JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
9 July 2003 *

In Case T-230/00,

Daesang Corp., established in Seoul (South Korea),

Sewon Europe GmbH, established in Eschborn (Germany),

represented by J.-F. Bellis and S. Reinart, lawyers, and A. Kmiecik, solicitor, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by W. Wils and R. Lyal, acting as Agents, assisted by J. Flynn, barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for a reduction in the fine imposed on the applicants by Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24),

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

composed of: M. Vilaras, President, V. Tiili and P. Mengozzi, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2002,

gives the following

Judgment

Facts

1 The applicants Daesang Corp. ('Daesang') and its European subsidiary Sewon Europe GMbH ('Sewon Europe') are active in the animal feedstuffs and amino acids production sector. Daesang, a Korean company, was created at the end of

1997 through the merger of Miwon Corp. Ltd and Daesang Industrial Ltd (formerly Sewon Corp. Ltd, hereinafter 'Sewon Corp.'). In the first half of 1998 Daesang sold its worldwide business in the lysine market to another company.

2 Lysine is the principal amino acid used in animal feedstuffs for nutritional purposes. Synthetic lysine is used as an additive in feedstuffs, such as cereals, which do not contain sufficient natural lysine; this enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals. Feedstuffs to which synthetic lysine is added may also be substituted for feedstuffs containing a sufficient quantity of lysine in the natural state, such as soybean.

3 In 1995, following a secret investigation by the Federal Bureau of Investigation, searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 Archer Daniels Midland Co. ('ADM Company'), Kyowa Hakko Kogyo Co. Ltd ('Kyowa Hakko Kogyo'), Sewon Corp., Cheil Jedang Corp. ('Cheil') and Ajinomoto Co. Inc. were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the American Department of Justice, the companies were fined by the judge in charge of the case. Kyowa Hakko Kogyo and Ajinomoto Co. Inc. were each fined USD 10 million, ADM Company was fined USD 70 million and Cheil USD 1.25 million. The fine imposed on Sewon Corp. was, it says, USD 328 000. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

4 In July 1996, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the

Leniency Notice'), Ajinomoto Co. Inc. offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area ('EEA').

5 On 11 and 12 June 1997 the Commission carried out investigations at the European premises of ADM Company and Kyowa Hakko Europe GmbH ('Kyowa Europe') pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87). Following those investigations, Kyowa Hakko Kogyo and Kyowa Europe informed the Commission of their wish to cooperate and gave it certain information concerning, in particular, a chronology of the meetings which had taken place between lysine producers.

6 On 28 July 1997 the Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to ADM Company and its European subsidiary Archer Daniels Midland Ingredients Ltd ('ADM Ingredients'), to Sewon Corp. and Sewon Europe (hereinafter together referred to as 'Sewon') and to Cheil concerning their conduct in the amino acids market and certain cartel meetings specified in the requests for information. In response to that request for information, Sewon indicated that it was willing to cooperate with the Commission. It produced minutes of meetings of lysine producers and provided information concerning meetings which had not been specified in the Commission's request for information. It subsequently provided further information.

7 On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to the applicants and the other companies concerned, namely ADM Company and ADM Ingredients (hereinafter together referred to as 'ADM'), Ajinomoto Co. Inc. and its European subsidiary Eurolysine SA (hereinafter together referred to as 'Ajinomoto'), Kyowa Hakko Kogyo and its European subsidiary Kyowa Hakko Europe (hereinafter together referred to as 'Kyowa') and Cheil, for infringement of Article 81(1) EC and

Article 53(1) of the Agreement on the European Economic Area ('the EEA Agreement'). In its statement of objections the Commission charged the companies in question with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes from September 1990 (in the case of Ajinomoto, Kyowa and Sewon), March 1991 (Cheil) and June 1992 (ADM), to June 1995.

8 On 17 August 1999, after a hearing of the companies held on 1 March 1999, the Commission sent them a supplementary statement of objections concerning the duration of the cartel, to which the applicants replied on 8 October 1999.

9 On completion of this administrative procedure, the Commission adopted Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24, 'the Decision'). The Decision was served on Daesang on 19 June 2000 and on Sewon Europe on 28 June 2000.

10 The Decision includes the following provisions:

'*Article 1*

[ADM Company] and its European subsidiary [ADM Ingredients], Ajinomoto Company, Incorporated and its European subsidiary Eurolysine SA, Kyowa Hakko Kogyo Company Limited and its European subsidiary Kyowa Hakko

Europe GmbH, [Daesang] and its European subsidiary [Sewon Europe], as well as [Cheil] have infringed Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement by participating in agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA.

The duration of the infringement was as follows:

(a) in the case of [ADM Company] and [ADM Ingredients] from 23 June 1992 to 27 June 1995;

(b) in the case of Ajinomoto Company, Incorporated and Eurolysine SA from at least July 1990 to 27 June 1995;

(c) in the case of Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH from at least July 1990 to 27 June 1995;

(d) in the case of [Daesang] and [Sewon Europe] from at least July 1990 to 27 June 1995;

(e) in the case of [Cheil] from 27 August 1992 to 27 June 1995.

Article 2

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

(a) [ADM Company] and
[ADM Ingredients],
jointly and severally liable, a fine of EUR 47 300 000

(b) Ajinomoto Company, Incorporated and
Eurolysine SA,
jointly and severally liable, a fine of EUR 28 300 000

(c) Kyowa Hakko Kogyo Company Limited and
Kyowa Hakko Europe GmbH,
jointly and severally liable, a fine of EUR 13 200 000

(d) [Daesang] and
[Sewon Europe],
jointly and severally liable, a fine of EUR 8 900 000

(e) [Cheil], a fine of EUR 12 200 000

...'

11 In calculating the amount of the fines, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines') and the Leniency Notice.

12 First, the basic amount of the fine, determined by reference to the gravity and duration of the infringement, was fixed at EUR 21 million for the applicants, EUR 42 million for Ajinomoto, EUR 39 million for ADM, EUR 21 million for Kyowa, and EUR 19.5 million for Cheil (paragraph 314 of the Decision).

13 In fixing the starting amount of the fines, determined by reference to the gravity of the infringement, the Commission began by finding that the undertakings concerned had committed a very serious infringement, having regard to its nature, its actual impact on the lysine market in the EEA and the extent of the relevant geographical market. Then, observing that the total turnover figures achieved by each undertaking in the last year of the infringement revealed considerable disparity of size between the undertakings which had committed the infringement, the Commission went on to apply differential treatment. Consequently, the starting amounts of the fines were set at EUR 30 million for ADM and Ajinomoto and EUR 15 million for Kyowa, Cheil and the applicants (paragraph 305 of the Decision).

14 In order to reflect the duration of each undertaking's involvement in the infringement and determine the basic amount of their respective fines, the starting amounts were then increased by 10% per annum, giving an increase of 30% in the case of ADM and Cheil and 40% in the case of Ajinomoto, Kyowa and the applicants (paragraph 313 of the Decision).

