Update Seminar

on

EU Competition Law

Riga Graduate School of Law

October 2008

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Update seminar on EU Competition Law

Riga Graduate School of Law

Thursday 29 January 2009 from 9.00 to 13.00

Seminar outline

1 Legislation

1.1 Procedural issues

- Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases
- Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases

1.2 Merger control

- Commission Consolidated Jurisdictional Notice of 10 July 2007 under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

2 Cases

2.1 Application of EU competition law

- ETI, case C-280/06
- Akzo Nobel, case T-112/05
- Doulamis, case C-446/05
- MOTOE, case C-49/07

2.2 Horisontal agreements

- SGL Carbon, case C-328/05
- Britannia Alloys & Chemicals, case C-76/06 P
- Coats Holdings, case T-36/05
- BASF & UCB, joint cases T-101/05 and T-111/05
- Hoechst, case T-410/03
- AC-Treuhand, case T-99/04

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- BPB, case T-53/03

2.3 Dominant positions

- Duales System Deutschland, case T-151/01 (and case T-289/01)
- Microsoft, case T- 201/04
- Scippacercola & Terezakis, case T-306/05
- Deutsche Telekom, case T-271/03

2.4 Merger control

- Sun Chemical Group, case T-282/06
- Schneider Electric, case T-351/03
- Cementbouw Handel & Industrie, case C-202/06 P
- Commission vs Spain, case C-196/07
- Bertelsmann & Sony Corporation of America, case C-413/06 P

2.5 Procedural issues

- Alrosa, case T-170/06
- Akzo Nobel Chemicals & Akcros Chemicals, joint cases T-125/03 and T-253/03
- Pergan Hilfsstoffe für industrielle Prozesse, case T-474/04
- Aer Lingus Group, case T-411/07 R

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COMMISSION REGULATION (EC) No 622/2008

of 30 June 2008

amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1], and in particular Article 33 thereof,

Having published a draft of this Regulation [2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [3] lays down rules concerning the participation of the parties concerned in such proceedings.

(2) Parties to the proceedings may be prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability in respect of such participation, if they can reasonably anticipate the Commission's envisaged findings as regards their participation in the infringement and the level of potential fines and agree with those findings. It should be possible for the Commission to disclose to those parties, where appropriate, the objections which it intends to raise against them on the basis of the evidence in the file and the fines that they are likely to incur. Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability.

(3) When the Commission reflects the parties' settlement submissions in the statement of objections and the parties' replies confirm that the statement of objections corresponds to the contents of their settlement submissions, the Commission should be able to proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

(4) A settlement procedure should therefore be established in order to enable the Commission to handle faster and more efficiently cartel cases. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. Therefore, the Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including any unreasonable delays, such as delays associated with the resources required to provide access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent may also be considered.

(5) Complainants will be closely associated with settlement proceedings and be duly informed of the nature and subject matter of the procedure in writing to enable them to provide their views thereon and thereby cooperate with the Commission investigation. However, in the particular context of settlement proceedings, providing systematically a non-confidential version of the statement of objections to complainants would not always serve the purpose of enabling complainants to cooperate with the Commission's investigation and may occasionally discourage the parties to the proceedings from cooperating with the Commission. To this end, the Commission should not be obliged to provide a non-confidential version of the statement of objections to complainants.

[1] OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).
[2] OJ C 50, 27.10.2007, p. 48.
[3] OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

(6) Regulation (EC) No 773/2004 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 773/2004 is amended as follows:

1. Article 2, paragraph 1 is replaced by the following:

‘1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.’

2. In Article 6, paragraph 1 is replaced by the following:

‘1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections, except in cases where the settlement procedure applies, where it shall inform the complainant in writing of the nature and subject matter of the procedure. The Commission shall also set a time limit within which the complainant may make known its views in writing.’

3. In Article 10, paragraph 1 is replaced by the following:

‘1. The Commission shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified in writing to each of the parties against whom objections are raised.’

4. The following Article 10a is inserted:

‘*Article 10a*

Settlement procedure in cartel cases

1. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

If two or more parties within the same undertaking indicate their willingness to engage in settlement discussions pursuant to the first subparagraph, they shall appoint a joint representation to engage in discussions with the Commission on their behalf. When setting the time limit referred to in the first subparagraph, the Commission shall indicate to the relevant parties that they are identified within the same undertaking, for the sole purpose of enabling them to comply with this provision.

2. Parties taking part in settlement discussions may be informed by the Commission of:

(a) the objections it envisages to raise against them;

(b) the evidence used to determine the envisaged objections;

(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and

(d) the range of potential fines.

This information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty as well as their liability. Before the Commission sets a time limit to introduce their settlement submissions, the parties concerned shall be entitled to have the information specified in Article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The Commission may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

4. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.'

5. Article 11(1) is replaced by the following:

'1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.'

6. Article 12 is replaced by the following:

'*Article 12*

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

2. However, when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions.'

7. In Article 15, the following paragraph 1a is inserted:

'1a. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties willing to introduce settlement submissions to do so, the Commission shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions.'

8. Article 17 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. In setting the time limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2), Article 10a(1), Article 10a(2), Article 10a(3) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.'

(b) paragraph 3 is replaced by the following:

'3. The time limits referred to in Article 4(3), Article 10a(1), Article 10a(2) and Article 16(3) shall be at least two weeks. The time limit referred to in Article 3(3) shall be at least two weeks, except for settlement submissions, for which corrections shall be made within one week. The time limit referred to in Article 10a(3) shall be at least two weeks.'

Article 2

This Regulation shall enter into force on 1 July 2008.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 June 2008.

For the Commission

Neelie KROES

Member of the Commission

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases

(Text with EEA relevance)

(2008/C 167/01)

1. INTRODUCTION

1. This Notice sets out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Article 81 of the EC Treaty [1] to cartel cases [2]. The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence. The cooperation covered by this Notice is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is covered by the Commission Notice on Immunity from fines and reduction of fines in cartel cases [3] (the Leniency Notice). Provided that the cooperation offered by an undertaking qualifies under both Commission Notices, it can be cumulatively rewarded accordingly [4].

2. When parties to the proceedings are prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability therefore, they may also contribute to expediting the proceedings leading to the adoption of the corresponding decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [5] in the way and with the safeguards specified in this Notice. Whilst the Commission, as the investigative authority and the guardian of the Treaty empowered to adopt enforcement decisions subject to judicial control by the Community Courts, does not negotiate the question of the existence of an infringement of Community law and the appropriate sanction, it can reward the cooperation described in this Notice.

3. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [6] lays down the core practical rules concerning the conduct of proceedings in antitrust cases including those applicable in the variant for settlement. In this regard, Regulation (EC) No 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties.

4. Effective enforcement of Community competition law is compatible with full respect of the parties' rights of defence, which constitutes a fundamental principle of Community law to be respected in all circumstances, and in particular in antitrust procedures which may give rise to

(1) References in this text to Article 81 also cover Article 53 EEA when applied by the Commission in accordance with the rules laid down in Article 56 of the EEA Agreement.

(2) Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC.

(3) OJ C 298, 8.12.2006, p. 17.

(4) See point 33.

(5) OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

(6) OJ L 123, 27.4.2004, p. 18. Regulation as last amended by Regulation (EC) No 622/2008 (OJ L 171, 1.7.2008, p. 3).

penalties. It follows that the rules established to conduct the Commission proceedings to enforce Article 81 of the Treaty should ensure that the undertakings and associations of undertakings concerned are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission [1], throughout the administrative procedure.

2. PROCEDURE

5. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent might apply. The Commission may also decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine. Distortion or destruction of evidence relevant to the establishment of the infringement or any part thereof may also constitute an aggravating circumstance within the meaning of point 28 of the Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 [2] (the Guidelines on fines), and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. The Commission may only engage in settlement discussions upon the written request of the parties concerned.

6. While parties to the proceedings do not have a right to settle, should the Commission consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.

7. The parties to the proceedings may not disclose to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorization by the Commission. Any breach in this regard may lead the Commission to disregard the undertaking's request to follow the settlement procedure. Such disclosure may also constitute an aggravating circumstance, within the meaning of point 28 of the Guidelines on fines and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice.

2.1. Initiation of proceedings and exploratory steps regarding settlement

8. Where the Commission contemplates the adoption of a decision pursuant to Article 7 and/or Article 23 of Regulation (EC) No 1/2003, it is required in advance to identify and recognize as parties to the proceedings the legal persons on whom a penalty may be imposed for an infringement of Article 81 of the Treaty.

