeit one that is relative and flexible.

226 It is therefore necessary to consider whether that new method of calculating fines, on the assumption that it has the effect of increasing the level of fines imposed, was reasonably foreseeable at the time when the infringements concerned were committed.

227 As already stated at paragraph 169 of this judgment in connection with the pleas alleging breach of the principle of protection of legitimate expectations, it follows from the case-law of the Court that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17

if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.

228 It follows, as already held at paragraph 173 of this judgment, that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines.

229 Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past.

230 That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines.

231 It must be concluded that, particularly in the light of the case-law cited at paragraph 219 of this judgment, the Guidelines and, in particular, the new method of

calculating fines contained therein, on the assumption that this new method had the effect of increasing the level of the fines imposed, were reasonably foreseeable for undertakings such as the appellants at the time when the infringements concerned were committed.

232 Accordingly, in applying the Guidelines in the contested decision to infringements committed before they were adopted, the Commission did not breach the principle of non-retroactivity.

233 In the light of all the foregoing, all the pleas examined must be rejected.

2. The pleas in law relating to the legality of the method of calculating the amount of the fines as laid down in the Guidelines or applied in the contested decision

234 By their respective pleas in law, Dansk Rørindustri (first plea in law), the Henss/Isoplus group (first and third pleas in law), KE KELIT (first and second pleas in law), LR A/S (first and third pleas in law), Brugg (fourth plea in law), LR GmbH (second plea in law) and ABB (third plea in law) criticise the Court of First Instance for having rejected the pleas whereby they sought to demonstrate that certain aspects of the method of calculating the amount of the fines laid down in the Guidelines or as applied in the contested decision are contrary to Article 15(2) of Regulation No 17 and to certain general principles, in particular the principles of proportionality and equal treatment, and indeed of the rights of the defence.

235 In that regard, the Henss/Isoplus group and LR GmbH, by way of principal submission, and LR A/S, by way of alternative submission, dispute the legality of the Guidelines on the ground that the illegality of the calculation method followed in the present case is inherent in the Guidelines.

236 The admissibility of the objection of illegality raised in that regard by those appellants and admitted by the Court of First Instance cannot be disputed.

237 Regard being had to the legal effects which may be produced by rules of conduct such as the Guidelines, and since the Guidelines contain provisions of general application which, it is accepted, were applied by the Commission in the contested decision, as stated at paragraphs 209 to 214 of this judgment, it cannot be denied that there is a direct link between the contested decision and the Guidelines.

(a) The pleas in law alleging breach of Article 15(2) of Regulation No 17 consisting in the determination in the contested decision of the amount of the fines according to the calculation method provided for in the Guidelines

238 Dansk Rørindustri, the Henss/Isoplus group, LR A/S, LR GmbH and ABB maintain that the Court of First Instance erred in law in holding that the method of calculating the fines, as applied in the contested decision, does not infringe Article 15(2) of Regulation No 17.

239 The Henss/Isoplus group, LR A/S and LR GmbH infer that the Commission was not competent to adopt the Guidelines.

240 It should be noted at the outset, first, that according to the case-law of the Court, in fixing the amount of the fines, regard must be had to duration and to all the factors capable of affecting the assessment of the gravity of the infringements (see *Musique Diffusion française and Others* v *Commission*, paragraph 129).

241 The gravity of the infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (see, in particular, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 465).

242 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the Community (see *Musique Diffusion française and Others* v *Commission*, paragraph 129).

243 It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic

power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure (see *Musique Diffusion française and Others* v *Commission*, paragraph 121, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111).

244 It should be borne in mind, second, that in the context of an appeal the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 85 of the Treaty and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, in particular, *Baustahlgewebe* v *Commission*, cited above, paragraph 128, and Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 47).

245 As regards the allegedly disproportionate nature of the fine, on the other hand, it must be borne in mind that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed for infringements of Community law (see, in particular, *Baustahlgewebe* v *Commission*, paragraph 129, and *British Sugar* v *Commission*, paragraph 48).

246 It follows that a plea must be declared inadmissible in so far as it seeks a general re-examination of the fines (see *Baustahlgewebe* v *Commission*, paragraph 129, and *British Sugar* v *Commission*, paragraph 49).

247 Dansk Rørindustri, the Henss/Isoplus group, LR A/S, LR GmbH and ABB maintain, first of all, that the calculation method applied in the present case, in that it consists in taking as a starting point the basic amounts defined in the Guidelines, which are not determined according to relevant turnover, is contrary to Article 15(2) of Regulation No 17, as interpreted by the Court of Justice.

248 That, they contend, entails a mechanical calculation which fails to take into account, or at least to take sufficiently into account, the relevant turnover and the requirement that the fines for each undertaking concerned be adapted individually.

249 The Henss/Isoplus group, LR A/S and LR GmbH maintain on that basis that, in adopting such a calculation method in its Guidelines, the Commission exceeded the limits of the discretion conferred on it by Regulation No 17, so that the Guidelines are unlawful on account of the Commission's lack of competence.

250 However, it follows from a thorough analysis of the content of the Guidelines, as carried out, in particular, at paragraphs 223 to 232 of the judgment in *LR AF 1998* v *Commission*, that, as stated, moreover, at the first subparagraph of Section 1 of the Guidelines, the basic amount is to be determined according to the gravity and

duration of the infringements, which are the only criteria referred to in Article 15(2) of Regulation No 17, and therefore in conformity with the legal framework of penalties as defined in that provision.

251 As is apparent from, in particular, paragraphs 225 to 230 of the judgment in *LR AF 1998* v *Commission*, the Court of First Instance based that conclusion on the following analysis of the Guidelines:

'225 According to the Guidelines, the Commission is to take as the starting point in calculating the amount of the fines an amount determined according to the gravity of the infringement ... 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 market (first paragraph of Section 1.A). Within that framework, infringements are to be put into one of three categories: "minor infringements", for which the likely fines are between ECU 1 000 and ECU 1 million, "serious infringements", for which the likely fines are between ECU 1 million and ECU 20 million, and "very serious infringements", for which the likely fines are above ECU 20 million, (first to third indents of the second paragraph of Section 1.A). Within each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines is to make it possible to apply differential treatment to undertakings according to the nature of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensure that it has a sufficiently deterrent effect (fourth paragraph of Section 1.A).

226 Account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more

easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (fifth paragraph of Section 1.A).

227 It may be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. Consequently, it may be necessary to adapt the general starting point according to the specific nature of each undertaking ... (sixth paragraph of Section 1.A).

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

229 The Guidelines then set out, by way of example, a list of aggravating and attenuating circumstances which may be taken into consideration in order to increase or reduce the basic amount and refer to the [Leniency Notice].

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

252 The Court of First Instance did not err in law when it concluded that, in setting out in the Guidelines the method which it proposed to apply when calculating fines imposed under Article 15(2) of Regulation No 17, the Commission remained within the legal framework laid down by that provision and did not exceed the discretion conferred on it by the legislature, as stated at paragraph 432 of the judgment in *HFB and Others* v *Commission* and paragraph 277 of the judgment in *LR AF 1998* v *Commission*.

253 The Court of First Instance was therefore correct on that point to reject the objections of illegality raised against the Guidelines and alleging that the Commission lacked competence to adopt them.

254 That conclusion is not called in question by the first complaint put forward by the appellants, namely that in setting out in the Guidelines a method of calculating fines which is not based on the turnover of the undertakings concerned, the Commission departed from the judicial interpretation of Article 15 of Regulation No 17.

255 As the Court of First Instance held, in particular at paragraph 442 of the judgment in *HFB and Others* v *Commission* and paragraph 278 of the judgment in *LR AF 1998* v *Commission*, the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertaking concerned.

256 As the Court of First Instance observed, in particular at paragraphs 443 and 444 of the judgment in *HFB and Others* v *Commission* and also at paragraphs 280 and 281 of the judgment in *LR AF 1998* v *Commission*, that conclusion is clearly based on principles which, according to the case-law of the Court of Justice set out at paragraphs 240 to 243 of this judgment, derive from Article 15 of Regulation No 17.

257 It follows from those principles that, subject to compliance with the upper limit provided for in that decision, which refers to total turnover (see *Musique Diffusion française and Others* v *Commission*, paragraph 119), it is permissible for the Commission to take account of the turnover of the undertaking concerned in order to assess the gravity of the infringement when determining the amount of the fine, but that disproportionate importance must not be attributed to that turnover by comparison with other relevant factors.