15 Secondly, on account of aggravating circumstances, the basic amount of the fines imposed on ADM and Ajinomoto was increased by 50%, that is to say EUR 19.5 million for ADM and EUR 21 million for Ajinomoto, on the ground that each had played a leading role in the infringement (paragraph 356 of the Decision).

16 Thirdly, on account of mitigating circumstances, the Commission reduced by 20% the increase in the applicants' fine on account of the duration of the infringement, on the ground that Sewon had played a passive role in the cartel from the beginning of 1995 (paragraph 365 of the Decision). The Commission also reduced by 10% the basic amount of the fine imposed on each of the undertakings concerned, on the ground that they had all put an end to the infringement as soon as a public authority intervened (paragraph 384 of the Decision).

17 Fourthly, the Commission allowed a 'significant reduction' in the fines, pursuant to Section D of the Leniency Notice. The fines on Ajinomoto and the applicants were reduced by 50% of the amount they would have had to pay if they had not cooperated with the Commission, the fines on Kyowa and Cheil were reduced by 30% and, lastly, the fine on ADM by 10% (paragraphs 431, 432 and 435 of the Decision).

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 30 August 2000 the applicants brought the present action.

19 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the Commission to give written replies to a number of questions. The Commission complied with that request within the time allowed.

20 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 25 April 2002.

21 The applicants claim that the Court should:

— reduce the amount of the fine imposed on them and

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application as unfounded and

— order the applicants jointly and severally to pay the costs.

Law

23 The action falls into four principal heads of complaint. First, the applicants complain that the Commission calculated the fine on the basis of the criteria laid down by the Guidelines. Second, the applicants complain that the Commission failed to take account of the relevant turnover figure on assessing the gravity of the infringement. Third, the applicants claim that the Commission failed to take account of certain mitigating circumstances. Fourth and last, the applicants complain that the Commission incorrectly appraised their cooperation during the administrative procedure.

24 During the hearing, the applicants withdrew their complaint alleging retroactive application of the Guidelines, as set out in section II B of their application. The Court's acknowledgement of that withdrawal is recorded in the transcript of the hearing.

The turnover figure taken into account in assessing the gravity of the infringement

Arguments of the parties

25 The applicants maintain that, when determining the starting amount of the fine, to reflect the gravity of the infringement, the Commission infringed the principle of proportionality and the principle of equal treatment.

— Infringement of the principle of proportionality

26 The applicants complain that, when deciding the starting amount of the fine, fixed by reference to the gravity of the infringement, the Commission took account of Sewon's worldwide turnover, rather than its turnover from the sale of lysine in the EEA. Its failure to take account of that latter figure constitutes an infringement of the principle of proportionality in that the starting amount of the fine represents, in the applicants' case, 100% of the value of its lysine sales in the EEA in 1995.

27 According to the applicants, the Commission erred in taking the view that turnover from sales of the product which is the subject of the infringement in the relevant geographical market is not a relevant factor in the calculation of the basic amount of a fine (paragraph 318 of the Decision). In so doing it disregarded the principle of proportionality, enshrined in Article 5 EC, which requires that measures should not exceed what is necessary to achieve the objective pursued.

28 According to the applicants, it is clear from paragraph 121 of the judgment in Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825 that total turnover is not relevant in determining the amount of a fine and that a low turnover in the product concerned must be taken into account. That view is confirmed by the judgment in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, in which a fine was reduced by reason of the low turnover of the product to which the infringement related by comparison with the total sales of the undertaking.

29 Failing to take account of turnover from sales of the product which is the subject of the infringement in the relevant geographical market amounts to disregarding the true scale of the infringement when determining the basic amount of the fine. Indeed, none of the factors taken into account enables the impact of the infringement to be assessed. First, the criterion of the nature of the infringement, although relevant, is distinct from the criterion of its scale. Secondly, whilst the Decision refers to the impact of the cartel on the producers (paragraphs 261 to 296), it does not quantify that aspect, which would have required account to be taken of the volume of business in the product in question. The Decision also mentions the fact that the infringement extended throughout the EEA market (paragraph 297), but the fact that a cartel has affected a number of countries does not necessarily mean that it has had a significant impact. Equally, a comparison of Sewon's size with that of the other cartel members does not enable the degree to which the cartel affected competition to be assessed.

— The Commission's reliance on the wrong turnover figure and infringement of the principle of equal treatment

30 The applicants maintain that, when comparing the sizes of the undertakings concerned in order to set the starting point for the fines by reference to the gravity of the infringement (paragraphs 303 to 305 of the Decision), the Commission relied on the wrong turnover figure in Sewon's case, which led to discrimination against it.

31 The applicants point out that the total turnover figure for Sewon which the Commission gave in the first column of the table set out in paragraph 304 of the Decision, EUR 946 million in 1995, is incorrect. It was in fact only EUR 295 million.

32 The applicants conclude from this that, in so far as Sewon's turnover was one third of the figure indicated, the Commission's comparison is manifestly incorrect. In particular, Sewon's worldwide turnover was only 10% of Kyowa's and 15% of Cheil's, although those undertakings were regarded as comparable in size.

33 In order to apply differential treatment reflecting those differences in size, Sewon should have been placed in a third group. As matters stand, the starting point for Sewon's fine on account of the gravity of the infringement is 50% of that of ADM and Ajinomoto despite the fact that, on the basis of total turnover in 1995, Sewon is only 2% of the size of ADM and 6% of the size of Ajinomoto. In addition, the starting point for Sewon's fine represents approximately 5% of its total turnover in 1995, as against 0.5% for Kyowa and 0.79% for Cheil.

34 In their reply, the applicants state that it is difficult to understand the argument which the Commission sets out in its defence to the effect that it actually relied on Sewon's total turnover of EUR 227 million in making the comparison in issue. That figure in fact represents 8% of Kyowa's turnover and 12% of Cheil's. Even if the Commission had really used that figure, its treatment of Sewon would be none the less discriminatory.

35 The Commission's argument that Sewon's turnover from lysine sales in the EEA in 1995 was in any case comparable with that of Cheil and Kyowa is an *ex post* justification which the institution itself dismissed in the Decision.

36 The Commission maintains, essentially, that the basic amount of the fine determined by reference to the gravity of the infringement is neither disproportional nor discriminatory. Moreover, fines must be fixed not by reference to turnover in the EEA but by reference to the gravity and duration of the infringement.

Findings of the Court

— Infringement of the principle of proportionality

37 It is settled case-law that under Regulation No 17 the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). The proper application of those rules requires that the Commission may at any time adjust the level of fines to the needs of Community competition policy, raising them if necessary (see, to that effect, *Musique diffusion française and Others* v *Commission*, cited above, paragraph 109).

38 In setting the amount of the fines which it imposed on the applicants in the Decision the Commission used the calculation method which it imposed on itself in the Guidelines. According to settled case-law, the Commission may not depart from rules which it has imposed on itself (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, confirmed on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, and the

case-law cited). In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion, there arises a self-imposed limitation of that discretion inasmuch as it must then follow those guidelines (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89).