9. To this end, the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 in view of adopting such a decision can take place at any point in time, but no later than the date on which the Commission issues a statement of objections against the parties concerned. Article 2(1) of Regulation (EC) No 773/2004 further specifies that, should the Commission consider it suitable to explore the parties' interest in engaging in settlement discussions, it will initiate proceedings no later than the date on which it either issues a statement of objections or requests the parties to express in writing their interest to engage in settlement discussions, whichever is the earlier.

10. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission becomes the only competition authority competent to apply Article 81 of the Treaty to the case in point.

11. Should the Commission consider it suitable to explore the parties' interest to engage in settlement discussions, it will set a time-limit of no less than two weeks pursuant to Articles 10a(1) and 17(3) of Regulation (EC) No 773/2004 within which parties to the same proceedings should declare in writing whether they envisage engaging in settlement discussions in view of possibly introducing settlement submissions at a later stage. This written declaration does not imply an admission by the parties of having participated in an infringement or of being liable for it.

12. Whenever the Commission initiates proceedings against two or more parties within the same undertaking, the Commission will inform each of them of the other legal entities which it identifies within the same undertaking and which are also concerned by the proceedings. In such a case, should the concerned parties wish to engage in settlement discussions, they must appoint joint representatives duly empowered to act on their behalf by the end of the time-limit referred to in point 11. The appointment of joint representatives aims solely to facilitate the settlement discussions and it does not prejudge in any way the attribution of liability for the infringement amongst the different parties.

(1) Case 85/76, *Hoffmann-La Roche* v *Commission* [1979] ECR 461, at paragraphs 9 and 11.
(2) OJ C 210, 1.9.2006, p. 2.

13. The Commission may disregard any application for immunity from fines or reduction of fines on the ground that it has been submitted after the expiry of the time-limit referred to in point 11.

2.2. **Commencing the settlement procedure: settlement discussions**

14. Should some of the parties to the proceedings request settlement discussions and comply with the requirements referred to in points 11 and 12, the Commission may decide to pursue the settlement procedure by means of bilateral contacts between the Commission Directorate-General for Competition and the settlement candidates.

15. The Commission retains discretion to determine the appropriateness and the pace of the bilateral settlement discussions with each undertaking. In line with Article 10a(2) of Regulation (EC) No 773/2004, this includes determining, in view of the progress made overall in the settlement procedure, the order and sequence of the bilateral settlement discussions as well as the timing of the disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine ([1]). Information will be disclosed in a timely manner as settlement discussions progress.

16. Such an early disclosure in the context of settlement discussions pursuant to Article 10a(2) and Article 15(1a) of Regulation (EC) No 773/2004 will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle. Upon request by a party, the Commission services will also grant it access to non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the cartel ([2]).

17. When the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission, and the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Commission may grant a final time-limit of at least 15 working days for an undertaking to introduce a final settlement submission pursuant to Articles 10a(2) and 17(3) of Regulation (EC) No 773/2004. The time-limit can be extended following a reasoned request. Before granting such time-limit, the parties will be entitled to have the information specified in point 16 disclosed to them upon request.

18. The parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected.

19. Should the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision in their regard will follow the general provisions, in particular Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004, instead of those regulating the settlement procedure.

2.3. **Settlement submissions**

20. Parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. The settlement submission provided for in Article 10a(2) of Regulation (EC) No 773/2004 should contain:

    (a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;

    (b) an indication ([3]) of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;

    (c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;

([1]) Reference to the 'potential fine' in Article 10a(2) of Regulation (EC) No 773/2004 affords the Commission services the possibility to inform the parties concerned by settlement discussions of an estimate of their potential fine in view of the guidance contained in the Guidelines on fines, the provisions of this Notice and the Leniency Notice, where applicable.

([2]) For that purpose, the parties will be provided with a list of all accessible documents in the case file at that point in time.

([3]) This would result from the discussions as set out in points 16 and 17.

(d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;

(e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community.

21. The acknowledgments and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.

22. Settlement requests cannot be revoked unilaterally by the parties which have provided them unless the Commission does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29). The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein.

2.4. **Statement of objections and reply**

23. Pursuant to Article 10(1) of Regulation (EC) No 773/2004, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Commission will issue a statement of objections also in a settlement procedure ([1]).

24. For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate ([2]). The Commission must be able not only to accept or reject the parties' relevant arguments expressed during the administrative procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.

25. By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account ([3]) already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision ([4]).

26. Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time-limit of at least two weeks set by the Commission in accordance with Articles 10a(3) and 17(3) of Regulation (EC) No 773/2004, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Commission will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure.

27. The Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004 will apply. The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a time-limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing.

2.5. **Commission decision and settlement reward**

28. Upon the parties' replies to the statement of objections confirming their commitment to settle, Regulation (EC) No 773/2004 allows the Commission to proceed, without any other procedural step, to the adoption of the

([1]) In the context of settlement procedures, statements of objections should contain the information necessary to enable the parties to corroborate that it reflects their settlement submissions.

([2]) In line with settled case-law, the Commission shall base its decisions only on objections on which the parties concerned have been able to comment and, to this end, they shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

([3]) In this regard, recital 2 of Regulation (EC) No 622/2008 states: '(…) *Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability*'.

([4]) As required by Article 11(1) of Regulation (EC) No 773/2004 and Article 27(1) of Regulation (EC) No 1/2003, respectively.

subsequent final decision pursuant to Articles 7 and/or 23 of Regulation (EC) No 1/2003, after consultation of the Advisory Committee pursuant to Article 14 of Regulation (EC) No 1/2003. In particular, this implies that no oral hearing or access to the file may be requested by those parties once their settlement submissions have been reflected by the statement of objections, in line with Articles 12(2) and 15(1a) of Regulation (EC) No 773/2004.

29. The Commission retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission to this effect. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties would then be entitled to have access to the file, to request an oral hearing and to reply to the statement of objections. The acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.

30. The final amount of the fine in a particular case is determined in the decision finding an infringement pursuant to Article 7 and imposing a fine pursuant to Article 23 of Regulation (EC) No 1/2003.

31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission under this Notice during the administrative procedure will be indicated in the final decision, so as to explain the reason for the level of the fine.

32. Should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10 % the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ([1]). Any specific increase for deterrence ([2]) used in their regard will not exceed a multiplication by two.

33. When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.

3. GENERAL CONSIDERATIONS

34. This Notice applies to any case pending before the Commission at the time of or after its publication in the Official Journal of the European Union.

35. Access to settlement submissions is only granted to those addressees of a statement of objections who have not requested settlement, provided that they commit — together with the legal counsels getting access on their behalf — not to make any copy by mechanical or electronic means of any information in the settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related proceedings. Other parties such as complainants will not be granted access to settlement submissions.

36. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceedings, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

37. Settlement submissions made under this Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation (EC) No 1/2003, provided that the conditions set out in the Network Notice ([3]) are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

38. Upon the applicant's request, the Commission may accept that settlement submissions be provided orally. Oral settlement submissions will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Regulation (EC) No 1/2003 and Articles 3(3) and 17(3) of Regulation (EC) No 773/2004 undertakings making oral settlement submissions will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral settlement submissions and the accuracy of the transcript without delay.

39. The Commission will not transmit settlement submissions to national courts without the consent of the relevant applicants, in line with the provisions in the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC ([4]).

40. The Commission considers that normally public disclosure of documents and written or recorded statements (including settlement submissions) received in the context of this Notice would undermine certain public or private

([1]) OJ C 210, 1.9.2006, p. 2.
([2]) Point 30 of the Guidelines on fines.
([3]) Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43).
([4]) OJ C 101, 27.4.2004, p. 54; point 26.

interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [1], even after the decision has been taken.

41. Final decisions taken by the Commission under Regulation (EC) No 1/2003 are subject to judicial review in accordance with Article 230 of the Treaty. Moreover, as provided in Article 229 of the Treaty and Article 31 of Regulation (EC) No 1/2003, the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Regulation (EC) No 1/2003.

Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003

I. **Investigation as usual**

— Parties may express their interest in a hypothetical settlement.

II. **Exploratory steps regarding settlement**

— Letter to all companies (and MS) informing of the decision to initiate proceedings in view of settlement (Article 11(6)) and requesting them to express their interest in settlement.

III. **Bilateral rounds of settlement discussions**

— Disclosure and exchange of arguments on potential objections, liability, fines range.

— Disclosure of evidence used to establish potential objections, liability, fines.

— Disclosure of other non-confidential versions of documents in the file, when justified.

IV. **Settlement**

— Conditional settlement submissions by the companies, jointly represented where applicable.