258 In that regard, it must be further stated, as the Court of First Instance also correctly observed, in particular at paragraph 447 of the judgment in *HFB and Others* v *Commission* and paragraph 283 of the judgment in *LR AF 1998* v *Commission*, that although the Guidelines do not provide that the fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant product market, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it.

259 In that regard, the Court of First Instance held, in particular at paragraphs 284 and 285 of the judgment in *LR AF 1998* v *Commission*:

> '284 It so happens that, under the Guidelines, the turnover of the undertakings concerned may be relevant when the actual economic capacity of the offenders to cause significant harm to other traders and the need to ensure that the fine has sufficient deterrent effect is taken into consideration, or when account is taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (see paragraph 226 above). The turnover of the undertakings concerned may also be relevant when the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition is determined, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type (see paragraph 227 above). Likewise, the turnover of the undertakings may give an indication of any economic or financial benefit acquired by the offenders or of other specific characteristics which, depending on the circumstances, may need to be taken into consideration (see paragraph 230 above).
>
> 285 Furthermore, the Guidelines state that the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetical calculation (seventh paragraph of Section 1(A)).'

260 On the contrary, since the calculation method recommended by the Guidelines envisages that numerous factors will be taken into account in assessing the gravity of

the infringement for the purpose of determining the amount of the fine, including in particular the profits secured by the infringement or the need to ensure the deterrent effect of the fines, it seems to correspond better with the principles laid down by Regulation No 17 as interpreted by the Court of Justice, notably in its judgment in *Musique Diffusion française and Others* v *Commission*, than what is alleged to be the Commission's earlier practice, referred to by the applicants, in which the relevant turnover played a predominant and relatively mechanical role.

261 The appellants cannot therefore claim that the calculation method laid down in the Guidelines, in so far as it consists in taking as the starting point basic amounts which are not determined according to relevant turnover, is contrary to Article 15(2) of Regulation No 17 as interpreted by the Court.

262 As the Advocate General observed at point 73 of his Opinion, the contested decision itself shows that the method laid down in the Guidelines allows turnover to be taken into account, since in that decision the Commission divided the applicants into four groups according to their size and, consequently, adopted basic amounts which differed considerably.

263 In that regard, the Court of First Instance held at paragraphs 295 to 297 of the judgment in *LR AF 1998* v *Commission*:

'295 In order to take account of the difference in size of the undertakings which took part in the infringement, the Commission divided the undertakings

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

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

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

264 Although the Guidelines provide for a basic amount which may exceed EUR 20 million for very serious infringements, such as that in the present case, it must be

pointed out that in the contested decision that amount was significantly adjusted for all the undertakings concerned, following the approach taken by the Commission and described by the Court of First Instance, as stated in the preceding paragraph of this judgment.

265 In the contested decision, the starting point was fixed at EUR 10 million for LR A/S, an undertaking in the second category, at EUR 5 million for Dansk Rørindustri, the Henss/Isoplus group and LR GmbH, undertakings in the third category, and at EUR 1 million for Brugg, an undertaking in the fourth category. As for ABB, a specific starting point of EUR 50 million was set.

266 It follows from the analysis of the terms of the Guidelines made by the Court of First Instance, as described at paragraph 251 of this judgment, that, contrary to the appellants' contention, the Guidelines do not lay down an arithmetical calculation method which does not allow the fines imposed on each undertaking concerned to be adjusted individually to take account of the relative gravity of its participation in the infringement.

267 As the Advocate General observed at point 75 of his Opinion, that analysis shows, on the contrary, that the Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15 of Regulation No 17, as interpreted by the Court of Justice, whose case-law was recalled, in that regard, at paragraphs 240 to 243 of this judgment.

268 As observed at paragraph 264 of this judgment, the Guidelines, as applied in the contested decision, also entail significant adjustments to the amount of the fines, according to the particular features of each trader, particularly as regards the basic amounts.

269 In so far as the appellants' pleas must be understood as criticising the Court of First Instance for not having condemned the contested decision on the ground that their relevant turnover was not sufficiently taken into account, they must be rejected.

270 In the light of the case-law of the Court to the effect that turnover is only one of the factors which the Commission may take into account when calculating the amount of fines, as indicated at paragraph 243 of this judgment, and since it is common ground that turnover was indeed taken into account in the contested decision, it must be held that the judgments under appeal disclose no error of law on that point.

271 In so far as the appellants intend, by these pleas in law, to impute to the Court of First Instance certain errors relating to the finding or to the assessment of facts, it is sufficient to state that no distortion of the facts has been demonstrated and that no material inaccuracy in the findings of the Court of First Instance is evident from the documents on the file.

272 Dansk Rørindustri, the Henss/Isoplus group, LR A/S and LR GmbH claim, next, that since the basic amounts are not determined according to the relevant turnover of each undertaking, but in absolute amounts which prove to be particularly high in the

case of small and medium-sized undertakings, the limit of 10% of total turnover referred to in Article 15(2) of Regulation No 17 is already exceeded at this initial stage of the calculation for undertakings of their size, so that ultimately, in such a situation, the final amount of the fine imposed is calculated arithmetically and solely on the basis of total turnover.

273 That, in the appellants' submission, would have the consequence that, in such a situation, the adjustments for the duration of the infringement or to take account of any aggravating or attenuating circumstances, since they are applied to an amount above the limit of 10% of total turnover, cannot be reflected in the final amount of the fine and, accordingly, are not taken into account, or are taken into account only in an abstract fashion, or theoretically.

274 In their submission, Article 15(2) of Regulation No 17 requires that those factors be actually taken into account in the calculation of the fine and be specifically reflected in the final amount of the fine.

275 The Henss/Isoplus group, LR A/S and LR GmbH maintain, last, on that basis, that in adopting such a calculation method in the Guidelines, the Commission exceeded its discretion under Regulation No 17, so that the Guidelines are illegal on account of the Commission's lack of competence.

276 In that regard, it must be held that the Court of First Instance's reasoning, notably at paragraphs 287 to 290 of the judgment in *LR AF 1998* v Commission, which led to that argument being rejected, is not vitiated by any error of law.

277 The Court of First Instance was correct to hold, in essence, that the upper limit of the amount of the fine referred to in Article 15(2) of Regulation No 17 must be understood to mean that the amount of the fine ultimately imposed on an undertaking cannot exceed that limit and that the Guidelines are consistent with that principle, as may be seen from point 5(a) thereof.

278 As the Court of First Instance rightly held, Article 15(2) of Regulation No 17 does not therefore prohibit the Commission from referring, for the purpose of its calculation, to an intermediate amount in excess of that limit. Nor does it preclude intermediate calculations that take account of the gravity and duration of the infringement from being applied to an amount above that limit.

279 Where it turns out, following the calculation, that the final amount of the fine must be reduced by the amount by which it exceeds the upper limit, the fact that certain factors such as the gravity and duration of the infringement are not actually reflected in the amount of the fine imposed is merely a consequence of the application of that upper limit to the final amount.

280 As the Commission contended, that upper limit seeks to prevent fines being imposed which it is foreseeable that the undertakings, owing to their size, as

determined, albeit approximately and imperfectly, by their total turnover, will not be able to pay (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraphs 119 and 121).

281 That limit is therefore one which is uniformly applicable to all undertakings and arrived at according to the size of each of them and seeks to ensure that the fines are not excessive or disproportionate.

282 That upper limit thus has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement.

283 The only possible consequence of the upper limit is that the amount of the fine calculated on the basis of those criteria will be reduced to the maximum permitted level. Its application implies that the undertaking concerned will not pay the fine which in principle would be payable if it were assessed on the basis of those criteria.

284 That is all the more so if, as in this case for Dansk Rørindustri, the Henss/Isoplus group, LR A/S and LR GmbH, the adjustments concerned are likely to increase further the amount of the fine.

285 For those appellants, no attenuating circumstance was found by the Commission and the basic amount could only be adjusted upwards on account of the factors established by the Commission, namely for the duration of the infringement and for certain aggravating circumstances.

286 It follows that the application of the upper limit had the effect that those applicants did not receive the increases which, in principle, would have been payable on account of those aggravating circumstances.