39 Under the Guidelines the Commission must take as the starting point in calculating a fine an amount determined by reference to the gravity of the infringement (hereinafter 'the general starting point'). The gravity of an infringement is established by reference to a number of factors, some of which the Commission must now imperatively take into account.

40 The Guidelines provide that, apart from the specific nature of the infringement, its actual effect on the market and its geographical extent, it is necessary also to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (fourth paragraph of Section 1.A).

41 Account may also be taken of the fact that large undertakings are usually better able to recognise that their conduct constitutes an infringement and more aware of the consequences stemming from it (fifth paragraph of Section 1.A).

42 In cases involving several undertakings, such as cartels, it may be necessary to apply weightings to the general starting point in order to take account of the

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

43 It is appropriate to observe that the Guidelines do not provide that fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover in the relevant market. However, nor do they preclude the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances demand it. In particular, turnover may be relevant when considering the various factors mentioned in paragraphs 40 to 42 of the present judgment (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 283 and 284).

44 Furthermore, it should be borne in mind that, according to settled case-law, the criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a 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 other of those figures an importance which is disproportionate in relation to other factors and that the fixing of the fine cannot be the result of a simple calculation based on total turnover (*Musique diffusion française and Others* v *Commission*, cited above, paragraphs 120 and 121, *Parker Pen* v *Commission*, cited above, paragraph 94, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176).

45 In the present case, it is clear from the Decision that, in order to determine the starting point for the fine, the Commission first considered the specific nature of the infringement, its actual effect in the market and its geographic extent. The Commission then stated that it was important, given the need to treat each firm individually, to take account of the 'effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA', the dissuasive effect of the fine and the relative size of each undertaking. In order to assess these factors the Commission chose to refer to the total turnover of each of the undertakings concerned in the last year of the infringement, on the view that that figure would enable it 'to assess the real resources and importance of the undertakings concerned in the markets affected by their illegal behaviour' (paragraph 304 of the Decision).

46 The Commission's reliance on total turnover rather than turnover from the sale of the products in issue in the EEA is precisely what the applicants complain of.

47 It is important to emphasise at this stage that a certain degree of ambiguity arises when the Decision is read alongside the Commission's pleadings in the present case and that the Commission, on being questioned on the point by the Court at the hearing, stated that it took account of not only the total turnover of the undertakings concerned, that is to say turnover from all their activities, but also their worldwide turnover in the lysine market. The two sets of figures are given in a table appearing in paragraph 304 of the Decision. In addition, it should be noted that, according to paragraph 318 of the Decision, 'the Commission has taken due account of the economic importance of the particular activity concerned by the infringement in its conclusions of gravity'.

48 Nevertheless, it is established that the Commission did not take account of the turnover of each undertaking from sales in the market concerned by the infringement, namely the lysine market in the EEA.

49 Now, for the purposes of assessing the 'effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA' (paragraph 304 of the Decision), which implies an assessment of the real importance of the undertakings in the market affected by their unlawful conduct, that is to say their influence on that market, total turnover is an imprecise guide. It is of course possible for a powerful undertaking with a multitude of different business activities to have only a very limited presence in certain specific markets, such as the lysine market. Similarly, an undertaking with a strong position in a geographical market outside the Community may have only a weak position in the Community or EEA market. In such cases, the mere fact that the undertaking in question has a high total turnover does not necessarily mean that it has a decisive influence in the market affected by the infringement. That is why the Court emphasised in paragraph 139 of its judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 that although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market. In the present case, however, the Commission took no account of the undertakings' market shares in terms of volume in the market affected by the cartel (the EEA lysine market) or even of their turnover in that market, although, given the absence of any other producers, that would have enabled it to establish the relative importance of each of the undertakings in the market in that the Commission would have obtained an indirect indication, in value terms, of their respective market shares (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 99).

50 Moreover, it is clear from the Decision that the Commission made no explicit reference to taking account of the 'specific weight and, therefore, the real impact on competition of the offending conduct of each undertaking', which, under the Guidelines, it must now do where it considers, as it did in the present case, that the starting amounts of the fines must be weighted because the infringement is one that involves several undertakings (a cartel) among which there is considerable disparity in size (see the sixth paragraph of Section 1.A of the Guidelines).

51 The Commission's reference in the last sentence of paragraph 304 of the Decision to 'the real... importance of the undertakings' does not remedy that omission.

52 An assessment of the specific weight, that is to say of the real impact of the infringement committed by each of the undertakings, in fact involves establishing the scale of the infringement committed by each of them, rather than the importance of the undertaking in question in terms of its size or economic power. Now, as is clear from settled case-law (*Musique diffusion française and Others* v *Commission*, paragraph 121 and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 369), the proportion of turnover derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the scale of the infringement on the relevant market. In particular, as the Court of First Instance has emphasised, the turnover in products which have been the subject of a restrictive practice constitutes an objective criterion which gives a proper measure of the harm which that practice causes to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

53 It follows from the foregoing that, by relying on Sewon's worldwide turnover, without taking into consideration its turnover in the market affected by the infringement, the EEA lysine market, the Commission disregarded the fourth and sixth paragraphs of Section 1.A of the Guidelines.

54 That being so, it is incumbent on the Court to consider whether the Commission's failure to take account of turnover in the relevant market and its consequential disregard of the Guidelines have led it in this case to breach the principle of proportionality in setting the fine. It must be remembered in this connection that assessing the proportionality of a fine with regard to the gravity and duration of an infringement, which are the criteria referred to in Article 15(2) of Regulation

No 17, falls within the unlimited jurisdiction conferred on the Court of First Instance by Article 17 of that regulation.

55 In the present case, the applicants argue, essentially, that the specific starting amount of the fine, set at EUR 15 million, is disproportionate in that it is equal to Sewon's turnover in the EEA lysine market in the last year of the infringement.

56 First of all, it is appropriate to state that the fact that the specific starting point is equivalent to the turnover achieved in the relevant market is not, of itself, conclusive. Indeed, that figure of EUR 15 million is merely an intermediate figure which, in accordance with the method laid down in the Guidelines, is then adapted to reflect the duration of the infringement and any aggravating and mitigating circumstances.

57 Secondly, an intermediate figure such as that may be justified by the very nature of the infringement, its actual effect, the geographical extent of the market affected, the fact that the fine must have a deterrent effect and the size of the undertaking in question, all of which were taken into account by the Commission in this case. The Commission was right to classify the infringement as 'very serious' in that Sewon participated in a horizontal agreement the object of which was to set price objectives and sales quotas and to establish a system for exchanging information on sales volumes. Moreover, that agreement had a real effect on the lysine market in the EEA, causing an artificial price increase and a restriction of sales volumes. As regards the size of the undertakings and the deterrent effect of the fines, the Commission was entitled to have regard to the total turnover of the undertakings concerned. According to case-law, total

turnover is in fact the figure which gives an indication of the size of the undertaking (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 121) and of its economic power, which must be known in order to assess whether a fine will deter it.