— DG COMP sends acknowledgement of receipt.

V. **'Settled' statement of objections**

— Notification of streamlined SO endorsing company's settlement submissions, where appropriate.

— Company's reply to SO confirming clearly that it reflects its settlement submission.

VI. **'Settlement' Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003**

— Advisory Committee on a draft streamlined final decision.

If College of Commissioners agrees:

— Adoption of streamlined final decision.

(1) OJ L 145, 31.5.2001, p. 43.

IP/08/1056

Brussels, 30th June 2008

Antitrust: Commission introduces settlement procedure for cartels

The European Commission has introduced a settlement procedure for cartels which will allow the Commission to settle cartel cases through a simplified procedure. Under this procedure, parties, having seen the evidence in the Commission file, choose to acknowledge their involvement in the cartel and their liability for it. In return for this acknowledgement, the Commission can reduce the fine imposed on the parties by 10%. Settlements aim to simplify the administrative proceedings and could reduce litigation before the European Courts in cartel cases. This will in turn free Commission resources to pursue other cases. The Commission has analysed the 51 contributions received during the public consultation launched on 26th October 2007 (see IP/07/1608) and has revised the package in consultation with the Member States' competition authorities. The legislative package consists of a Commission Regulation together with a Commission Notice (the "settlement notice") explaining the new system in detail. The settlements package will enter into force on the day of its publication in the EU Official Journal.

Competition Commissioner Neelie Kroes commented: "This new settlements procedure will reinforce deterrence by helping the Commission deal more quickly with cartel cases, freeing up resources to open new investigations. Companies which are convinced that the Commission can prove their involvement in a cartel, will also benefit from quicker decisions and a fine reduction."

The Commission's ability to fight cartels hinges on the evidence gathered during its investigations. Parties found guilty of a cartel often do not go to court to contest the existence of a cartel or their involvement in it, but rather to reduce or avoid fines. This is particularly so in cases driven by leniency applications.

Under the new settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction, but can reward the parties' cooperation to attain procedural economies. Such cooperation is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is already covered by the Leniency Notice (see IP/06/1705). Where both the settlement reduction and the leniency reduction are applicable, they are applied cumulatively. A decision finding an infringement of the antitrust rules and imposing fines pursuant to Regulation (EC) Nº 1/2003 is adopted, irrespective of whether the standard or the settlement procedure applies.

Parties have neither the right nor the duty to settle, but in cases where companies are convinced that the Commission could prove their involvement in a cartel, a settlement can be reached with the Commission on the scope and duration of the cartel, and the individual liability of the companies involved. To this end, parties will be informed about the envisaged objections and the evidence supporting them, and will be given the occasion to state their views, before formal objections are sent. If the parties chose to introduce a settlement submission, acknowledging the objections, the Commission's statement of objections (SO) would endorse the contents of the parties' submission and so could be much shorter than an SO issued without prior cooperation. Since parties will have been heard in anticipation of the "settlement" SO, other procedural steps can be simplified so that, following confirmation by the parties, the Commission can proceed swiftly to adopt a final decision after consulting Member States in the framework of the Advisory Committee, comprised of representatives of all Member States' competition authorities.

The Commission retains the possibility, until the final decision, to revert to the standard procedure. In addition, if no settlement was explored or reached, the standard procedure would apply by default.

The amendments to Commission Regulation (EC) nº 773/2004 on procedures for applying Articles 81 and 82 of the EC Treaty accommodate the settlement option within the existing framework. Changes include:

- The introduction of "settlement" variants in provisions including the initiation of proceedings, access to file and oral hearings.
- Procedural flexibility through the possibility to choose a different sequence of procedural steps, moving some to before the adoption of the SO.

The Settlements Notice sets out the specifics of the new procedure and provides guidance for the legal and business community. Companies will be able to:

- anticipate the type and extent of cooperation expected from them in order to settle and
- estimate the individual benefits of settling.

The Commission will publish the documents in the Official Journal in all official languages. The documents are also already available at

http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html

For more details, see MEMO/08/458.

MEMO/08/458

Brussels, 30th June 2008

Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions

(see also IP/08/1056)

Why does the Commission introduce a settlement procedure?

Where the parties to a cartel case agree with the Commission findings, the Commission wants to be able to use an instrument to speed up the adoption of a Decision.

This should free resources to deal with other cases, increasing the detection rate and overall efficiency of the Commission's antitrust enforcement. This is also expected to have a positive impact on general deterrence.

When parties are convinced of the strength of the Commission's case in view of the evidence gathered during the investigation and of their internal audit, they may be ready to acknowledge their participation to an infringement and accept their liability for it, in order to shorten the procedure and obtain a reduction of the fine. A settlement procedure therefore provides scope for reducing the length of the administrative procedure given the acceptance by parties of the Commission's case.

Does the settlement procedure imply negotiations?

No. The procedure will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction. It can, however, reward the cooperation of companies by speeding the proceedings in cartel cases and reducing the fine.

The Commission will not bargain about evidence or its objections, however, parties will also be heard effectively in the framework of the settlement procedure and parties will therefore have the opportunity to influence the Commission's objections through argument.

Why is the settlement procedure limited to cartel cases?

In the anti-cartel field, the practical ability of the Commission to enforce the EC Treaty's rules on restrictive business practices (Article 81) hinges on the extent and probative value of the evidence gathered during the investigation. Experience shows that litigation mainly relates to circumstances having a bearing on the amount of the fine and liability of parent companies for actions undertaken by their subsidiaries.

Moreover, amongst antitrust cases, cartel investigations are comparatively more frequent and often entail a heavier procedure in view, among other things, of the multiplicity of parties and languages involved and the jurisdictional issues they raise (e.g. discovery).

Will the settlements procedure apply to all cartel cases?

Not every cartel case will be suitable for settlement. The Commission will have a broad margin of discretion to determine which cartel cases are suitable. Account will be taken of the likelihood that the Commission and all parties concerned will reach the same conclusions on the scope of the objections and the prospect of achieving procedural efficiencies. This issue is addressed in point 5 of the Notice.

On the other hand, companies are not obliged to enter settlement discussions or to ultimately settle and the Commission may only apply the settlement procedure upon parties' explicit request.

What are the main differences between the current Commission's leniency programme and the settlements procedure?

The Commission leniency programme is an investigation tool (see IP/06/1705). It aims at discovering cartel cases and collecting evidence to discharge the Commission's burden of proof. The "Leniency Notice" rewards companies who voluntarily disclose to the Commission the existence of a cartel and bring evidence to prove the infringement. The reduction of the fine varies widely depending on the timing and significant added value of the information and evidence provided.

In contrast, settlement aims at simplifying and expediting the procedure leading to the adoption of a formal decision, thereby allowing for procedural savings and the internal redeployment of enforcement resources. The "Settlements Notice" rewards concrete contributions to procedural efficiency. All parties settling in the same case will receive equivalent reductions of the fine (10%), because their contribution to procedural savings will be equivalent.

Will the settlement reduction have a negative impact on the leniency programme?

Even with a settlement procedure, the incentive for companies to ask for leniency will remain unchanged.

First of all, the expected reduction of fine under the leniency programme is considerably more significant than the 10% settlements reduction. Secondly, leniency will not be available once settlement discussions start, which will be after the purely investigative phase.

To the extent that companies have an interest to get the maximum reduction of fine, they will therefore have a strong interest to favour leniency. However, as the reductions of fine are cumulative, companies will always have an incentive to ask for both.

What are the main differences between "commitment" decisions and procedures on the one hand and "settlement" decisions and procedures on the other?

Commitment decisions are adopted on the basis of Article 9 of Regulation (EC) Nº 1/2003. They do not establish an infringement or impose a fine, but bring a suspect behaviour to an end by imposing on companies the commitments offered to meet the Commission concerns. Commitment decisions render the commitments legally binding and conclude that there are no longer grounds for action by the Commission. Therefore, they do not constitute precedents to establish recidivism for subsequent infringements. Commitment decisions are not appropriate in cartel cases.

Settlement decisions are only foreseen in cartel cases. They are adopted pursuant to Articles 7 and 23 of Regulation (EC) Nº 1/2003, which are the standard legal basis for Commission Decisions acting against violations of Articles 81 and 82 EC. Therefore, settlement decisions establish the existence of an infringement, describing and proving all the relevant parameters thereof, require the termination of the infringement and impose a fine. They constitute a precedent valid to establish recidivism for subsequent similar infringements and preclude the adoption of another decision for the same facts and pursuant to the same legal basis by the Commission or any EU National Competition Authority.

When can a company request the initiation of settlement discussions? When do settlement discussions start?