287 Contrary to Dansk Rørindustri's and LR A/S's contention, the application of the upper limit referred to in Article 15(2) of Regulation No 17 does not therefore imply that the amount of the fine was calculated solely on the basis of the undertaking's total turnover.

288 The fact that the final amount of the fine is equal to that upper limit does not mean that it was calculated solely on the basis of that limit but that that amount, which should in principle have been fixed in the light of the gravity and duration of the infringement, was reduced to that limit.

289 LR A/S cannot therefore criticise the Court of First Instance for having contradicted itself in holding, first, that according to the case-law of the Court of Justice, the assessment of the gravity of the infringement when determining the amount of the fine cannot be based on a single factor and, on the other hand, that in the contested decision the amounts of the fines were fixed at the level of the upper limit.

290 The Henss/Isoplus group maintains, with reference to the fifth indent of point 2 of the Guidelines, that the Guidelines introduced a new aggravating circumstance, based on the gains improperly made by a undertaking as a result of the infringement.

291 It submits that that circumstance is not covered by Article 15(2) of Regulation No 17. There is a further danger, that the profit made by the undertaking will be taken into account twice, since it is already taken into consideration in determining the gravity of the infringement. Accordingly, the Guidelines are unlawful on that point, since the Commission was not competent to adopt them.

292 In fact the Court of First Instance was correct to hold at paragraphs 454 to 456 of the judgment in *HFB and Others* v *Commission* that it follows from the case-law of the Court of Justice that the profit which the undertakings were able to derive from their practices is one of the factors to be considered in assessing the gravity of the infringement and that taking that factor into account is designed to ensure that the fine is deterrent (see *Musique Diffusion française and Others* v *Commission*, paragraph 129).

293 Clearly, therefore, that is a factor that can be taken into consideration in accordance with Article 15(2) of Regulation No 17, irrespective of whether it is expressly mentioned in the Guidelines.

294 The Guidelines provide that account must be taken, as an aggravating circumstance, of the need to increase the penalty in order to exceed the amount of gains

improperly made as a result of the infringement, when it is objectively possible to estimate that amount. As the Commission maintained, it follows that where that aggravating circumstance is found to exist the basic amount will be increased where on an objective estimate of such improper gains it can be established that the level of the basic amount is insufficient to neutralise the profit which an undertaking derives from the infringement.

295 In those circumstances, the Guidelines do not entail the inherent risk that the profit will be taken into account twice.

296 It follows that the pleas in law must be rejected.

(b) The pleas in law alleging breach of the principles of proportionality and equal treatment when determining, in the contested decision, the amount of the fines according to the calculation method provided for in the Guidelines

297 Dansk Rørindustri, the Henss/Isoplus group, KE KELIT, LR A/S, Brugg and LR GmbH criticise the Court of First Instance for having rejected the pleas in law whereby they alleged a breach of the principles of proportionality and, where appropriate, equal treatment when determining, in the contested decision, the amount of the fines according to the calculation method provided for in the Guidelines.

298 Those appellants maintain essentially that, according to the method provided for in the Guidelines, the basic amounts are determined not according to the relevant

turnover but in terms of set amounts which are fixed at particularly high levels for undertakings of their size, namely small and medium-sized undertakings, designated in the contested decision as undertakings in the second and third categories.

299 It follows, in their submission, that in the case of such undertakings, the upper limit of 10% of total turnover referred to in Article 15(2) of Regulation No 17 is considerably exceeded at that initial stage of the calculation, so that, unless they are reduced under the Leniency Notice, the fines imposed on them are effectively set at the level of that upper limit and therefore correspond to the maximum amount of the fine.

300 The appellants maintain that that level of the fines imposed on them entails unequal treatment and a breach of the principle of proportionality, which would be particularly manifest if the level of their fines were compared with that of the fine imposed on ABB, the only multinational undertaking operating in the district heating sector and the undisputed ringleader of the cartel, since that fine represents only a very small percentage — in fact 0.36% — of ABB's total turnover before it was reduced in application of the Leniency Notice.

301 The plea whereby LR A/S seeks to demonstrate a breach of the principles of proportionality and equal treatment must be rejected at the outset as inadmissible, as that breach, in the appellant's submission, was the consequence of the fact that

the maximum amount of the fine was imposed on it in spite of the following attenuating circumstances, which in its view are undisputed:

— it was not the ringleader of the cartel;

— it was placed under considerable pressure by ABB, a much more powerful undertaking than the appellant. Furthermore, the infringement which LR A/S is alleged to have committed is much less serious than the one alleged to have been committed by ABB;

— LR A/S, which achieved only 36.8% of its turnover on the relevant product market, is not an undertaking specialising in a single product;

— the cartel was initially confined to Denmark and acquired a Community dimension only during a relatively short period;

— there is no evidence that LR A/S profited from the infringements;

— there are a number of further attenuating circumstances.

302 As thus formulated, this plea seeks a general re-examination of the fine imposed on LR A/S and, to that extent, it is inadmissible in an appeal, in accordance with the case-law referred to at paragraphs 245 and 246 of this judgment.

303 It should also be recalled that, in the context of an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 85 of the Treaty and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced, as has already been observed at paragraph 244 of this judgment.

304 At paragraphs 198 to 210 of the judgment in *Dansk Rørindustri* v *Commission*, paragraphs 292 to 301 of the judgment in *LR AF 1998* v *Commission* and paragraphs 299 to 305 of the judgment in *Lögstör Rör* v *Commission*, the Court of First Instance was able to hold, without making an error susceptible of being called in question in an appeal, that the level of the amount of the fine imposed on the applicants in the second and third categories could not be regarded as entailing unequal treatment, particularly in the light of the level of the fine imposed on ABB.

305 The Court of First Instance arrived at that conclusion following a detailed examination of the method of calculating the fines as followed in the contested decision.

306 In that regard, the Court of First Instance explained that the amounts of the fines were established on the basis of basic amounts, themselves determined by reference

to the likely amount of EUR 20 million indicated in the Guidelines for very serious infringements, which were adjusted for all the undertakings concerned according, in particular, to their respective size and to the relative gravity of their participation in the infringement.

307 Thus, the basic amount was fixed at EUR 5 million for Dansk Rørindustri, LR A/S and LR GmbH. The Court of First Instance also emphasised that the basic amount chosen for ABB was increased to EUR 50 million in order to take account of its position as one of the main European groups in the sector concerned.

308 The Court of First Instance further pointed out that the basic amount chosen for ABB, after being increased on account of the duration of the infringement, was increased by a further 50% in order to take account of aggravating circumstances, including the circumstance of having been the ringleader of the cartel.

309 It is also clear that the percentages chosen in that regard for Dansk Rørindustri, LR A/S and LR GmbH were set at considerably lower levels on account of the respective and less important roles which those undertakings had played in the cartel, as is apparent, in particular, from paragraph 306 of the judgment in *Lögstör Rör* v *Commission*.

310 At paragraph 210 of the judgment in *Dansk Rørindustri* v *Commission*, paragraph 298 of the judgment in *LR AF 1998* v *Commission* and paragraph 304 of the

judgment in *Lögstör Rör* v *Commission*, the Court of First Instance concluded, without erring in law, that, regard being had to all the relevant factors taken into consideration, the difference between the starting point chosen for Dansk Rørindustri, LR A/S and LR GmbH, on the one hand, and that chosen for ABB, on the other, was objectively justified.

311 The correctness of that conclusion is also reinforced by the multiple weightings applied in the contested decision in respect of the duration of the infringement and the aggravating circumstances, which differ significantly according to the gravity of the participation of each undertaking concerned in the infringement.

312 As the Court of First Instance correctly held, in particular at paragraph 442 of the judgment in *HFB and Others* v *Commission* and paragraph 278 of the judgment in *LR AF 1998* v *Commission*, it follows from the principles set out at paragraphs 240 to 243 of this judgment that the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover.

313 The Court of First Instance was therefore correct to reject the objection of illegality raised by the Henss/Isoplus group in so far as that objection was based on the allegation that the Guidelines were illegal owing to a breach of the principle of equal treatment, on account of the fact that the calculation method set out in the Guidelines is not based on the turnover of the undertakings concerned.