58 Thirdly, it is important to emphasise that the figure of EUR 15 million adopted in respect of the applicants is significantly lower than the minimum threshold of EUR 20 million laid down in the Guidelines as standard for 'very serious' infringements (see the third indent of the second paragraph of Section 1.A of the Guidelines).

59 In support of their submission the applicants also refer explicitly to the judgment in *Parker Pen* v *Commission*, cited above, in which the Court of First Instance upheld a plea of infringement of the principle of proportionality on the ground that the Commission had failed to take into consideration the fact that the turnover accounted for by the product to which the infringement related was relatively low in comparison with the turnover resulting from the undertaking's business as a whole and that this justified a reduction in the fine (paragraphs 94 and 95).

60 It should be observed, first of all, that the approach adopted by the Court in *Parker Pen* v *Commission* related to the final amount of the fine rather than the starting amount in light of the gravity of the infringement, which is in issue in the present case.

61 Next, even if the authority of that case were applicable to the present case, it must be pointed out at this stage that the Court has power to assess, in the context of its unlimited jurisdiction, whether or not the amount of a fine is reasonable. That assessment may justify the production and taking into account of additional information (see, to that effect, case C-297/98 P *SCA Holding* v *Commission*

[2000] ECR I-10101, paragraphs 53 to 55) such as, in this case, Sewon's turnover in the EEA lysine market, which was not taken into account in the Decision.

62 In this connection, it is important to point out that a comparison of Sewon's various turnover figures for 1995 reveals two things. First, turnover from sales of lysine in the EEA can indeed be regarded as small in comparison with total turnover, the first representing only 5% of the second. Secondly, it appears, by contrast, that its turnover from lysine sales in the EEA represents a relatively large proportion — 22% in fact — of its sales in the worldwide lysine market.

63 Since the sales of lysine in the EEA therefore represent not a small fraction but a significant proportion of worldwide turnover from lysine sales, it cannot validly be argued that the principle of proportionality has been infringed, *a fortiori* because the starting amount of the fine was not set on the mere basis of a simple calculation based on total turnover, but also by reference to sectoral turnover and other relevant information such as the nature of the infringement, its actual effect on the market, the extent of the market affected, the necessary deterrent effect of the sanction and the size and power of the undertakings.

64 In light of those reasons, the Court, in the exercise of its unlimited jurisdiction, finds that the starting amount of the fine, determined by reference to the gravity of the infringement committed by Sewon, is appropriate and that, since the Commission's failure to adhere to the Guidelines has not, in the present case, led it to breach the principle of proportionality, the applicants' complaint in this regard must be rejected.

— Infringement of the principle of equal treatment

65 When determining the amount of a fine, the Commission must not infringe the principle of equal treatment, a general principle of Community law which, according to settled case-law, is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309, and the case-law cited).

66 In accordance with this principle, the sixth paragraph of Section 1.A of the Guidelines provides that, in the case of an infringement involving several undertakings, it might be necessary to apply weightings to the starting amounts of the fines 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.

67 Thus, under the seventh paragraph of Section 1.A of the Guidelines, 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 arithmetic calculation.

68 In the Decision (paragraphs 303 and 304) the Commission noted that there was considerable disparity between the sizes of the undertakings which committed the infringement. Consequently, it took the view that, in order to take account of the

effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA and the need to ensure that the amount of the fine has a sufficiently deterrent effect, it was appropriate to divide the parties into two groups according to size, the first including Ajinomoto and ADM, for whom the starting amount of the fine was set at EUR 30 million, and the second Kyowa, Cheil and Sewon, for whom the starting amount was set at EUR 15 million.

69 By contrast with the reasoning which it propounds in the context of its plea of infringement of the principle of proportionality, the applicants do not point out that account was not taken of turnover in the lysine market in the EEA. They rely, on the contrary, on a comparison of the worldwide turnover figures of the undertakings involved in the cartel to justify their assertion that the starting amount of their fine is discriminatory. At the same time they emphasise that, in their case, that figure is EUR 295 million for 1995, not EUR 946 million as wrongly stated by the Commission.

70 It must be pointed out that the Commission has acknowledged that the total turnover figure for Sewon given in the table set out in paragraph 304 of the Decision is incorrect and that it has stated that, in fact, it used the figure for 1995 given in paragraph 16 of the Decision, EUR 227 million, which is lower than the figure put forward by the applicants.

71 However, whilst Sewon's total turnover in 1995, whether it be EUR 227 million or EUR 295 million, does indeed appear appreciably lower than that achieved by Cheil and Kyowa, the undertakings with which it was grouped, it cannot be concluded from that fact that there has been any breach of the principle of equal treatment in this case.

72 A comparison of the turnover achieved in the world lysine market by Cheil, Kyowa and Sewon, as set out in the second column of the table appearing in paragraph 304 of the Decision, reveals that the Commission was quite right to group those undertakings together and to take the same specific starting point for the fines imposed on them.

73 It is established that Sewon's turnover in 1995 in the world lysine market was EUR 67 million, a figure very close to Kyowa's EUR 73 million and slightly higher than Cheil's EUR 40 million (or EUR 52 million, according to paragraph 18 of the Decision). The Court points out that the Commission was entitled in this case to take their relative size into account in its reasoning, in accordance with the seventh paragraph of Section 1.A of the Guidelines, and indeed the applicants acknowledged that fact at the hearing.

74 The Commission also submits that a comparison of the turnover achieved in the EEA lysine market by each undertaking also justifies its dividing them into two groups.

75 Although it is established that the Commission did not take account in the Decision of those turnover figures, it should be borne in mind that, as indicated in paragraph 54 of the present judgment, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amount of the fines. That assessment may justify the production and taking into account of additional information such as, in this case, the turnover achieved by the undertakings in question in the EEA lysine market (see, to that effect, C-297/98 P *SCA Holding* v *Commission*, cited above, paragraphs 53 to 55).

76 If the turnover achieved by Sewon in the EEA lysine market is considered, it becomes clear that it is in an almost identical position to that of the other two 'small' producers Cheil and Kyowa. Whilst, in 1995, Ajinomoto and ADM achieved turnover in that market of EUR 75 million and EUR 41 million (paragraphs 5 and 10 of the Decision), Cheil, Kyowa and Sewon achieved EUR 17 million, EUR 16 million and EUR 15 million respectively on that same market. Thus, it appears that Sewon's influence in the market affected by its unlawful conduct was comparable to that of the other two 'small' producers, Cheil and Kyowa. Since those undertakings all participated in the same infringement, it is right that the starting amount of the fine imposed on them should be the same.

77 It follows that the starting amount of EUR 15 million chosen by the Commission in the applicants' case is not discriminatory.