Any company which becomes aware of the existence of an investigation (e.g. a leniency applicant, the addressee of a measure of investigation in general or the addressee of a decision of inspection in particular) may already at that stage indicate to the Commission its interest in exploring settlements.

Settlement discussions start only once the Commission has gathered and analysed evidence and is prepared to raise objections. Should the Commission consider a case suitable for settlement, it will initiate proceedings once the investigation (leniency, inspections) takes it to the stage of drafting a statement of objections. It will then explore the interest in settlement discussions of all parties' to the proceedings by letter setting a final time-limit to express their interest in writing.

Why does the Commission require parties to the procedure belonging to the same group of undertakings to appoint a joint representative?

This is necessary to have fruitful and efficient discussions with each of the undertakings concerned. In this regard, joint representation will not prejudge the finding of joint and several liability amongst parties of the same undertaking or group.

When and how will settlements discussions take place?

Upon parties' written request, the Commission may decide to open discussions rounds to be held between the initiation of proceedings and the adoption of the statement of objections.

Settlement discussions will tackle in a timely manner the alleged facts, their classification, the gravity and the duration of the infringement and on the liability for the individual involvement in the cartel on the basis of the evidence in the file supporting the envisaged objections. This includes discussing the potential maximum fine net of any other reduction. Accessible versions of other documents (than evidence) listed in the case file may be disclosed upon reasoned request when it is justified to enable a company to ascertain its position on a given time period or issue, and where this disclosure does not jeopardise the overall efficiency sought with the settlement procedure. This issue is addressed in Articles 15 to 17 of the Notice.

If the parties are convinced of the case the Commission may set a time-limit for them to introduce a formal request ("settlement submission") to settle the case. The settlement submission would be formulated according to a specified template and drafted along with the results of the settlement discussions. The conditional settlements submission will contain in particular the acknowledgement of their participation to the infringement, their commitment to follow the settlement procedure and an estimate of the potential fine, in anticipation of the formal objections.

What are the main conditions to obtain a settlement decision for a company?

According to article 20 of the Notice, the parties who want to settle a case with the Commission have to declare their interest in settlement discussions, appoint a representative per undertaking and submit a settlement submission in the terms discussed with the Commission and containing:

- an acknowledgement of the parties' liability for the infringement
- an indication of the maximum amount of the fines the parties foresee to be imposed by the Commission
- the parties' confirmation that they have been informed of the Commission's objections in a satisfactory manner and that they have been given the opportunity to be heard
- the parties' confirmation that they will request neither access to the file nor a formal oral hearing
- the parties' agreement to receive the statement of objections and the final decision of the Commission in a given language of the European Community.

By introducing a settlement submission, the parties commit to follow the settlement procedure subject to the condition that the Commission Decision ultimately reflects the contents of the settlement submission and it does not impose a fine higher that the maximum fine indicated in it.

How are settlement submissions protected against discovery orders from other jurisdictions? Can the parties introduce settlement submissions orally?

In cases where all parties settle, settlement submissions will not be rendered accessible, because no access to the file will be provided once the "settled" statement of objections is issued. In hybrid cases, the parties who do not settle will only get access to other parties' settlement submissions at Commission premises, and they are not allowed to make any mechanical copy thereof. The information obtained from the settlement submission may solely be used for their defence in procedures where Community competition rules are at issue. Other parties such as complainants will not be granted access to settlement submissions.

Settlement submissions can be introduced both in writing and orally.

These provisions, together with other more detailed ones in paragraphs 35 to 40 of the Notice, provide settlement submissions with the same level of protection as submissions introduced under the Leniency Notice.

Can the parties to the proceedings disclose to any other third party the content of bilateral settlement discussions?

The parties to the proceedings and their legal representatives are not allowed to disclose to any third party the content of their discussions with the Commission's services or of the documents which they have had access to. A breach of this rule may constitute an aggravating circumstance to be taken into account in setting the fine.

What will happen if the statement of objections or the final decision does not reflect the contents of the conditional settlements submissions?

If the Commission does not reflect the contents of settlements submissions of the parties in a statement of objections or in a final decision, the acknowledgments provided by the relevant parties are deemed to have been withdrawn and they cannot be used against them. Moreover, the relevant parties would be able to challenge the Commission findings within the administrative proceedings and the ordinary procedure and all these steps would apply.

Are the companies' rights of defence restricted under the settlements procedure compared to those under the ordinary procedure?

The rights to have access to the file or to request an oral hearing are exercised upon parties' request also in the framework of the ordinary procedure and a party can choose self-incrimination as a line of defence in view of possible rewards also in the framework of the ordinary procedure. However, isolated parties' choices do not result in procedural efficiencies. The settlement procedure simply provides incentives and organizes the procedural steps to promote similar procedural choices by the parties to the same proceedings in order to obtain procedural efficiencies.

Parties' rights of defence under the settlement procedure remain the same as in the ordinary procedure. They are simply exercised in the framework of bilateral discussions both orally and by means of a submission, in anticipation of the formal notification of objections.

Parties choose between the settlement procedure and the ordinary procedure freely and in a fully informed manner.

By introducing a settlement phase, the Commission increases companies' options to be informed earlier of potential objections and of the evidence supporting them. In addition, companies would be informed of the likely range of fines prior to the adoption of the final decision. On the basis of these facts and documents, the parties have the opportunity to express their views to the Commission, in line with the case-law of the Court of Justice as mentioned in particular in article 16 of the Commission's notice. This enables companies to influence the contents of the statement of objections and, thereby, of the decision itself. Full access to file remains available after the SO for those who do not settle, as it is the case today, and the parties may decide at any moment to stop the settlements discussions or not to send a settlement submission. Finally, any settlement Decision is open to appeal.

May the parties call upon the Hearing Officer during the settlements procedure?

The parties may call upon the Hearing Officer at any time during the settlements procedure in relation to issues that might arise relating to due process. This constitutes an additional guarantee for the respect of the rights of defence, as is the case in the ordinary procedure.

How will the 10% reduction of fine be determined for settlement decisions?

Pursuant to article 32 of the Commission notice, the settlement reduction will be deducted from the fine that a company would normally have to pay according to the provisions of the current Commission's guidelines on fines. If the fine calculated before the settlements reduction is capped to 10% of the worldwide turnover according to Article 23 of Regulation (EC) Nº 1/2003, the settlement reduction will be applied to the resulting amount.

When applicable, the reduction of fine given under the settlements procedure will be cumulative with the reduction of fine under the leniency program.

Is the settlement reduction the same for all parties settling?

The reduction of the fine rewarding companies for having settled a case with the Commission is equivalent for each party having settled (10%).

Is the Commission bound by the settlement agreement that was previously concluded between companies and the Commission's services?

The respect of the principle of collegiality of Commission Decisions and the benefit of having Advisory Committee meetings mean that the College of Commissioners may legitimately depart from the parties' submissions or the results of their discussions with the Commission's services up until the final Decision. However, as the Notice specifies, the Commission may not adopt a decision departing from the "settled" objections without informing the parties concerned and adopting a new statement of objections subject to the ordinary rules of procedure and which cannot be based on acknowledgements provided by the parties in view of settlement. However, this should occur only exceptionally if the usefulness of the settlement instrument is to be preserved.

Does a settlement decision imply that a company who accepted to acknowledge its participation to an infringement of Community law will not make an appeal to the Court of first instance?

No. A company who is the subject of an antitrust decision after a settlement with the Commission can still appeal the Commission Decision to the Court of First Instance

Commission Notice on Immunity from fines and reduction of fines in cartel cases

(Text with EEA relevance)

(2006/C 298/11)

I. INTRODUCTION

(1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC ([1]).

(2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

(4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

(5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

(6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.

(7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. ([2])

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

(8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel

([1]) Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement.

([2]) OJ L 8, 12.1.2001, p. 1.

affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel [1]; or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

(9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:

(a) A corporate statement [2] which includes, in so far as it is known to the applicant at the time of the submission:

— A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.

— The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;

— The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;

— Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

(b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC,.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

(a) The undertaking cooperates genuinely [3], fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:

— providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

— remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;

— making current (and, if possible, former) employees and directors available for interviews with the Commission;

— not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

— not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

(1) The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

(2) Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

(3) This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-301/04 P, Commission v SGL Carbon AG a.o., at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395-399.

(b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;

(c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

(13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. **Procedure**

(14) An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.

(15) The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

(16) An undertaking making a formal immunity application to the Commission must:

(a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or

(b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

(17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.

(18) Once the Commission has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

(19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

(20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

(21) The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.