314 The plea in law put forward on that point by the Henss/Isoplus group cannot therefore be upheld.

315 The Court of First Instance, also correctly, inferred from the principles set out at paragraphs 240 to 243 of this judgment that the Commission could not be criticised for having imposed a starting point which led to a final amount of the fine that, expressed as a percentage of total turnover, was higher than the amount of the fine imposed on ABB.

316 It was essentially on the basis of the same reasoning as that summarised at paragraphs 306 to 310 of this judgment, moreover, that the Court of First Instance, at paragraphs 303 and 304 of the judgment in *LR AF 1998* v *Commission*, rejected the argument that the Commission did not take sufficient account of LR A/S's relevant turnover, which in that undertaking's submission had the effect that it received a discriminatory fine by comparison with the fines imposed on the undertakings in the third category.

317 In so far as it is admissible, the plea in law raised on that point by LR A/S cannot therefore be upheld.

318 The plea whereby that appellant alleges discrimination by comparison with the undertakings in the fourth category is not admissible in the context of this appeal, since it is apparent from the application which LR A/S lodged before the Court of First Instance that such a plea in law was not raised in that application.

319 On the basis of the reasoning set out at paragraphs 306 to 310, the Court of First Instance was also able, without making any error of law, to hold that the fines thus imposed were not disproportionate.

320 Since, in assessing the proportionate nature of the amount of the fines, the Court of First Instance took into consideration, in a legally correct manner, all the factors essential to assess the gravity of particular conduct in the light of Article 85 of the Treaty and Article 15 of Regulation No 17, and since, moreover, it has not been established that the Court of First Instance did not respond to a sufficient legal standard to all the arguments raised by the appellants with a view to having the fine cancelled or reduced, the arguments whereby they seek to establish that a particular factor was taken into account only insufficiently by the Court of First Instance are inadmissible in an appeal.

321 Dansk Rørindustri and LR GmbH criticise the Court of First Instance for having failed to condemn the contested decision on the ground that the application of the upper limit referred to in Article 15(2) of Regulation No 17 to the final amount of the fine had the consequence that, for certain undertakings including those appellants, adjustments to the basic amount, which were favourable to those undertakings in absolute or relative terms, were not reflected in the final amount, since they were applied to the amount exceeding the upper limit, whereas, for other undertakings involved in the same cartel, such adjustments were actually reflected in the final amount of the fine imposed on them. Such an outcome is, in their submission, contrary to the principle of equal treatment.

322 In that regard, LR GmbH criticises the fact that the relatively short duration of the infringement found in its case by comparison with other undertakings such as ABB was not reflected in the final amount of its fine, whereas the duration of the

infringement was reflected in the fines imposed on other undertakings such as Brugg and KE KELIT, so that the final amount of their fines did not have to be reduced to the level of the upper limit referred to in Article 15(2) of Regulation No 17. Dansk Rørindustri criticises the Court of First Instance, in particular, because the reduction in the duration established in its case was not reflected in the final amount of its fine.

323 As indicated at paragraphs 278 to 283 of this judgment, however, such an outcome cannot be criticised on the basis of the principle of equal treatment, since it is merely the consequence of the application of that upper limit to the final amount of the fine, as for those appellants the upper limit in question proved to be exceeded.

324 The Court must also examine three specific complaints alleging breach of the principles of equal treatment and proportionality.

325 First of all, in the context of its first plea in law, LR A/S criticises the Court of First Instance for having, at paragraph 308 of the judgment in *LR AF 1998* v *Commission*, rejected its argument that the fine was disproportionate, in so far as the Commission had not taken account of its ability to pay the fine and had thus set the amount of the fine at a level that threatened its survival.

326 That plea cannot be upheld.

327 The Court of First Instance correctly held at that paragraph that the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking concerned, since recognition of such an obligation would be tantamount to giving an unjustified competitive advantage to undertakings least well adapted to the market conditions (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraphs 54 and 55).

328 Next, by its second plea in law, KE KELIT criticises the Court of First Instance for having held, at paragraphs 167, 169 and 170 of the judgment in *KE KELIT* v *Commission*, that the Commission could not be criticised for having increased the fine imposed by 10% in order to take account of the duration of the infringement established against it, namely approximately 15 months, when if that duration had been 12 months there would have been no increase for duration.

329 As the appellant's infringement was of medium duration within the meaning of the second indent of the first paragraph of point 1.B of the Guidelines — an infringement of one to five years, for which the maximum increase may be 50% — the increase due in respect of the three months in excess of one year, for which no additional amount is envisaged, as indicated in the first indent of the first paragraph of point 1.B of the Guidelines, should have been calculated on a linear basis for each month by which the period of one year was exceeded. The proper increase is therefore 1.042% per month, 50% divided by 48 months, or 3.126% for the three months whereby the period of one year was exceeded.

330 That linear approach, in the appellant's submission, is dictated by the principle of equal treatment, which requires that the differences between undertakings participating in the cartel in terms of the duration of the infringement must be reflected in the amount of the fine.

331 The appellant maintains that the Court of First Instance itself proceeded in that way at paragraphs 214 to 216 of the judgment in *Dansk Rørindustri* v *Commission*, in that it reduced the fine by 1% for each month during which it found that the infringement had not been established.

332 The Court of First Instance therefore breached the principle of equal treatment by not adopting the same approach in respect of KE KELIT (see, to that effect, Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraph 63).

333 That plea in law is unfounded.

334 At paragraphs 167 to 171 of the judgment in *KE KELIT* v *Commission*, the Court of First Instance held, essentially, that the duration of the infringement established in respect of KE KELIT was not disproportionate on the ground that the Commission had not taken such a linear approach as its basis in the contested decision.

335 As is apparent from paragraphs 170 and 178 of the grounds of the contested decision, to which the Court of First Instance refers at paragraph 170 of the

judgment under appeal, the Commission took into account, in respect of all the undertakings, the fact that, first, in the early period the arrangements were incomplete and of limited effect outside the Danish market, second, the arrangements were in abeyance from late 1993 to early 1994 and, third, they reached their most developed form only with the Europe-wide cartel set up in 1994 and 1995.

336 In the light of the wide discretion which the Commission enjoys in setting fines, the Court of First Instance did not err in law when it held that the increase in the fine to reflect the duration of the infringement by KE KELIT was not vitiated by a breach of the principle of equal treatment.

337 As regards KE KELIT's argument based on the judgment in *Dansk Rørindustri* v *Commission*, it does admittedly follow from the case-law of the Court that when the amount of fines is being decided, the exercise of unlimited jurisdiction cannot result in discrimination between undertakings which have participated in an agreement contrary to Article 85(1) of the Treaty and that if the Court of First Instance intended, in the case of one of those undertakings, to depart specifically from the method followed by the Commission, which it had not called in question, it should have given reasons for doing so in the judgment under appeal (see, in particular, Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 146).

338 However, that principle is not applicable in the present case, since it is common ground that the amount of the fine imposed on KE KELIT was not determined by the Court of First Instance in the exercise of its unlimited jurisdiction but by the Commission in the contested decision.

339 Furthermore, it follows from a reading of paragraph 55 together with paragraph 215 of the judgment in *Dansk Rørindustri* v *Commission* that the Court of First Instance did not intend to depart from the calculation method followed by the Commission but, on the contrary, sought to satisfy itself that the three factors which it took into account in assessing the duration of the infringement, as set out at paragraph 335 of this judgment, were reflected in the period taken for Dansk Rørindustri.

340 Nor is it established that KE KELIT's situation is comparable to Dansk Rørindustri's, since, in particular, KE KELIT was found to have committed an infringement of medium duration within the meaning of point 1 B of the Guidelines, namely one to five years, whereas Dansk Rørindustri was found to have committed an infringement of long duration within the meaning of that provision, namely more than five years.

341 Last, by its fourth plea in law, Brugg criticises paragraphs 149 to 157 of the judgment in *Brugg Rohrsysteme* v *Commission*.

342 It maintains that what in itself was an appropriate ratio of five to one was adopted by the Commission as the specific starting point for the calculation of the fines imposed on the undertakings in the third and fourth categories respectively.

343 However, as the basic amount chosen for undertakings in the third category already exceeded the upper limit of 10% referred to in Article 15(2) of Regulation No 17, that ratio was abandoned as that amount was reduced to the level of the upper limit.

344 It was then necessary, in the appellant's submission, also to reduce the basic amount of the undertakings in the fourth category, in order to reinstate the ratio of five to one at that stage of the calculation.