Mitigating circumstances

Arguments of the parties

78 The applicants maintain that, pursuant to the second indent of Section 3 of the Guidelines, concerning the 'non-implementation in practice of the offending agreements or practices', the Commission ought to have allowed them a reduction in their fine by reason of the fact that Sewon implemented the price and quota agreements to a much lesser extent that did the other producers.

79 First, the Commission took no account of the clear differences in the degree to which the price agreements between the producers were implemented. However, it can be seen from the comparative table of prices (annex 6 to the application and paragraph 47 of the Decision) that Sewon's prices were far below the target prices fixed in the agreements and the prices charged by the other producers. Specifically, Sewon's average monthly price in Europe was the lowest of all producers for 27 months.

80 Sewon's non-observance of the price agreements is also shown by numerous pieces of evidence. The applicants cite Ajinomoto's and Kyowa's criticism of Sewon at the meeting on 12 March 1991 in Tokyo (annex 7 to the application) and Ajinomoto's subsequent criticism at the meeting on 2 November 1992 in Seoul (paragraph 89 of the Decision and annex 8 to the application), the report by a representative of Kyowa dated 20 April 1993 and Kyowa's criticisms at the meeting on 27 May 1993 (annexes 9 and 10 to the application), a facsimile letter dated 17 May 1994 and addressed to Kyowa (annex 11 to the application), remarks made by ADM in June 1994 (annex 12 to the application), statements made by Ajinomoto on 23 November 1994 (annex 13 to the application) and a report by Ajinomoto (annex 14 to the application).

81 Secondly, the Commission took no account of the fact that Sewon had continually increased production and maximised its sales, which led to the agreements not being implemented in practice.

82 In paragraph 378 of the Decision the Commission merely asserted that the agreements on quantities had been complied with, without offering any conclusive evidence. Moreover, its argument that these were agreements as to minimum quantities is difficult to comprehend in so far as arrangements of this type require the opposite: a reduction in output so that prices can be increased. In any event, the documents in the case show that, on the contrary, Sewon tried to maximise its sales. On this point the applicants refer to an increase in their sales in 1991 (paragraph 211 of the Decision) and again in 1992 and 1993, to an

internal report referring to Sewon's policy of production at full capacity (annex 15 to the application) and also to a statement made by a representative of ADM at a meeting on 23 August 1994 (annex 16 to the application).

83 In answer to the Commission's point that Sewon's role was regarded as passive from 1995 onwards, and that that has already earned it a 20% reduction in its fine, the applicants reply that, according to the Guidelines, a 'passive role' within a cartel and 'non-implementation in practice' of an agreement are two separate concepts. The fact that Sewon obtained a reduction in its fine because it adopted a passive role in the allocation of sales quotas cannot justify the refusal of a reduction on account of its more limited implementation of the agreements.

84 The Commission submits that the applicants' claim should be rejected and that non-implementation of an agreement should not be confused with participating in an infringement and cheating and that Sewon has already been allowed a reduction in its fine on account of the passive attitude which it adopted from 1995 onwards toward the allocation of quantities (paragraph 365 of the Decision).

Findings of the Court

85 As is clear from case-law, where an infringement is committed by several undertakings, the relative gravity of the participation of each of them must be examined (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 150) so that it may be established whether aggravating or mitigating circumstances are applicable to them.

86 Sections 2 and 3 of the Guidelines provide for the basic amount of fines to be varied in accordance with certain aggravating and mitigating circumstances.

87 In particular, Section 3 of the Guidelines lays down, under the heading 'attenuating circumstances', a non-exhaustive list of circumstances which may lead to a reduction in the basic amount of a fine. Reference is made to the passive role of undertakings, to non-implementation in practice of agreements, to termination of the infringement as soon as the Commission intervenes, to the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement, to infringements committed by negligence and to effective cooperation by the undertaking in the proceedings, outside the scope of the Leniency Notice.

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

89 It should be observed, however, that, in *Cascades* v *Commission*, the Court was reviewing a Commission decision in which the Guidelines — which make express provision for non-implementation in practice of an infringing agreement to be taken into account as a mitigating circumstance — had not been applied because the decision preceded their adoption. However, as the Court has already stated in paragraph 38 of the present judgment, according to settled case-law, the Commission may not depart from rules which it has imposed on itself. In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply

in the exercise of its discretion, there arises a self-imposed limitation of that discretion inasmuch as it must then follow those guidelines (*AIUFFASS and AKT* v *Commission*, cited above, paragraph 57, and *Vlaams Gewest* v *Commission*, cited above, paragraph 89).

90 In the present case it remains to be established whether the Commission was entitled to conclude that the applicants could not claim, under the second indent of Section 3 of the Guidelines, the benefit of the mitigating circumstance that the agreements were not implemented in practice. To that end it is necessary to ascertain whether the circumstances which the applicants pleads are capable of showing that during the period in which Sewon was party to the infringing agreements it actually avoided applying them by adopting competitive conduct in the market (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 4872 to 4874).

91 As regards, first of all, the applicants' claim that the price agreements were not implemented, the Commission observed in paragraph 376 of the Decision that the agreements in question related to price objectives (or 'target prices'). Consequently, their implementation implies not that prices corresponding to the agreed price objective be applied, but that the parties endeavour to approach their price objectives. The Commission also indicated that '[f]rom the information in its possession it [was] clear that, in the present case, after most of the price agreements, the parties fixed their prices in accordance with their agreements'.

92 In reply to a written question of the Court, the Commission stated that the information just mentioned is in fact that on the prices charged by the undertakings, as set out in paragraph 47 of the Decision, and produced a graph illustrating the movement of target prices and of the prices charged by each of the undertakings concerned.

93 In light of that document, it may be observed, first, that whilst Sewon's prices, rather than matching the target prices, were regularly lower, the same may be said of the prices charged by the other lysine producers, with the exception of ADM, from March 1992 to the end of the period of the infringement in June 1995.

94 Next, it is apparent that, whilst Sewon's prices were much the same as Cheil's (being sometimes slightly higher, sometimes slightly lower) and regularly lower than those charged by the other producers, the differences cannot be regarded as significant and as revealing any really independent or competitive conduct in the market.

95 Lastly, it is especially important to observe that, throughout the period of the infringement, Sewon's prices evolved in line with the evolution of the price objectives agreed between the cartel members, a fact which, moreover, supports the conclusion that the cartel produced injurious effects in the market (see, to that effect, Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 340). That similarity in prices, over such a long period of time, demonstrates that Sewon had no desire actually to avoid applying the price agreements.

96 In this connection, it should be observed that, in June 1993, the five lysine producers agreed to set the price of lysine at DEM 3.20 per kilogram (paragraphs 104 and 198 of the Decision), at the same time contemplating staged increases in that price. The price of lysine subsequently underwent a steep rise and was set at DEM 5.30 per kilogram pursuant to an agreement concluded in October 1993 (paragraphs 114 and 199 of the Decision). Now, from August 1993 onwards, Sewon participated fully in that price increase, in which all the producers were involved, increasing its prices from DEM 2.81 per kilogram in July 1993 to DEM

3.45 in August, then to DEM 3.94 in September and, lastly, DEM 4.55 in October 1993. During this important phase of the cartel Sewon in no way sought to distance itself from the other producers by adopting a truly competitive pricing policy.