(22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the Commission will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Commission, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

III. REDUCTION OF A FINE

A. Requirements to qualify for reduction of a fine

(23) Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

(24) In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.

(25) The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

— first undertaking to provide significant added value: a reduction of 30-50 %,

— second undertaking to provide significant added value: a reduction of 20-30 %,

— subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

B. Procedure

(27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the Commission and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Commission which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.

(28) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.

(29) If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.

(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;

(c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

IV. CORPORATE STATEMENTS MADE TO QUALIFY UNDER THIS NOTICE

(31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file and can thus be used in evidence.

(32) Upon the applicant's request, the Commission may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Council Regulation (EC) No 1/2003 [1] and Articles 3 and 17 of Commission Regulation (EC) No 773/2004 [2], undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.

(33) Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.

(34) In accordance with the Commission Notice on rules for access to the Commission file [3], access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceeding, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(35) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice [4] are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

V. GENERAL CONSIDERATIONS

(36) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

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[1] OJ L 1, 4.1.2003, p. 1.

[2] OJ L 123, 27.4.2004, p. 18.

[3] OJ C 325, 22.12.2005, p. 7.

[4] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

(37) From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.

(38) 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.

(39) In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

(40) The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 ([1]), even after the decision has been taken.

([1]) OJ L 145, 31.5.2001, p. 43.

IP/06/1705

Brussels, 7th December 2006

Competition: Commission adopts revised Leniency Notice to reward companies that report cartels

The European Commission has taken another important step to uncover and put an end to hard-core cartels by adopting a revised Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the "Leniency Notice"). The revised Leniency Notice clarifies the information an applicant needs to provide to the Commission to benefit from immunity, and introduces a so-called marker system for immunity applicants. It also clarifies the conditions for immunity and reduction of fines and introduces a procedure to protect corporate statements made by companies under the Leniency Notice from being made available to claimants in civil damage proceedings. The revision takes account of public consultations in February and October 2006.

Competition Commissioner Neelie Kroes said "Secret cartels undermine healthy economic activity. To root out cartels we need heavy sanctions to deter cartels and an efficient leniency policy providing incentives to report them. These changes will further strengthen the effectiveness of the Commission's leniency programme in the detection of cartels and offer clearer guidance for business."

Leniency allows the Commission to offer full immunity or a reduction in the fines that would otherwise have been imposed on a cartel member in exchange for disclosure of information on the cartel and cooperation with the investigation.

Main aspects of the revision

Improvements have been made in several areas of the Leniency Notice to provide more guidance to applicants and to increase the transparency of the procedure. These improvements reflect more than four years of experience in applying the 2002 Leniency Notice (see IP/02/247 and MEMO/02/23) and are also fully in line with the European Competition Network's Model Leniency Programme (see IP/06/1288 and MEMO/06/356).

The **immunity thresholds** have been clarified to:

- set out explicitly and clearly what type of information and evidence the applicants should submit to qualify for immunity
- link the threshold for immunity to information needed by the Commission to carry out a "targeted" inspection in connection with the alleged cartel, which will allow for the inspections to be better focused
- clarify that applicants are not required to produce in their initial application for immunity information and evidence, the collection of which would jeopardise a Commission inspection, and which can be provided under the continuous cooperation obligation
- state explicitly that the applicants need to disclose their participation in the cartel.

Concerning the **threshold for reduction of fines** the Notice makes it clear that evidence that requires little or no corroboration will have greater value. Such evidence will also be rewarded outside the normal bands for reduction of fines, when it is used to establish any additional facts increasing the gravity or duration of the infringement.

The **conditions for immunity and reduction of fines** have been made more explicit by:

- introducing flexibility as to the point in time when applicants should terminate their participation in the alleged cartel activities
- clarifying that genuine cooperation requires in particular that the applicant provides accurate, and complete information that is not misleading
- extending the obligation not to destroy, falsify or conceal information to cover also the period when the applicant was contemplating making an application
- stating explicitly that the obligation on continuous cooperation concerns also applications for a reduction of fines.

Another innovation in the revision is the **introduction of a discretionary marker system**. Where justified, an application can be accepted on the basis of only limited information. The applicant is then granted time to perfect the information and evidence to qualify for immunity.

In order to ensure that applicants that cooperate with the Commission investigation are not impaired in their position in civil proceedings, as compared to companies who do not cooperate, the Commission has developed a **procedure to protect corporate statements** given under the Leniency Notice from discovery in civil damage procedures. This is essential to maintain effectiveness of the Leniency Notice.

For more information on changes to the Leniency Notice, see MEMO/06/469 and MEMO/06/470.

Entry into force

The revised Leniency Notice will come into force on 8th December 2006, when it is published in the EU Official Journal. From that date it will be applicable to companies which file for leniency in a cartel case, as long as no other company is already co-operating with the Commission under the Leniency Notice in the same cartel. The procedure to protect corporate statements will be applied from the moment of publication of the Notice to all pending and new applications for leniency.

The revised notice is available on the Commission's competition web-site: http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html

Comments on the public consultation are available at:
http://ec.europa.eu/comm/competition/cartels/legislation/leniency_consultation.html

For general information on the Commission’s action against cartels, see MEMO/06/451.

MEMO/06/469

Brussels, 7th December 2006

Competition: revised Leniency Notice – frequently asked questions

(see also IP/06/1705)

The European Commission has taken another important step to uncover and put an end to hard-core cartels by adopting a revised Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the "Leniency Notice", see IP/06/1705). The revision takes account of public consultations in February and October 2006.

I. Threshold for immunity

Has the threshold been changed?

There is now more clarity. Experience shows that there was a need for further guidance for potential applicants on the threshold that applies in situations where the Commission does not yet have enough information to carry out an inspection (point 8(a) threshold of the Notice). To avoid uncertainties as to what type of information and evidence is required to meet this threshold for immunity, the Notice gives a list which helps applicants to anticipate what is required. In addition, the Commission will continue the current practice of discussing with an applicant the collection and submission of information and evidence. Any supplementary submissions by an applicant can be taken into account as a part of its application, until such time as the Commission receives another application for immunity in the same case or, if the applicant has been granted a marker (a new concept in the revised Notice, see point on Marker system below for details), until the marker period expires.

Why has the concept of a "targeted inspection" been added to the threshold? What is meant by a "targeted inspection"?

The Notice specifies that the applicants should provide sufficient evidence to enable the Commission to carry out the inspection in a "targeted" manner. An immunity applicant by definition has been a party to an alleged cartel that is subject to the application. It should therefore be in a position to provide to the Commission such "insider" information on the cartel that would allow he Commission to better target its inspection with more precise information as to, for instance, what to look for and where in terms of evidence. The information and evidence listed in point 9 of the Notice aims at meeting this need.

The Notice also specifies that the assessment of the "targeted inspection" threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has been successful or whether an inspection has been carried out. The assessment will be made exclusively on the basis of the type and quality of the information submitted by the applicant.

Will the information and evidence listed in point 9 be enough to qualify for immunity under point 8(a)?

The purpose of the Notice is that by providing the information and evidence listed in point 9, the applicant can qualify for point 8(a) immunity. In line with the spirit of cooperation expected from the applicant, the latter should not, however, limit itself strictly to providing only the things specified in point 9, if it has at the time of the application more information or evidence available.

How exhaustive must the applicant be in providing information and evidence to qualify for conditional immunity? What is meant by "to the extent that this would not, in the Commission's view, jeopardise the inspections"?

To qualify for point 8(a) immunity, an applicant needs to provide the information and evidence listed in point 9. However, as specified in the Notice, the purpose is that an applicant should not take any measure in preparing its application "that would jeopardise the inspections". If an applicant learns that its internal inquiries, carried out for the purposes of completing or supplementing an application, raise a real concern of alerting other cartel members prior to an inspection, it should communicate its concerns to the Commission. It should also be pointed out that under the continuous cooperation obligation of point 12, the applicant should during the whole administrative proceedings provide the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it. Therefore, if the applicant comes across or can obtain information or evidence listed in point 9 after its initial submission, it should provide those for the Commission. This also means that if the applicant has not completed its internal inquiries due to risk of leaks prior to a conditional immunity decision and/or a Commission inspection, the applicant should complete such inquiries directly thereafter, unless the Commission otherwise requires.

Why does the applicant need to provide home addresses of individuals? How is this requirement reconciled with privacy laws?

The Commission has been given the power (under the Council Regulation (EC) N° 1/2003 on how the Commission should apply the EC Treaty's anti-trust rules – see IP/04/511) to carry out inspections of other premises, including the homes of directors, managers or other members of staff, of the companies concerned. This power can be exercised if a reasonable suspicion exists that relevant books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 of the EC Treaty, are being kept in such other premises. The Notice also specifies that home addresses need to be provided only "where necessary" and in so far as known to the applicant. The Commission will process personal data in the context of the Leniency Notice in conformity with its obligations under Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies.