345 That plea must be rejected.

346 The Court of First Instance was correct to reject that plea on the ground, set out at paragraph 155 of the judgment in *Brugg Rohrsysteme* v *Commission*, that the fact that the starting point taken into account for undertakings in the third category resulted in amounts that had to be reduced in order to take the limit of 10% of turnover provided for in Article 15 of Regulation No 17 into consideration, when no such reduction was necessary for undertakings in the fourth category, could not be considered discriminatory. That difference in treatment is merely the direct consequence of the maximum limit placed on fines by that regulation, the lawfulness of which has not been called in question and which clearly applies only where the amount of the fine envisaged would have exceeded 10% of the turnover of the undertaking concerned, as stated at paragraphs 278 to 283 of this judgment.

347 It follows from all of the foregoing that the pleas put forward by the appellants alleging breach of the principles of proportionality and of equal treatment must be rejected in their entirety.

(c) The pleas in law whereby the Henss/Isoplus group alleges breach of the rights of the defence in the assessment of the aggravating circumstances

348 By the third part of its first plea in law, the Henss/Isoplus group criticises the Court of First Instance for having erred in law in rejecting, at paragraphs 474 to 481 of the judgment in *HFB and Others* v *Commission*, the objection of illegality raised against the Guidelines and, in particular, the second indent of point 2 of the Guidelines, which provides for an increase in the basic amount for 'aggravating circumstances such as: ... refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations'.

349 The appellant contends that, on that point, the Guidelines entail a breach of the rights of the defence and must therefore be declared inapplicable to it, since that aggravating circumstance would apply immediately an undertaking exercised its rights of defence, in particular if it refuses, in accordance with the case-law, to provide information within the meaning of Article 11 of Regulation No 17, on the ground that the information would help to incriminate it.

350 That complaint cannot be upheld.

351 As the Court of First Instance correctly recalled at paragraph 475 of the judgment in *HFB and Others* v *Commission*, the conduct of the undertaking during the administrative procedure may be one of the factors to be taken into account when fixing the fine (see, in particular, Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 56).

352 As is clear from paragraph 478 of that judgment, the second indent of point 2 of the Guidelines must be taken to mean that an undertaking which disputes the Commission's position and limits its cooperation to that which is required under Regulation No 17 will not, on that ground, have an increased fine imposed on it (see *Finnboard* v *Commission*, cited above, paragraph 58).

353 Accordingly, the aggravating circumstance consisting in the refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations cannot be applied where the undertaking concerned is merely exercising its rights of defence.

354 By the second part of its third plea in law, moreover, the Henss/Isoplus group criticises the Court of First Instance for having erred in law in holding, at paragraphs 555 to 565 of the judgment in *HFB and Others* v *Commission*, that its fundamental right to defend itself was not infringed on account of the fact that the Commission took as an aggravating circumstance the fact that the appellant attempted to deceive it about the actual relationships between the undertakings of that group.

355 The appellant maintains that the Court of First Instance was wrong to hold that the Commission was entitled to criticise it for having disputed the existence of relationships governed by company law and for not having disclosed strictly confidential fiduciary relationships between different companies.

356 In so doing, the Henss/Isoplus group was, it contends, merely exercising its right to defend itself, so that those facts could not be held against it as aggravating circumstances by the Commission.

357 That argument proceeds from a misreading of paragraphs 556 to 560 of the judgment under appeal.

358 In those paragraphs, the Court of First Instance held that the Henss/Isoplus group did not confine itself during the administrative procedure to disputing the findings of fact and the legal position adopted by the Commission, but supplied the Commission with incomplete and partly inaccurate information.

359 The Court of First Instance arrived at that conclusion following what was in principle a sovereign assessment of the evidence before it and, in particular, in the light of an examination of the answers to the requests for information and also of the Henss/Isoplus group's observations on the statement of objections.

360 Contrary to the appellant's suggestion, moreover, paragraph 557 of the judgment in *HFB and Others* v *Commission* does not mean that the Court of First Instance found that the request for information under Article 11 of Regulation No 17 which was sent to the appellant contained a question relating specifically to the fiduciary relationships between the undertakings in the group, relationships of which the Commission was not required and indeed was not able to know.

361 On the contrary, the Court of First Instance merely found that, in answer to a more general question asking the undertaking concerned to provide full details of the meetings held with the competing companies and, in particular, as regards the participants in those meetings, their names, undertakings and positions, that undertaking provided certain incomplete and partly inaccurate information.

362 Clearly, therefore, there is no contradiction on that point between that finding and the case-file. Accordingly, the procedural defect alleged in that regard by the Henss/Isoplus group as part of its seventh plea in law must be rejected.

363 In the light of all of the foregoing, the pleas in law whereby the Henss/Isoplus group alleges a breach of the rights of the defence in the assessment of the aggravating circumstances must be rejected.

(d) The plea in law whereby LR A/S alleges failure to take attenuating circumstances into account

364 By its third plea in law, LR A/S criticises the Court of First Instance for having held, at paragraphs 336 to 346 of the judgment in *LR AF 1998* v *Commission*, that the Commission was entitled to take the view that no attenuating circumstance should be recognised in its case.

365 On that point, LR A/S maintains, first, that it should have been given a reduction on account of the following attenuating circumstances:

— its subordinate position in relation to ABB, the largest operator and the only multinational group in the district heating sector, as well as the ringleader of the cartel;

— the economic pressure brought to bear on LR A/S by ABB to take part in the cartel and to implement the cartel's decisions;

— the fact that ABB's alleged infringements were much more serious than those found against LR A/S.

366 In fact, the Court of First Instance was correct to hold, at paragraph 338 of the judgment under appeal, that the fact that the applicant was a medium-sized undertaking did not constitute an attenuating circumstance.

367 As regards, more particularly, its position in relation to ABB, LR A/S claims that, contrary to the finding made by the Court of First Instance at paragraph 339 of the judgment under appeal, the requirement to determine the amount of the fine imposed on it on the basis of all the relevant individual factors required that the pressure brought to bear by ABB on the other undertakings participating in the cartel, such as LR A/S, should be reflected in a downwards adjustment of its own fine and not merely in an upwards adjustment of ABB's fine.

368 Nor, in the appellant's submission, does the latter adjustment reflect any differences between LR A/S's position and that of other undertakings which were not, or were to a lesser degree, subject to such pressure, and leads to systematic discrimination against LR A/S by comparison with those undertakings.

369 However, the Court of First Instance cannot be criticised for having rejected that complaint, on the ground that LR A/S could have reported the pressure to the competent authorities and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participate in the cartel.

370 The existence of such pressure does nothing to alter the reality and the gravity of the infringement committed by LR A/S.

371 Last, LR A/S disputes paragraph 345 of the judgment in *LR AF 1998* v *Commission*, in which the Court of First Instance held that the fact that the appellant set up a compliance programme could not be regarded as an attenuating circumstance leading to a reduction in the fine. In the appellant's submission, the Court of First Instance thus failed to have regard to a well-established practice.

372 That argument cannot be accepted.

373 The Court of First Instance did not err in law in holding at paragraph 345 of the judgment that although it was important that LR A/S had taken measures to prevent future infringements of Community competition law by its personnel, that fact did not alter the reality of the infringement found in the present case. The Court of First Instance was correct to hold that that fact did not in itself mean that the Commission was obliged to reduce the appellant's fine on account of an attenuating circumstance.

374 In the light of the foregoing, the plea in law under consideration must be rejected.

(e) The pleas whereby the Henss/Isoplus group and LR A/S allege failure to take into account, or to take sufficiently into account, their cooperation during the administrative procedure

375 By the first part of its third plea in law, the Henss/Isoplus group criticises the Court of First Instance for having held, at paragraphs 607 to 623 of the judgment in *HFB and Others* v *Commission*, that the Commission was correct to refuse to reduce its fine under the Leniency Notice and that, accordingly, the Commission did not infringe Article 15(2) of Regulation No 17 on that point.

376 In that regard, the Henss/Isoplus group complains that the Court of First Instance, first, held at paragraphs 609 and 610 of the judgment under appeal that the Commission was correct to refuse to reduce its fine under the sixth indent of point 3 of the Guidelines, on the ground that such a reduction assumes that the infringement in question does not fall within the scope of the Leniency Notice, whereas a cartel comparable to that in question clearly falls within the scope of that notice, as described in Section A, point 1, of that notice.