97 In so far as concerns the reactions of the other members of the cartel to Sewon's conduct, they cannot be regarded as evidence that the anti-competitive agreements were not implemented in practice. They are merely logical complaints addressed to an undertaking that was attempting to obtain commercial advantages over its cartel partners and at the same time remain in the cartel.

98 It follows that the applicants have failed to show that Sewon did not implement the price agreements in practice. A difference in the degree to which the agreements were implemented, that being the way in which the applicants plead the point in their application, cannot be regarded as an actual refusal to implement them.

99 Secondly, with regard to the alleged non-implementation of the agreements on sales quotas, it should be pointed out at the outset that the Commission states in paragraph 378 of the Decision that the cartel members considered the quantities allocated to them as 'minimum quantities' and that '[a]s long as every party was able to sell at least the quantities allocated it, the agreement was respected'.

100 The undertakings in question have all emphasised, quite rightly, that that assertion is, to say the least, inconsistent with the alleged facts because the objective of raising prices, which was the cartel members' principal aim, necessarily implied limiting lysine production and, therefore, allocating maxi-

mum sales quotas. That is confirmed, *inter alia*, by paragraph 221 et seq. of the Decision, devoted to the quota agreements' compatibility with Article 81(1) EC, in which reference is made to the limitation of sales. The Commission's assertion must therefore be treated as wholly irrelevant.

101 Next, in so far as concerns the Commission's analysis in the Decision of Sewon's implementation in practice of the agreements on sales volumes, it is important to differentiate between two distinct periods, that is to say before and after January 1995.

102 As regards the first of those two periods, the Commission states in paragraph 211 of the Decision that, following the meetings on 18 February and 12 March 1991, an agreement was concluded between Ajinomoto, Kyowa and Sewon, the purpose of which was to restrict Sewon's 1991 sales in Europe to their 1990 level. Furthermore, after accepting the sales allocation plan for 1992 proposed by Ajinomoto and Kyowa, Sewon agreed to limit its sales in Europe to 6 000 tonnes (paragraph 214 of the Decision). Lastly, although the members of the cartel reached no comprehensive agreement on the allocation of sales volumes for 1993, on 8 December 1993 Sewon subscribed to an agreement for allocating 1994 sales volumes to all five lysine producers. Under that agreement, Sewon was allotted a basic quota equal to its 1993 sales and, on the basis of a forecasted increase in sales, a supplementary quota of 2 000 tonnes (paragraphs 215 and 216 of the Decision). It should be borne in mind at this stage that the applicants expressly state in their application that they do not call into question or dispute any of the findings of fact set out in the Decision and that what they dispute is solely the amount of the fine imposed on them by Article 2 of the Decision.

103 In support of their argument that they did not adhere to the quotas agreements, the applicants point to a sustained growth in output and lysine sales from 1990 onwards.

104 First of all, they refer to various production and sales figures set out in their application, but these in no way prove that the applicants did not in fact implement the quotas agreements described in paragraph 102 above.

105 The figures set out in a table on page 33 of the application and in paragraph 48 of the Decision which state the total tonnage of lysine production and worldwide sales in no way demonstrate Sewon's failure to comply with the agreements on European sales volumes which it had accepted. The 1994 figures given in that table show that Sewon did indeed keep to its quota for that year and whilst the applicants have provided no figures for European lysine sales in 1990, making comparison between 1990 and 1991 impossible, the 1992 figures reveal that Sewon's sales in Europe were well below 6 000 tonnes.

106 Secondly, the reference to an internal marketing report dated 3 May 1993 (annex 15 to the application), which contains the statement 'keep continuing with the policy of full production and selling whole quantity', is also irrelevant because that statement merely expresses an intention and in no way proves that the quotas agreements were not implemented in practice.

107 Thirdly, the statement made by a representative of ADM on 23 August 1994 (annex 16 to the application) that 'it is always [Sewon] who asks for more whereas [Sewon is] already the only one at capacity' cannot, of itself, prove non-implementation. It should also be observed that, in so far as concerns 1994, the table appearing in paragraph 267 of the Decision, which compares the worldwide market shares allotted to each cartel member for that year under the agreements with actual market shares, clearly shows that Sewon did not exceed

the sales quota allotted it under the agreements, its worldwide market share remaining well below that level. The applicants have proffered no evidence to show that the information given in the table is incorrect.

108 Consequently, the applicants cannot claim as a mitigating circumstance that, between July 1990 and December 1994, they did not in practice implement the sales volume agreements.

109 In so far as concerns the last six months of the cartel, from January to June 1995, all the undertakings agreed at a meeting on 18 January 1995 to maintain the market shares agreed for 1994, with the exception of Sewon, which refused the quota proposed and requested a larger market share (paragraph 154 of the Decision). Also, at a meeting on 21 April 1995 all the cartel members compared the production quotas fixed for 1994 and the first quarter of 1995 with actual sales figures for the same period. Ajinomoto, ADM, Cheil and Kyowa protested strongly because Sewon had increased its sales volume and was exceeding its 1995 allocation. Sewon nevertheless reconfirmed its sales target (paragraph 160 of the Decision). Lastly, at a meeting on 27 April 1995, ADM, Kyowa and Cheil again complained about the increase in Sewon's sales volume and about the incomplete information which that company was supplying (paragraph 164 of the Decision).

110 On the basis of that evidence the Commission drew the conclusion that, from 1995 onwards and in relation to the agreement on sales quantities, Sewon had played a passive role in that it was no longer a party to that agreement and had also ceased informing the other producers about its own sales quantities (paragraph 365 of the Decision).

111 The description of Sewon's conduct given in paragraph 109 of the present judgment shows that it did indeed refrain from implementing the agreement on quantities between January and June 1995, a conclusion with which the Commission's representative agreed unreservedly at the hearing on 25 April 2002.

112 Nevertheless, leaving aside the question of exactly how to characterise Sewon's conduct in terms of the mitigating circumstances mentioned in the Guidelines, the applicants have benefited under the Decision from a 20% reduction in the increase applied on account of duration, which equates to a 5.71% reduction in the basic amount of the fine.

113 Given that the reduction already granted by the Commission and that claimed by the applicants are based on precisely the same facts, the Court, in the exercise of its unlimited jurisdiction, finds that the reduction already granted to the applicants is completely appropriate in size given Sewon's conduct concerning the agreement on sales volumes for the period January to June 1995.

Sewon's cooperation during the administrative procedure

Arguments of the parties

114 The applicants contend that the Commission breached the provisions of Section C of the Leniency Notice in that it refused them a substantial reduction of between 50% and 75% of the fine as provided for under that section, instead allowing only a 50% reduction under Section D of the notice.