Why do applicants need to provide both "contemporaneous, incriminating" evidence and a corporate statement to meet the 8(b) threshold for immunity? What is meant by "contemporaneous, incriminating evidence"?I

f the Commission has carried out an inspection concerning an alleged cartel or has already sufficient evidence in its possession to carry out an inspection, immunity under point 8(a) is no longer available. However, in such a situation an applicant can still qualify for immunity under point 8(b) of the Notice. To meet the point 8(b) threshold for immunity an applicant needs to submit information and evidence which will enable the Commission to find evidence of a violation of Article 81 of the EC Treaty in connection with the alleged cartel. This threshold corresponds to the one required under Article 7 of Regulation 1/2003 for the Commission to be able to adopt an infringement decision. It is higher than the threshold for immunity in a situation where the Commission does not yet have any knowledge of the alleged cartel. In order to find an infringement against the suspected cartel participants, and not only the applicant that self-reports on the cartel, the applicant needs to submit incriminating evidence that originates from the time of the infringement. Experience shows that corporate statements are needed in addition to the evidence to explain the pieces of evidence and to give insight to the alleged cartel that only an ex-cartel member can provide. For example, in the Raw Tobacco Italy case (see IP/05/1315), the Commission granted conditional immunity under point 8(b), to reward the applicant for providing the Commission with decisive incriminating evidence for the establishment of objections which the Commission included in the Statement of Objections and in the final Decision.

Threshold for reduction of fines

Has the threshold been changed?

The threshold for reduction of fines remains the same: in order to qualify, an applicant for a reduction of fines needs to provide evidence which represents significant added value as compared to the evidence already in the file. For the sake of clarity and in the light of the latest case-law of the EC Courts dealing with the relative value of evidence, the revised Notice expressly recalls that evidence that requires little or no corroboration provides greater value for proving the case than evidence which requires corroboration if it is contested. This is one amongst a number of (non-exhaustive) criteria explicitly mentioned in the Notice.

What is meant by "compelling evidence" and what does this seek to add to the criteria of significant added value?

"Compelling evidence" means conclusive, stand-alone evidence as compared with, for instance, a corporate statement uncorroborated by other pieces of evidence which would not be used as evidence against other parties to the cartel if they all contradicted it in similar statements. This does not mean that corporate statements can never provide significant added value, but it signals that they are more likely to provide it in when they corroborate other statements or pieces of evidence.

Why does receiving an extra reduction outside the normal bands for reduction of fines require that the evidence provided is compelling?

Compelling evidence is the level of evidence enabling the Commission to prove additional facts liable to extend the gravity or the duration of the infringement. Therefore, a company providing this level of evidence should be sure that the effects of such an extension directly linked to its contribution will not increase its own fine. A company should have an incentive to provide all conclusive evidence as early as possible in the procedure in order to benefit from any extra reduction before others do.

When is an applicant for reduction of fines informed whether it meets the threshold set in the Notice?

The applicant will be informed on the preliminary conclusion that it meets the threshold as soon as the Commission has ascertained that the evidence submitted constitutes significant added value. This information will be communicated to the applicant no later than the date on which a statement of objections is notified.

Conditions for immunity and reduction of fines

What is meant by genuine cooperation and why has this requirement been added to the conditions?

Cooperation is an essential feature of the leniency programme that rewards those who assist the Commission in its investigation. Cooperation by an applicant has to be sincere and to make this clear, the Notice specifies that the applicant needs to cooperate "genuinely, fully, on a continuous basis and expeditiously from the time it submits its application". Genuine cooperation, as referred to in the case-law of the EC Courts, requires in particular that the applicant provides accurate and complete information that is not misleading. This addition to the Leniency Notice is therefore fully in line with judgements of the EC Courts.

How can the company meet this requirement if its personnel refuse to answer questions from Commission's investigators through fear of criminal sanctions by EU Member States?

It is already the established practice of the Commission under the 2002 Leniency Notice to interview directors and employees of the applicants. Natural persons interviewed can be subject to different types of sanctions in different EU Member States. There are therefore safeguards in place regarding transfer of information to Member States that apply criminal sanctions. Regulation 1/2003 EC ensures that information exchanged in the network of EU Member States' competition authorities can only be used by the receiving authority if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as in the receiving authority. Moreover, exchanged information can only be used by the receiving authority to impose custodial sanctions if the law of the transmitting authority foresees such sanctions for antitrust infringements, which is not the case for the Commission Moreover, making directors and employees available for interviews does not imply that they have to provide self-incriminating information.

Does the obligation not to disclose the fact or content of the application take into account other legal obligations of the applicant which may oblige it to make such a disclosure?

Leniency applicants may have legal obligations to acknowledge in public their cooperation under the Leniency Notice (e.g. listed companies). This is why the revised Leniency Notice provides that the restriction on disclosure to third parties applies "unless otherwise agreed" with the Commission. This point of the Notice also covers the practice of the Commission to discuss with the applicants the question of how to address discovery requests in third country jurisdictions, while protecting the EU leniency programme. Naturally, the applicants are free to approach other competition authorities, in which case the Commission may ask for a waiver to discuss the application and exchange information with such authorities.

Would any acts of destruction, falsification or concealment of evidence lead to a loss of leniency? How far back can this condition extend before actual filing of an application?

The Leniency Notice makes it clear that this obligation applies only from the moment when the applicant is "contemplating making its application", i.e. when the applicant is deciding on and preparing its application. This reference to the timing, as well as the reference to "the undertaking" and not to any employee, also makes it clear that the Commission wants to catch deliberate actions of destruction, falsification and concealment of evidence.

What happens if an immunity or reduction of fines applicant does not meet some of the conditions? Can they still get some reduction of fines?

The Leniency Notice makes clear that failure to comply with the conditions will disqualify the applicant from the leniency programme. This question has already been addressed in the Commission decision in the Raw Tobacco Italy case (see above) . That case showed that in such situations the Commission follows the normal enforcement procedure set out in Regulation No 1/2003, notably with a hearing and respecting full rights of defence of the party concerned. The same Raw Tobacco Italy case also demonstrated that, in exceptional circumstances, particularly when the company has contributed substantially to the Commission's investigation, the Commission can take the cooperation into account by granting a reduction of fines under the Fines Guidelines (recently revised – see IP/06/857 and MEMO/06/256) as cooperation outside leniency

The marker system

How will the marker system be operated in practice?

The Leniency Notice makes a marker available for immunity applicants at the discretion of the Commission. It is in the public interest to maintain the race between companies to provide the information and evidence required to meet the conditions for immunity and thereby to facilitate the detection and termination of infringements, and not in the race to simply get a place in the queue. Nevertheless, there can be various circumstances that would justify the granting of a marker. Therefore, the decision to grant a marker will need to be made on a case by case basis, taking into account the specificities of each situation and the justifications that the applicant presents for its request to get a marker.

The marker is one of the key new features in the revision of the Leniency Notice and therefore the practical modalities of this system need to be developed following discussions with applicants and according to experience. When the Commission is dealing with a case where applications for leniency have been made in several different jurisdictions, it may need to coordinate the marker system with the other jurisdictions, as it would coordinate also first investigation actions.

How long a time period can an applicant expect to have to perfect the marker?

The time period to be granted to perfect a marker (i.e. to complement the initial information to bring it up to the standard required to qualify for immunity) will need to be decided based on the circumstances of each case. But it is clear that the time period will necessarily be short so as not to disadvantage other potential applicants and to ensure that an investigation in the case can be launched swiftly. The longer the time period is, the higher the risk of leaks on the application become, which may ultimately jeopardise a Commission investigation into the case.

What information must an applicant provide to get a marker?

When applying for a marker, the applicant is only asked to provide the following information: the applicant's name and address, the parties to the alleged cartel, the affected products and territories, the estimated duration of the cartel and the nature of the cartel conduct. This information is necessary to ensure that this is a serious application and that there are no prior applications relating to the same alleged infringement. This information would also allow the Commission to see whether the case concerns one or more Member States. This list of information is the same as in the ECN Model Leniency Programme (see IP/06/1288 and MEMO/06/356).

Why would the Commission grant a marker only for immunity applicants and not for reduction of fines applicants?

It is necessary for the effectiveness of the leniency programme to maintain the race between the applicants for reduction of fines. Practical experience shows that following the Commission inspections, there may be several such applications in a short interval. It would also be in practice difficult for the Commission to effectively process and assess several simultaneous markers.