377 The appellant submits that Section A, point 1, does not indicate that the notice applies only to such infringements.

378 Nor does it follow from the Leniency Notice that the Commission could take account of admissions or cooperation in part only on the basis of that notice. Such a restrictive interpretation is in any event, in the appellant's contention, contrary to Article 6 of the ECHR and to the principle of the presumption of innocence as a general principle of Community law.

379 The Henss/Isoplus group's argument on that point is based on a misreading of paragraphs 609 and 610 of the judgment under appeal.

380 On the basis of an interpretation of the sixth indent of point 3 of the Guidelines which, moreover, reveals no error in law, the Court of First Instance merely held that the specific attenuating circumstance referred to in that indent applies only to infringements which do not fall within the scope of the Leniency Notice.

381 As the Court of First Instance asserts, there is no dispute that there was a cartel in this case and, consequently, there was an infringement which does indeed fall within the scope of that notice.

382 Accordingly, the Court of First Instance was correct to conclude that the Commission could not be criticised for not having taken the appellant's cooperation into account on the basis of that attenuating circumstance.

383 The Henss/Isoplus group then maintains that the final sentence of paragraph 615 of the judgment under appeal is vitiated by a procedural defect in so far as the case-file indicates that, in their response to the statement of objections, all the companies belonging to that group acknowledged having participated in the cartel on a Community-wide scale from late 1994 to early 1996.

384 By that complaint, the appellant essentially criticises the Court of First Instance for having held that in their observations on the statement of objections the companies of the group did not dispute having participated in the cartel only in respect of the period before October 1994 but disputed their participation throughout the entire period of the infringement.

385 The line of argument developed in that regard by the Henss/Isoplus group before the Court does not serve to establish that, on that point, the Court of First Instance misunderstood the scope of the response to the statement of objections by interpreting it as meaning that, in that document, the group of companies concerned disputed their participation in the cartel throughout the entire period of its existence.

386 Accordingly, it does not follow from the documents on the file that the Court of First Instance's findings are factually incorrect.

387 The Henss/Isoplus group claims, last, that, contrary to what the Court of First Instance held, the Commission was required under Section D of the Leniency Notice to grant it a significant reduction in its fine.

388 The appellant submits that, unlike Sections B and C of the notice, in order to obtain a reduction under Section D the undertaking concerned is not required to give permanent and total cooperation, but is required merely, before a statement of objections is sent, to provide information, documents or other evidence which materially contribute to establishing the existence of the infringement.

389 It maintains that both the Court of First Instance, at paragraph 617 of the judgment in *HFB and Others* v *Commission*, and the Commission, at the hearing and at points 110 and 180 of the grounds of the contested decision, acknowledged that the appellants' cooperation and admissions, although only partial, satisfied in principle the conditions for the application of the first indent of Section D, point 2, of the Leniency Notice.

390 The Henss/Isoplus group contends that it could not be refused that reduction on the ground of aggravating circumstances or of the fact that it refrained, in the exercise of its rights of defence, to disclose certain information to the Commission, that it provided the Commission with incorrect information or that it disputed certain facts.

391 That complaint must be rejected.

392 Admittedly, as the appellant observes, it follows from paragraph 617 of the judgment in *HFB and Others* v *Commission* that the Court of First Instance acknowledged that the appellant had cooperated, albeit not decisively, and made admissions, although only partial.

393 However, the Court of First Instance was correct, and made no error of law capable of being condemned on appeal, to hold that the information provided by the applicant and capable, in principle, of coming within situations permitting a reduction in the fine under Section D, point 2, of the Leniency Notice, would not necessarily have had to induce the Commission to grant the applicant a reduction under that notice.

394 The Commission has a discretion in that regard, as may be seen from the very wording of that point and, in particular, from the introductory words 'Such cases may include ...'.

395 Furthermore, and above all, a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part.

396 It is clear from the very concept of cooperation, as described in the Leniency Notice, and in particular in the introduction to Section D, point 1, that it is only where the conduct of the undertaking concerned reveals such a spirit of cooperation that a reduction may be granted on the basis of that notice.

397 As the Court of First Instance found, at paragraphs 618 and 622 of the judgment under appeal, in the present case, by providing incomplete and in part inaccurate information, the Henss/Isoplus group could not claim that its conduct had been of that type.

398 Contrary to the appellant's contention, the Court of First Instance did not breach what the appellant alleges to be the criminal-law principle that an admission, even where it is only a partial admission, must necessarily lead to a reduction in the fine, nor did it breach the rights of the defence or the principle *non bis in idem*.

399 As regards a reduction in the amount of the fine designed to reward an undertaking for a contribution during the administrative procedure which enabled the Commission to establish an infringement with less difficulty and, where appropriate, to put an end to that infringement, it would be absurd, as the Commission contends, if the latter were required to grant such a reduction where the contribution in question does not enable it to attain that objective, but, on the contrary, even prevented it from doing so.

400 As the Court has already held at paragraphs 358 to 362 of this judgment, the Henss/Isoplus group cannot claim in a situation such as this that its rights of defence were infringed.

401 The appellant was not required to cooperate or to make any admission. Furthermore, the rights of the defence do not entail a right to be able to communicate incomplete and partly inaccurate information.

402 Nor can a breach of the principle *non bis in idem* be established, if it was based on the fact that the conduct in question has already been taken into account as an aggravating circumstance.

403 The fact that an undertaking is not rewarded for cooperation which did not allow the Commission to establish an infringement with less difficulty and, where appropriate, to put an end to it cannot be classified as a sanction additional to the punishment consisting in recognition of an aggravating circumstance.

404 By its fourth plea in law, LR A/S claims that paragraphs 359 to 370 of the judgment in *LR AF 1998* v *Commission* are vitiated by an error of law in that the Court of First

Instance approved the level of the reduction in the fine granted by the Commission in respect of the appellant's cooperation during the administrative procedure, namely 30%, whereas the appellant claims that it was entitled to a greater reduction for cooperation.

405 First, as already held at paragraphs 191 to 196 of the present judgment in response to the appellant's second plea in law, the appellant could not rely on any legitimate expectation in what it alleged to have been the Commission's practice in taking decisions at the time when it cooperated and which would in this instance have been more advantageous than the Leniency Notice.

406 Accordingly, in so far as the fourth plea in law raised by LR A/S seeks to challenge paragraphs 361 and 366 of the judgment at first instance on the same basis, it must be rejected.

407 LR A/S maintains, second, that it should have been granted a greater reduction on account of the fact that it was the first undertaking to cooperate with the Commission, which in its submission led other undertakings to follow suit.

408 In that regard, it is sufficient to point out that, at paragraphs 363 to 365 of the judgment under appeal, the Court of First Instance held, following a sovereign assessment of elements of fact, that the amount of the reduction granted to LR A/S

for cooperation was appropriate, particularly since it follows from the contested decision that the Commission was not prepared to grant a reduction of 50% of the fine to undertakings which had not communicated information to it before receiving a request for information and since it is common ground that the appellant communicated documents to the Commission only after receiving such a request.

409 Third, LR A/S criticises the Court of First Instance for having rejected, at paragraph 368 of the judgment, its argument that it ought not to have been fined in respect of the period after the dawn raids, since it was the first undertaking to reveal that the cartel had continued after the Commission's dawn raids.

410 The ground stated by the Court of First Instance at paragraph 368 of the judgment under appeal, namely that the infringement, and therefore the reduction, must be considered as a whole when assessing cooperation, is not decisive and does not preclude a greater reduction.

411 In that regard, the Court of First Instance held, without making any error of law susceptible of being condemned on appeal, that the fact that the cartel continued after the dawn raids was an aspect indissociable from the infringement and that the infringement could only be considered as a whole when applying the Leniency Notice.

412 As regards the amount of the reduction, which LR A/S challenges, the Court of First Instance's reasoning at paragraph 368 of the judgment in *LR AF 1998* v *Commission*, which was based on the Leniency Notice, is not vitiated by any error of law as regards the interpretation of that notice. This complaint cannot therefore be upheld.