115 First, the Commission was wrong to conclude that Sewon had not satisfied the conditions laid down in point (d) of Section B of the Leniency Notice, to which Section C refers, because its cooperation 'was not completely voluntary', even though it had provided all relevant information and maintained continuous and complete cooperation throughout the investigation, in accordance with the terms of that provision. The fact that investigations had already been carried out at the premises of Kyowa and ADM and that a request for information had been addressed to Sewon is irrelevant because neither point (d) of Section B nor Section C of the Leniency Notice requires cooperation to begin prior to any investigatory measures.

116 Secondly, the applicants say that the second condition in Section C of the Leniency Notice, namely that information must be given after an on-the-spot investigation, but before the Commission has sufficient grounds for initiating the procedure leading to a decision, was also fulfilled. The investigations at the premises of ADM and Kyowa did not yield sufficient information concerning the infringement between 1990 and 1992.

117 The Commission contends, first of all, that whilst Sewon was the first to provide complete, decisive evidence concerning the duration of the cartel, Ajinomoto was the first to provide decisive proof in relation to the period following ADM's entry into the market.

118 The Commission adds that Sewon did not satisfy the condition specified in point (d) of Section B of the Leniency Notice because, in order for cooperation to be regarded as 'continuous and complete', an undertaking must volunteer complete evidence and not, as in the present case, provide information only in response to a request from the Commission pursuant to Article 11 of Regulation No 17. That interpretation is confirmed by the judgment in *Cascades* v *Commission*, cited above.

119 Moreover, according to the Commission, this was not a situation in which it did not possess, after carrying out investigations at the premises of the members of the cartel, sufficient information to warrant commencing an administrative procedure.

120 Lastly, even if Sewon had satisfied the conditions laid down in Section C of the Leniency Notice, it would not necessarily have obtained any greater reduction than that granted under Section D of the Leniency Notice, which was 50% of the fine that would otherwise have been imposed on it.

Findings of the Court

121 It should be observed at the outset that, in the Leniency Notice, the Commission defined the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fines which would otherwise have been imposed on them (Section A.3).

122 In so far as concerns application of the Leniency Notice in Sewon's case, it is not disputed that that undertaking's situation does not fall within the scope of Section B, which addresses the situation where an undertaking informs the Commission

about a secret cartel before the Commission has undertaken an investigation, a case which may lead to a reduction of at least 75% of any fine.

123 However, in so far as the applicants submit that the Commission was wrong to refuse them the benefit of the reduction contemplated in Section C of the Leniency Notice, it is appropriate to consider whether in fact the Commission misinterpreted the conditions for applying that section.

124 Section C of the Leniency Notice, headed 'Substantial Reduction in a Fine', provides as follows:

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

125 The conditions set out in Section B, to which Section C refers, are where the undertaking in question:

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

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

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

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

126 In the Decision the Commission found that none of the undertakings qualified for a substantial reduction in the fine under Section C of the Leniency Notice because none of them satisfied the conditions laid down in points (b) to (e) of Section B, to which Section C refers (paragraph 429).

127 It is clear from paragraphs 423 to 425 of the Decision that, as the applicants state, without being challenged, the Commission implicitly acknowledged, for the reasons set out in paragraph 423 of the Decision, that Sewon satisfied the conditions laid down in points (b), (c) and (e) of Section B of the Leniency Notice. The only reason they were not allowed the benefit of a reduction under Section C is that Sewon's cooperation did not, according to the Commission, satisfy the conditions in point (d) of Section B of the Leniency Notice.

128 However, the reasons which the Commission adduces in this connection (set out in paragraph 424 of the Decision) are clearly contrary to both the wording of point (d) of Section B of the Leniency Notice and the spirit of the provisions of Section C of that notice.

129 The first reason — that by the time Sewon began to cooperate the Commission already had sufficient information to establish the existence of a cartel as from the time of ADM's entry on the market — cannot justify a refusal to consider the condition laid down in point (d) of Section B to be satisfied and consequently to apply Section C of the Leniency Notice.

130 In this connection it is clear from paragraph 423 of the Decision that the Commission itself concluded that Sewon had been 'the first of the cartel members to adduce complete, decisive evidence concerning the infringement found' and that the documents which it produced were, in so far as concerns the first phase of the cartel, from 1990 to 1992, 'the main source of evidence used by the Commission in preparing the present Decision'. The Commission also admitted, in its defence, that Sewon was the first to provide complete, decisive evidence concerning the duration of the cartel. That being so, it cannot be denied that Sewon provided the Commission with 'all the relevant information and all the documents and evidence available to it regarding the cartel', as provided for in point (d) of Section B of the Leniency Notice.

131 It should be observed that, in its pleadings, the Commission attempted to justify its position by reference to a second condition laid down in Section C of the Leniency Notice, namely that the investigations carried out must have failed to

yield sufficient grounds for initiating a procedure leading to a decision. In this way the Commission seeks to argue that, at the time Sewon cooperated, it had already obtained sufficient information from Ajinomoto concerning the existence of a cartel from 1992 to 1995 and that that had already enabled it to commence a procedure.

132 The Court cannot accept that argument.

133 In addition to the fact that the Commission does not rely in the Decision on that second condition in Section C of the Leniency Notice but only on the inapplicability of point (d) of Section B, to which Section C refers, the fact remains that it was, in any event, the information provided by Sewon in relation to the existence of a cartel from 1990 to 1992 that enabled the Commission to initiate the procedure against Ajinomoto, Kyowa and Sewon itself with respect to that period and thereby to increase substantially the amount of their fines on account of the duration of the infringement. Consequently, even on a literal reading, the condition laid down in Section C concerning the impossibility of commencing a procedure on the basis of the information which the Commission has obtained from its investigations is satisfied in this case because the Commission was not in a position to commence a procedure with regard to the infringement during the period 1990 to 1992 until Sewon provided the evidence in its possession.

134 The second reason — namely that Sewon disclosed the existence of the cartel after the Commission had carried out investigations at the premises of ADM and Kyowa — is equally groundless, in view of the provisions of point (d) of Section B of the Leniency Notice and those of Section C thereof which relate to the second condition. Application of the former is not dependent upon there having

been no investigation and the latter even refer explicitly to the case where investigations have been carried out at the premises of undertakings party to a cartel.

135 Finally, the Court must also reject the last reason given in the Decision, namely that a substantial proportion of the information provided by Sewon was offered in response to a request for information pursuant to Article 11(1) of Regulation No 17 and that Sewon's cooperation was thus not entirely voluntary.

136 In this connection the Commission refers to settled case-law according to which cooperation in an investigation which does not go beyond that which undertakings are required to provide under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 341, and *Cascades* v *Commission*, cited above, paragraph 260).

137 However, it is also clear from that same case-law that a reduction in the fine is justified where an undertaking provides the Commission with information well in excess of that which the Commission may require under Article 11 of Regulation No 17 (see, to that effect, *Cascades* v *Commission*, paragraphs 261 and 262).