What is the difference between a hypothetical application for immunity and a marker request? Why can a marker not be combined with a hypothetical application?

A marker and a hypothetical application cannot be combined due to their different purposes and features. The hypothetical application is available to allow companies to ascertain whether the evidence in their possession would meet the immunity threshold before disclosing their identity or the infringement. In a hypothetical application, the company is supposed to actually show the evidence liable to meet the relevant immunity threshold, although it can be done by means of edited copies with the data that could identify the company and the cartel at that stage deleted.

In contrast, a marker is granted to protect the place in the queue of an applicant which has not yet gathered the evidence necessary to formalise an immunity application. In order to protect the place in the queue without obtaining the relevant evidence in exchange, the Commission must be in a position to ascertain whether it already has a previous immunity application for the same cartel and ensure that the company is seriously engaged to provide the evidence. Therefore, in order to obtain a marker, a company is expected to provide certain data listed in the Notice, which include the identity of the applicant and some details on the cartel, but not the rest of the evidence required to meet the immunity threshold. This can be submitted later within a specified timeframe.

The specific procedure to protect corporate statements

When does the specific procedure established for corporate statements apply?

The procedure to protect corporate statements applies to voluntary corporate statements supplied in the framework of the Leniency Notice, with a view to applying for immunity or for a reduction of fines. Those corporate statements (and the protection provided to them) will be covered by the relevant provisions in the Notice irrespective of whether the applicant finally obtains immunity from or reduction of fines. However, to avoid any misuses of this new system, if the applicant itself discloses the content of its statement to third parties in other jurisdictions, while at the same time asking the Commission to protect its statement, there is no justification for any protection of the statement

How does the production of oral statements and transcripts work?

Oral corporate statements will be recorded and verbatim written transcripts will be made of each statement. The recording and transcribing of the statements will take place at the Commission's premises. Applicants making oral statements will not retain or receive from the Commission any copies of these statements, but as soon as the oral statement has been given, it will become a Commission document.

Why does the accuracy of the written transcript produced at the Commission of an oral corporate statement need to be checked?

Oral corporate statements are considered as evidence on alleged cartels and both the tape and the transcript form part of the Commission file. In order to guarantee the value as evidence provided by a transcript, the applicant making the statement will need to check, at the Commission premises, the accuracy of the written transcript as compared to the recording.

Entry into force

If one or more companies have already applied for leniency under the 2002 Leniency Notice, which Notice applies for new applications for leniency made in the same case? Will the amended Leniency Notice apply for pending cartel cases too?

According to point 37 of the Notice, it will replace the 2002 Leniency Notice as from the date of its publication in the Official Journal, i.e. 8th December 2006, for all cases (including pending ones) in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that Notice. In order to guarantee that all parties to a same procedure are subject to the same set of rules, it is reasonable that one and the same Leniency Notice will apply to all applications made in one single case. However, according to the same provision, the section of the 2006 Notice that reflects the current Commission practice regarding corporate statements will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.

MEMO/06/470

Brussels, 7th December 2006

Competition: Commission Leniency Notice – frequently asked questions

(see also IP/06/1705)

How many applications for immunity and for reduction of fines has the Commission received under the 2002 Leniency Notice?

In the period from 14 February 2002 until the end of 2005, the Commission received 167 applications under the 2002 Leniency Notice (see IP/02/247 and MEMO/02/23). Of these applications, 87 were requests for immunity and 80 were requests for reduction in fines.

Where several immunity applications have been received for the same alleged infringement, the first application is counted as an immunity application and the subsequent ones as applications for a reduction of fines unless the first application for immunity is rejected. In the latter situation the second application will be considered as an immunity application. In practice immunity applications are normally made for immunity from fines, or in the alternative, reduction of fines. Where immunity is no longer available, such applications are treated – and for statistics recorded – as applications for a reduction of fines.

What is the number of applications granted, withdrawn and not followed?

In the period from 14 February 2002 until the end of 2005, the Commission has granted 51 decisions for conditional immunity. Over the same period, the Commission rejected or decided not to deal any further with 23 applications and had under scrutiny 13 more recent applications.

From which sectors have leniency applications been made under the 2002 Leniency Notice?

The Commission has received leniency applications in a wide variety of sectors including agriculture, steel, construction, chemicals, transport, services, paper and forestry industry as well as graphite products and electrical appliances.

In how many cases has the Commission received a leniency application and subsequently transferred the case to a national competition authority?

In the period from 14 February 2002 to the end of 2005, 6 cases have been transferred to national competition authorities.

In how many cases has a national competition authority transferred a case to the Commission after having received a leniency application?

There are no cases where an application was only made to a national competition authority that then transferred this case to the Commission.

In how many cases has the Commission received a leniency application under the 2002 Leniency Notice where the applicant has made a leniency application also to the competition authorities of the United States?

In the period from 14 February 2002 to the end of 2005, this occurred, to the Commission knowledge, in relation to 10 different cartel investigations.

How many leniency applications resulted in a final decision unveiling and punishing a cartel?

Since the entry into force of the current Leniency Notice on 14 February 2002 until the present, the Commission has taken formal decisions in 6 cartel cases in which companies co-operated with the investigations under the 2002 Leniency Notice.

All 6 cases together represent a total amount of fines of € 1,650 million.

Have conditional immunity decisions been withdrawn?

In the period from 14 February 2002 until the end of 2005, there was 1 such case. This case concerns cartel investigation on the raw tobacco sector where conditional immunity was granted at the beginning of the procedure under the terms of the Leniency Notice. The prohibition decision taken on 20 October 2005 (see also press release IP/05/1315) withholds final immunity due to a serious breach by the immunity applicant of its co-operation obligation. Having received conditional immunity, the applicant revealed to its main competitors that it had applied for leniency with the Commission. This occurred before the Commission could carry out surprise inspections, so that when these took place, most companies concerned were already aware of the existence of the Commission investigation.

What has been the experience with the current immunity threshold in the 2002 Leniency Notice?

Until the end of 2005 the Commission had received 87 requests for immunity and granted a conditional immunity only on 51 applications. These figures reflect the fact that numerous immunity applications have not given the necessary insider information and evidence on the alleged cartel to meet the immunity threshold. In addition, there have been cases where immunity has been granted after an applicant has supplemented its application, but the process has taken a lot of time. The reason behind this is that the 2002 Leniency Notice does not give enough guidance to the applicants as to what to submit in order to qualify for the immunity threshold. This has been perceived as a major problem by the business and legal community and has often resulted into a lot of time being spent on supplementing the applications.

Is the Commission Leniency Notice in line with other leniency programmes?

The amendments to the Commission Leniency Notice are fully consistent with the ECN Model Leniency Programme. For further information on the ECN Model Leniency Programme, see MEMO/06/356.

The main features of the Commission Leniency Notice are also common to other major leniency programmes across the world (for instance the possibility to get immunity, reduction of fines, the possibility to grant a marker etc.).

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance)

Commission Regulation (EC) No 773/2004

of 7 April 2004

relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(1), and in particular Article 33 thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EC) No 1/2003 empowers the Commission to regulate certain aspects of proceedings for the application of Articles 81 and 82 of the Treaty. It is necessary to lay down rules concerning the initiation of proceedings by the Commission as well as the handling of complaints and the hearing of the parties concerned.

(2) According to Regulation (EC) No 1/2003, national courts are under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national competition authorities are relieved from their competence once the Commission has initiated proceedings for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of the initiation of proceedings by the Commission. The Commission should therefore be able to make public its decisions to initiate proceedings.

(3) Before taking oral statements from natural or legal persons who consent to be interviewed, the Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the statements recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.

(4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 fines may be imposed on undertakings and associations of undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete or misleading answer given by a member of their staff to questions in the course of inspections. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations

given by a member of staff should remain in the Commission file as recorded during the inspection.

(5) Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.

(6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.

(7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.

(8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.

(9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so, it should inform the complainant of the identity of that authority.

(10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.

(11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 1/2003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.

(12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

(13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of "other confidential information" includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings that submit or have submitted documents or statements to identify confidential information.

(14) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

(15) In the interest of legal certainty, a minimum time-limit for the various submissions provided for in this Regulation should be laid down.

(16) This Regulation replaces Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty(2), which should therefore be repealed.

(17) This Regulation aligns the procedural rules in the transport sector with the general rules of procedure in all sectors. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector(3) should therefore be repealed.