413 LR A/S claims, fourth, that in holding at paragraphs 240 to 245 of the judgment in *ABB Asea Brown Boveri* v *Commission* that ABB should receive a reduction of more than 30% on account of the fact that it, unlike, in particular, the appellant, did not contest the truth of the main facts after receiving the statement of objections, the Court of First Instance penalised LR A/S merely for exercising its rights of defence. The Court of First Instance therefore infringed fundamental principles as established, in particular, by Article 6 of the ECHR and, in addition, discriminated against the appellant.

414 In fact, it follows from paragraph 243 of the judgment in *ABB Asea Brown Boveri* v *Commission* that the Court of First Instance, referring to the second paragraph of point 26 and the fifth paragraph of point 27 of the grounds of the contested decision, held that, unlike ABB, LR A/S claimed that there had been no cartel outside the Danish market before 1994 and that, in addition, there had been no continuous cartel. LR A/S also denied having participated in or implemented any action designed to eliminate Powerpipe.

415 In those circumstances, the Court of First Instance cannot be held to have subjected LR A/S to any discriminatory treatment by comparison with ABB.

416 Contrary to its contention, LR A/S was not penalised by comparison with ABB merely for having exercised its rights of defence.

417 In this particular case, ABB, unlike the other undertakings such as LR A/S, chose to waive the right to dispute the main facts described by the Commission and also the conclusions which it reached and, in that regard, fully cooperated with the Commission in order to be able to benefit from a further reduction in its fine.

418 Thus ABB exercised a free choice and the Commission treated it favourably.

419 That route was also open to LR A/S. It does not follow that, because LR A/S was not granted a further reduction, on the ground that it had decided not to follow that route, it was forced to testify under threat of a penalty, contrary to Article 6 of the ECHR, or that it was penalised merely for exercising its rights of defence.

420 In the light of all of the foregoing, the fourth plea in law raised by LR A/S must be rejected in its entirety.

D — Pleas in law relating to the right to be heard and the obligation to state reasons

1. Pleas in law alleging breach of the right to be heard

421 By their respective pleas in law, Dansk Rørindustri (third plea), the Henss/Isoplus group (first two pleas), KE KELIT (fourth plea), Brugg (third plea) and LR GmbH (fourth plea) criticise the Court of First Instance for having rejected their pleas alleging breach of the right to be heard on account of the fact that, during the administrative procedure and in particular in response to the statement of objections, they were unable to present their views on the question of what they alleged to be the retroactive application of the Guidelines in the present case, in so far as the Commission did not at any point in the administrative procedure indicate that it intended to apply the Guidelines.

422 It must be held at the outset that, as the Commission correctly contended, the plea in law put forward by Dansk Rørindustri in that regard was not raised before the Court of First Instance and is therefore a new plea and as such is inadmissible in an appeal.

423 In its reply, Dansk Rørindustri maintains that it is not a fresh plea, since it can be inferred by implication from the pleas in law and arguments which it put forward before the Court of First Instance in connection with the setting of the fine.

424 However, it follows from the file transmitted by the Court of First Instance that Dansk Rørindustri did not raise the plea relating to the right to be heard, either in the application or in the reply, in support of one of the other pleas in law which it raised at first instance.

425 It must be emphasised, moreover, on that point that the appeal does not indicate or permit the identification of the paragraphs or the part of the judgment under appeal which are criticised.

426 It must be borne in mind that, according to consistent case-law, it follows from Article 168a of the EC Treaty (now Article 225 EC), the first paragraph of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must state precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or plea concerned is inadmissible (see, inter alia, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 497 and the case-law cited).

427 As regards the pleas in law advanced on that point by the Henss/Isoplus group, KE KELIT, Brugg and LR GmbH, apart from some aspects specific to those appellants

which will be dealt with below in so far as they are criticised in this appeal, the Court of First Instance essentially rejected them on the same grounds, at paragraphs 310 to 322 of the judgment in *HFB and Others* v *Commission*, paragraphs 75 to 89 of the judgment in *KE KELIT* v *Commission*, paragraphs 82 to 98 of the judgment in *Brugg Rohrsysteme* v *Commission* and paragraphs 192 to 206 of the judgment in *Lögstör Rör* v *Commission*.

428 In those judgments, the Court of First Instance first of all correctly observed that, according to a consistent line of decisions of the Court of Justice, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. The Court of First Instance also correctly held that, in doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (see, to that effect, in particular, *Musique Diffusion française and Others* v *Commission*, paragraph 21).

429 The Court of First Instance then held that, for each of those appellants, examination of the statement of objections revealed that it contained elements of fact and of law on which the Commission intended to base the calculation of the amount of the fine to be imposed on the undertakings concerned and concluded that, in that regard, their right to be heard had been properly respected.

430 As regards an assessment of the evidence, namely the statement of objections of each of those appellants, review by the Court at the stage of the appeal is limited to cases where that evidence has been distorted (see, in particular, *Mag Instrument* v *OHIM*, paragraph 39).

431 The arguments put forward by the Henss/Isoplus group, KE KELIT, Brugg and LR GmbH do not seek to demonstrate such distortion, so that that part of the judgments under appeal cannot be criticised.

432 Those appellants maintain that the Court of First Instance erred in law in holding that the statement of objections sent to each of the appellants concerned contained sufficient evidence for the right to be heard to be respected and that it followed that, in this case, respect for that right did not require more and that, accordingly, the Commission was not required to inform the appellants during the administrative procedure that it intended to apply a new method of calculating the fines.

433 The appellants concerned claim, in essence, that in this case the intention to apply the Guidelines should have been mentioned during the administrative procedure, since those rules brought about a fundamental reform of the method of calculating fines and since, moreover, they were to be applied retroactively. In those circumstances, that information constituted an element necessary to the defence of those appellants on the question of the calculation of the amount of the fines.

434 In that regard, the Court of First Instance was correct to observe that, according to a consistent line of decisions of the Court of Justice, to give indications of the level of the contemplated fines, when the undertakings have not been in a position to put forward their observations on the objections held against them, would be tantamount to anticipate inappropriately the Commission's decision (see *Musique Diffusion française and Others* v *Commission*, paragraph 21, and *Michelin* v *Commission*, paragraph 19).

435 The Court of First Instance further held, also correctly, that according to that same line of decisions the Commission was not required to indicate in the statement of objections the possibility that it might change its policy as regards the level of the amount of the fines, a possibility which depends on general competition policy considerations with no direct bearing on the particular circumstances of the cases in question (see *Musique Diffusion française and Others* v *Commission*, paragraph 22).

436 It does appear, admittedly, that the Guidelines contain a new method of calculating the amount of fines which introduces a significant reform in that regard, in particular as regards the tariffication, albeit relative and flexible, of the basic amounts which they provide for as the starting points for the calculation.

437 However, it is clear from the rejection of the complaints relating to the alleged illegality of the Guidelines, as held at paragraphs 250 to 253 of this judgment that that new method is founded on the imperative criteria of the gravity and the duration of the infringement provided for in Article 15(2) of Regulation No 17 in that it consists essentially in specifying the way in which the Commission proposes to employ those criteria when determining the amount of the fines.

438 It is true that the Guidelines contain important details on that point and that it may be desirable that the Commission should provide the undertakings with those details, provided that that does not mean that it anticipates its decision in an inappropriate manner.

439 The fact remains that, as the Court of First Instance correctly held, the right to be heard in respect of the calculation of the amount of the fines does not cover the way in which the Commission proposes to employ the imperative criteria of the gravity and the duration of the infringement when determining the amount of the fines.

440 As regards the appellants' argument that they were entitled to be heard in respect of the Commission's intention to apply the Guidelines retroactively, it must be emphasised that, as held at paragraph 231 of this judgment, the new calculation method set out in the Guidelines was reasonably foreseeable for the undertakings concerned at the time when the infringements concerned were committed. In those circumstances, the appellants cannot rely on the right to be heard in respect of the retroactive application of the Guidelines. This complaint must therefore also be rejected.

441 It is appropriate to deal next with the few specific arguments advanced by certain appellants in support of the pleas in law whereby they allege breach of the right to be heard.

442 The Henss/Isoplus group criticises the Court of First Instance for having stated, at paragraph 312 of the judgment in *HFB and Others* v *Commission*, that, as regards the determination of the amount of the fines, the undertakings have an additional guarantee as regards their rights of defence, in so far as the Court of First Instance adjudicates with unlimited jurisdiction and may, inter alia, cancel or reduce the fine under Article 17 of Regulation No 17.