138 In the present case it is sufficient to observe that the information which Sewon provided in its reply went far beyond what was requested. Indeed, as the Commission itself noted in paragraph 172 of the Decision, 'Sewon also provided

details of meetings for which the Commission had made no request. It continued to supplement this information.'

139 Moreover, refusing the applicants the benefit of a reduction under Section C of the Leniency Notice on the ground that a request for information had been sent also contravenes the conditions laid down in that section.

140 As has been stated, Section C of the Leniency Notice addresses the case where the Commission has carried out 'an investigation ordered by decision' (a measure contemplated by Article 14(3) of Regulation No 17) 'on the premises of the parties to the cartel' and yet is unable to initiate a procedure. In the present case, at the time when Sewon offered its cooperation, the Commission had already carried out two investigations at the premises of the members of the cartel, namely ADM and Kyowa (paragraph 168 of the Decision) without that enabling it to initiate a procedure leading to a decision. After those investigations were carried out the preliminary investigation procedure was continued by means of requests for information pursuant to Article 11 of Regulation No 17 (paragraph 171 of the Decision). Moreover, it may be observed that no investigation was carried out at Sewon's premises, a fact which would not necessarily have rendered Section C of the Leniency Notice inapplicable, provided that the investigation had failed to provide sufficient grounds for initiating the procedure leading to a decision.

141 Therefore, the fact that the Commission addressed a request for information to Sewon pursuant to Article 11(1) of Regulation No 17 cannot of itself exclude the possibility of a substantial reduction of between 50% and 75% of the fine, pursuant to Section C of the Leniency Notice, particularly as a request for information is a less coercive measure than an investigation ordered by decision.

142 That interpretation is clearly confirmed by the judgment of the Court of First Instance in Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989 in which, after emphasising that the company in question, Stora, had supplied information well in excess of that which the Commission could require to be supplied under a request for information (paragraph 401 of the judgment), the Court held that 'even though Stora cooperated only after the Commission had initiated investigations at the undertakings pursuant to Article 14(3) of Regulation No 17, the Commission, by reducing by two-thirds the fine imposed on Stora, did not overstep the limits of its discretion when determining the amount of fines' (paragraph 402). Although that judgment relates to a decision adopted prior to publication of the Leniency Notice, the interpretative guidance contained in it is valid in the context of applying the provisions of Section C of that notice.

143 That being so, the Court must hold that the Commission failed to comply with Section C of the Leniency Notice.

144 Consequently, the Court must, in the exercise of its unlimited jurisdiction, rule on the amount by which the applicants' fine should have been reduced pursuant to Section C of the Leniency Notice. The Commission argues that any reduction allowed on that basis would not necessarily be greater than that which it granted under Section D of the Leniency Notice, that is to say 50%.

145 However, it must be observed that the information which Sewon furnished proved decisive in establishing the existence of a cartel between 1990 and 1992 and thus in establishing the duration of the infringement. That warrants a reduction of 60% in the amount of the fine.

The method employed in calculating the final amount of the fine

146 In the Decision, the Commission allowed Sewon the benefit of two mitigating circumstances: first for its passive role in 1995 in connection with the sales quotas, which led to a reduction of 20% of the increase applied, in that undertaking's case, on account of the duration of the infringement (paragraph 365 of the Decision); secondly, for termination of the infringement as soon as a public authority intervened (paragraph 384 of the Decision), warranting a reduction of 10% of the figure derived from the first reduction.

147 It is plain that, in those two cases, by contrast with the case of Cheil, the reductions to reflect mitigating circumstances were not applied by the Commission to the basic amount of the fine, determined by reference to the severity and duration of the infringement.

148 By a written question sent on 7 February 2002 the Court called upon the Commission, *inter alia*, to explain in detail and justify the method which it used to calculate the fines.

149 In its reply of 27 February 2002, the Commission stated that the proper way to calculate the increases and reductions intended to reflect aggravating and mitigating circumstances was to apply a percentage to the basic amount of the fine. It also acknowledged that it did not consistently follow that method in the Decision, especially in the case of Ajinomoto and ADM.

150 At the hearing the applicants stated that they had no objection to the method used to calculate the fines which the Commission proposed.

151 Against that background, it is important to point out that, according to the Guidelines, the Commission must, once it has determined the basic amount of the fine to take account of the gravity and duration of the infringement, increase and/or reduce that figure to reflect aggravating or mitigating circumstances.

152 Given the wording of the Guidelines, the Court takes the view that any percentage increases or reductions decided upon to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement, not to any increase already applied for the duration of the infringement or to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances. As the Commission rightly noted in its reply to the Court's written question, the method for calculating fines just described may be inferred from the wording of the Guidelines; it ensures equal treatment between the various undertakings involved in a cartel.

153 It should be pointed out that, on reviewing Sewon's conduct in relation to the agreements on sales volumes, the Court held (in paragraph 111 of the present judgment) that it had indeed refrained from implementing the agreements from January to June 1995. After finding that the reduction allowed by the Commission on account of the passive role which Sewon adopted in relation to sales quotas and the reduction claimed by the applicants on grounds of non-implementation of the agreements relied on precisely the same facts, the Court held (in paragraph 113 of the present judgment) that the reduction of 20% of the increase applied on account of the duration of the infringement, which equates to a 5.71% reduction in the basic amount of the fine (EUR 21 million), was completely appropriate.

154 Furthermore, it should be pointed out that the 10% reduction which the Commission allowed Sewon on the ground that the company had ceased the infringement as soon as a public authority intervened and which it applied to the figure resulting from the first reduction on account of Sewon's passive role, EUR 19.8 million, equates to a reduction of approximately 9.43% of the basic amount, which in fact appears appropriate.

155 Given those circumstances the Court, in the exercise of its unlimited jurisdiction, therefore finds that it is necessary to add to the 5.71% reduction the 9.43% reduction mentioned in the previous paragraph, giving a total reduction on account of mitigating circumstances of 15.14% which must be applied to the basic amount of the fine. That produces a figure of EUR 17 820 600 before application of the provisions of the Leniency Notice.

156 For the reasons stated, that figure of EUR 17 820 600 should be reduced by 60% pursuant to Section C of the Leniency Notice, equating to a reduction of EUR 10 692 360. The final amount of the fine imposed on the applicants must, consequently, be EUR 7 128 240.

Costs

157 Under Article 87(3) of its Rules of Procedure, the Court of First Instance may, where each party succeeds on some heads and fails on others, order that the costs be shared or that each party should bear its own costs. In this case, it is appropriate to order the applicants to bear their own costs and, jointly and severally, two thirds of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Daesang Corp. and Sewon Europe GmbH jointly and severally at EUR 7 128 240;**

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

3. **Orders Daesang Corp. and Sewon Europe GmbH to bear their own costs and, jointly and severally, to pay two thirds of the Commission's costs and orders the Commission to bear one third of its own costs.**

Vilaras Tiili Mengozzi

Delivered in open court in Luxembourg on 9 July 2003.

H. Jung M. Vilaras

Registrar President

Table of contents