443 The Henss/Isoplus group claims that it is entitled, under that regulation, to two levels of unlimited jurisdiction, namely before the Commission and before the Court of First Instance, and cannot therefore be deprived of one of those tiers by the breach of the right to be heard in respect of the calculation of the fine. It maintains that a breach of the rights of the defence at the stage of the administrative procedure cannot be made good during the procedure before the Court of First Instance.

444 That complaint is unfounded.

445 As the Commission has observed, at paragraph 312 of the judgment in *HFB and Others* v *Commission* the Court of First Instance merely held, correctly, that its unlimited jurisdiction in regard to fines constitutes an additional guarantee. Contrary to the Henss/Isoplus group's contention, it neither held nor suggested that this entailed replacing the tier consisting in the administrative procedure before the Commission and allowing the Court of First Instance to make good any breach of the rights of the defence during such a procedure.

446 The appellant further maintains that the Court of First Instance erred in law in rejecting its first plea in law, alleging breach of the right to be heard, since, in particular, the aggravating circumstance provided for in the second indent of Section 2 of the Guidelines — namely refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations — was established in its case without its having been informed of the Commission's intention to proceed in that manner and, consequently, without the appellant's having been heard on that point.

447 In that regard, it is sufficient to hold that that argument cannot be upheld, since it is apparent from the case-file that that circumstance clearly cannot form the subject-matter of the statement of objections, as it came about during that stage of the administrative procedure, namely in the response to the statement of objections lodged by the Henss/Isoplus group, and continued thereafter.

448 Brugg criticises the Court of First Instance for having rejected, at paragraph 97 of the judgment in *Brugg Rohrsysteme* v *Commission*, its argument that at the hearing the Commission gave it to understand that the fine would be determined on the basis of its relevant turnover. As the Court of First Instance observed at the same paragraph, the Commission expressly requested Brugg to confirm that turnover at the hearing. At no time, in Brugg's contention, did the Commission indicate that it would base its decision on the Guidelines.

449 In that regard, it is sufficient to state that by that complaint the appellant seeks to call in question, by means of a mere assertion, an assessment of the facts by the Court of First Instance, which, subject to any distortion of the evidence, is not a question of law amenable, as such, to review by the Court.

450 Since the appellant does not put forward any argument capable of establishing any distortion of the evidence in question, as examined at paragraphs 94 to 97 of the judgment in *Brugg Rohrsysteme* v *Commission*, that complaint must be rejected.

2. The pleas in law alleging breach of the obligation to state reasons in respect of the calculation of the fines

451 By their respective pleas in law, KE KELIT (fifth plea in law), LR A/S (second plea in law) and LR GmbH (third plea in law) criticise the Court of First Instance for having held, at paragraph 205 of the judgment in *KE KELIT* v *Commission*, paragraph 390 of the judgment in *LR AF 1998* v *Commission* and paragraph 374 of the judgment in *Lögstör Rör* v *Commission*, that the Commission was not required to explain in the contested decision whether and for what reasons it was applying the Guidelines.

452 KE KELIT and LR GmbH claim that, owing to the significance of the changes made by the Guidelines to the method of calculating the amount of the fines, the reasons for that change and for the retroactive application of the Guidelines in the present case should have been specifically explained in the contested decision. LR A/S maintains that the decision ought to have stated the reasons for the retroactive application of the Guidelines and of the Leniency Notice.

453 In that regard, it must be borne in mind, first of all, that according to the case-law of the Court, the extent of the obligation to state reasons is a question of law reviewable by the Court on appeal, since a review of the legality of a decision carried out in that context must necessarily take into consideration the facts on which the Court of First Instance based itself in reaching its conclusion as to the adequacy or inadequacy of the statement of reasons (see to that effect Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 24).

454 As regards the appellants' complaint that the contested decision should have stated the reasons for the retroactive application of the Guidelines, it must be borne in mind that it was held at paragraph 231 of this judgment that the new method of calculation set out in the Guidelines was reasonably foreseeable for the undertakings concerned at the time when the infringements were committed. In those circumstances, the retroactive application of the Guidelines did not require a specific statement of reasons. This complaint must therefore also be rejected.

455 As regards the plea in law whereby LR A/S alleges breach of the obligation to state reasons for the retroactive application of the Leniency Notice, that too must be rejected.

456 For the same reasons as those set out at paragraphs 227 to 231 of this judgment, even on the assumption that it did have the effect of raising the level of the fines imposed, the Leniency Notice was reasonably foreseeable for undertakings such as the appellant at the time when the infringements concerned were committed, so that the application of the notice to infringements committed before it was adopted did not breach the principle of non-retroactivity.

457 Accordingly, the contested decision was not required to state the reasons for the retroactive application of the Leniency Notice.

458 In the three judgments in *KE KELIT* v *Commission*, *LR AF 1998* v *Commission* and *Lögstör Rör* v *Commission*, the Court of First Instance is not to be criticised for not having explained the legal framework applying to the present case, in particular the application of the Guidelines.

459 It also follows from the judgments under appeal, and in particular from paragraph 209 of *LR AF 1998* v *Commission*, that the Commission did not at any time state that it intended to apply the Guidelines.

460 It is apparent from reading the contested decision that it contains no express reference to the Guidelines.

461 It must be borne in mind that the Guidelines constitute rules of conduct of general application which the Commission is in principle required to apply. It follows that the lawfulness of a decision applying the Guidelines, such as the contested decision, may be appraised in the light of the Guidelines, as held at paragraph 211 of this judgment.

462 According to a consistent body of case-law, the purpose of the obligation to state reasons is to enable the Court to review the legality of the decision and to provide

the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested (see, in particular, Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 145).

463 The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22).

464 It follows that it must be ascertained whether, at the time of the adoption of the contested decision, the undertakings knew with sufficient certainty that the calculation of the amount of the fines had been made on the basis of the new calculation method provided for in the Guidelines in order to be able, where appropriate, to challenge the lawfulness of that decision from the aspect of those Guidelines.

465 In the judgments under appeal, the Court of First Instance held, correctly, that the requirement to state reasons is, inter alia, a function of the context and of the whole body of rules governing the matter in question. It inferred that the Commission was not required to explain whether and for what reasons it was applying the Guidelines in the present case, since the introduction to the Guidelines states that '[t]he new method of determining the amount of a fine will adhere to the following rules'. The Commission thus undertook to apply the Guidelines when determining the amount of fines for infringement of the competition rules.

466 It must be held, however, that the passage from the introduction to the Guidelines cited in the preceding paragraph does not establish clearly and unambiguously that it is intended to determine the scope of the Guidelines *ratione temporis*, so that it covers infringements, such as those in the present case, which took place before the Guidelines were adopted.

467 At the very least, the Court of First Instance observed at paragraph 375 of the judgment in *Lögstör Rör* v *Commission* that, in any event, in the grounds of the contested decision relating to the application of Article 15(2) of Regulation No 17, in particular at points 163 to 168 of that decision, the Commission expressly set out considerations on the calculation of the amount of the fine analogous to those contained in the grounds of the Guidelines.

468 An examination of all the grounds of the contested decision relating to the calculation of the amount of the fine, namely points 168 to 183, confirms that the decision could reasonably be taken by the undertakings in question to contain an application as regards the Guidelines and the new calculation method provided for therein.

469 In those circumstances, the Court of First Instance was able to conclude that the contested decision contained a sufficient statement of reasons.

470 Accordingly, the pleas in law whereby KE KELIT, LR A/S and LR GmbH allege a breach of the obligation to state reasons in respect of the calculation of the fines must be rejected.

VII — Costs

471 Under Article 69(2) of the Rules of Procedure, which applies to the appeal by virtue of Article 118 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs and Dansk Rørindustri, the Henss/Isoplus group, KE KELIT, LR A/S, Brugg, LR GmbH and ABB have been unsuccessful, they must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Joins Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P for the purposes of the judgment;

2. Dismisses the appeals;

3. **Orders Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, Isoplus Fernwärmetechnik Gesellschaft mbH, Isoplus Fernwärmetechnik GmbH, KE KELIT Kunststoffwerk GmbH, LR af 1998 A/S, Brugg Rohrsysteme GmbH, LR af 1998 (Deutschland) GmbH and ABB Asea Brown Boveri Ltd to pay the costs.**

[Signatures]