(18) Regulation (EC) No 1/2003 abolishes the notification and authorisation system. Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17(4) should therefore be repealed,

HAS ADOPTED THIS REGULATION:

CHAPTER I SCOPE

Article 1

Subject-matter and scope

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II INITIATION OF PROCEEDINGS

Article 2

Initiation of proceedings

1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.

3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.

4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III INVESTIGATIONS BY THE COMMISSION

Article 3

Power to take statements

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

Article 4

Oral questions during inspections

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.

2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.

3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV HANDLING OF COMPLAINTS

Article 5

Admissibility of complaints

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

Article 6

Participation of complainants in proceedings

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

Article 7

Rejection of complaints

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

Article 8

Access to information

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Article 9

Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V EXERCISE OF THE RIGHT TO BE HEARD

Article 10

Statement of objections and reply

1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.

3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, 28 paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

Article 11

Right to be heard

1. The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

Article 12

Right to an oral hearing

The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

Article 13

Hearing of other persons

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject

matter of the procedure and shall set a time-limit within which they may make known their views in writing.

2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.

3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

Article 14

Conduct of oral hearings

1. Hearings shall be conducted by a Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.

3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.

4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.

6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15

Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement

of objections.

2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

Article 16

Identification and protection of confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

(a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;

(b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;

(c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

CHAPTER VII GENERAL AND FINAL PROVISIONS

Article 17

Time-limits

1. In setting the time-limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

3. The time-limits referred to in Article 3(3), Article 4(3) and Article 16(3) shall be at least two weeks.

4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

Article 18

Repeals

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 3385/94 are repealed.

References to the repealed regulations shall be construed as references to this regulation.

Article 19

Transitional provisions

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

Article 20

Entry into force

This Regulation shall enter into force on 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 April 2004.

For the Commission

Mario Monti

Member of the Commission

(1) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(2) OJ L 354, 30.12.1998, p. 18.

(3) OJ L 354, 30.12.1998, p. 22.

(4) OJ L 377, 31.12.1994, p. 28.

ANNEX

FORM C

COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.

2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. Details of the alleged infringement and evidence

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.

4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).

5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. Finding sought from the Commission and legitimate interest

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.

7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

IV. Proceedings before national competition authorities or national courts

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.

DOCNUM	32004R0773
AUTHOR	European Commission
FORM	Regulation
TREATY	European Community ; European Economic Area
PUBREF	OJ L 123, 27.4.2004, p. 18-24 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV) Special edition in Czech Chapter 08 Volume 03 P. 81 - 87 Special edition in Estonian Chapter 08 Volume 03 P. 81 - 87 Special edition in Hungarian Chapter 08 Volume 03 P. 81 - 87 Special edition in Lithuanian Chapter 08 Volume 03 P. 81 - 87 Special edition in Latvian Chapter 08 Volume 03 P. 81 - 87 Special edition in Maltese Chapter 08 Volume 03 P. 81 - 87 Special edition in Polish Chapter 08 Volume 03 P. 81 - 87 Special edition in Slovakian Chapter 08 Volume 03 P. 81 - 87 Special edition in Slovenian Chapter 08 Volume 03 P. 81 - 87
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REGISTER	08100000
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PREPWORK	CS;CCSENT;
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Council Regulation (EC) No 1/2003
of 16 December 2002
on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
(Text with EEA relevance)

Council Regulation (EC) No 1/2003

of 16 December 2002

on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

(4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the

required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

(10) Regulations such as 19/65/EEC(6), (EEC) No 2821/71(7), (EEC) No 3976/87(8), (EEC) No 1534/91(9), or (EEC) No 479/92(10) empower the Commission to apply Article 81(3) of the Treaty

by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called "block" exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.

(11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.

(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different

outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.

(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.

(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable

by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

(30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.

(31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74(11), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.

(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.

(33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

(35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17(12) should

therefore be repealed and Regulations (EEC) No 1017/68(13), (EEC) No 4056/86(14) and (EEC) No 3975/87(15) should be amended in order to delete the specific procedural provisions they contain.

(37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

HAS ADOPTED THIS REGULATION:

CHAPTER I

PRINCIPLES

Article 1

Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.

3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2

Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3

Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning

of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II

POWERS

Article 4

Powers of the Commission

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5

Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,

- ordering interim measures,

- accepting commitments,

- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6

Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III

COMMISSION DECISIONS

Article 7

Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9

Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10

Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV

COOPERATION

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case

that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12

Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13

Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14

Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15

Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16

Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V

POWERS OF INVESTIGATION

Article 17

Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

Article 18

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority,

for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply mutatis mutandis.

Article 22

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI

PENALTIES

Article 23

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;

(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

(d) in response to a question asked in accordance with Article 20(2)(e),

- they give an incorrect or misleading answer,

- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

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

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24

Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;

(b) to comply with a decision ordering interim measures taken pursuant to Article 8;

(c) to comply with a commitment made binding by a decision pursuant to Article 9;

(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);

(e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII

LIMITATION PERIODS

Article 25

Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

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

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted:

(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;

(b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 27

Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings.

They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28

Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX

EXEMPTION REGULATIONS

Article 29

Withdrawal in individual cases

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3)

of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X

GENERAL PROVISIONS

Article 30

Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32

Exclusions

This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.

Article 33

Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, inter alia:

(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

(b) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI

TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34

Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35

Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that

is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 36

Amendment of Regulation (EEC) No 1017/68

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is repealed;

2. in Article 3(1), the words "The prohibition laid down in Article 2" are replaced by the words "The prohibition in Article 81(1) of the Treaty";

3. Article 4 is amended as follows:

(a) In paragraph 1, the words "The agreements, decisions and concerted practices referred to in Article 2" are replaced by the words "Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty";

(b) Paragraph 2 is replaced by the following:

"2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease."

4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 30, paragraphs 2, 3 and 4 are deleted.

Article 37

Amendment of Regulation (EEC) No 2988/74

In Regulation (EEC) No 2988/74, the following Article is inserted:

"Article 7a

Exclusion

This Regulation shall not apply to measures taken under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(16)."

Article 38

Amendment of Regulation (EEC) No 4056/86

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Breach of an obligation

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(17) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed."

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words "under the conditions laid down in Section II" are replaced by the words "under the conditions laid down in Regulation (EC) No 1/2003";

(ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:

"At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, inter alia, to obtaining access to the market for non-conference lines."

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words "pursuant to Article 10" are replaced by the words "pursuant to Regulation (EC) No 1/2003".

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words "Advisory Committee referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

(b) In paragraph 2, the words "Advisory Committee as referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words "the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)" are deleted.

Article 39

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

Article 40

Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

Article 41

Amendment of Regulation (EEC) No 3976/87

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:

"Article 6

The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(18) before publishing a draft Regulation and before adopting a Regulation."

2. Article 7 is repealed.

Article 42

Amendment of Regulation (EEC) No 479/92

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

"Article 5

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(19)."

2. Article 6 is repealed.

Article 43

Repeal of Regulations No 17 and No 141

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

2. Regulation No 141 is repealed.

3. References to the repealed Regulations shall be construed as references to this Regulation.

Article 44

Report on the application of the present Regulation

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

Article 45

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 December 2002.

For the Council

The President

M. Fischer Boel

(1) OJ C 365 E, 19.12.2000, p. 284.

(2) OJ C 72 E, 21.3.2002, p. 305.

(3) OJ C 155, 29.5.2001, p. 73.

(4) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.

(5) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

(6) Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).

(7) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original

reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

(8) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.

(9) Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).

(10) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.

(11) Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

(12) OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).

(13) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.

(14) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.

(15) Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

(16) OJ L 1, 4.1.2003, p. 1.

(17) OJ L 1, 4.1.2003, p. 1.

(18) OJ L 1, 4.1.2003, p. 1.

(19) OJ L 1, 4.1.2003, p. 1.

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COMMISSION

CONSOLIDATED JURISDICTIONAL NOTICE

under Council Regulation (EC) No 139/2004
on the control of concentrations between undertakings

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A. Introduction

1. The purpose of this Notice is to provide guidance as to jurisdictional issues under Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2003, page 1 (the "Merger Regulation").[1] This formal guidance should enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations.

2. This Notice replaces the Notice on the concept of concentration[2], the Notice on the concept of full-function joint ventures,[3] the Notice on the concept of undertakings concerned[4] and the Notice on calculation of turnover[5].

3. This Notice deals with the concepts of a concentration and of a full-function joint venture, undertakings concerned and the calculation of turnover as set out in Articles 1, 3 and 5 of the Merger Regulation. Issues concerning referrals are dealt with in the Notice on referrals.[6] The Commission's interpretation of Articles 1, 3 and 5 in the present Notice is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

4. The guidance set out in this Notice reflects the Commission's experience in applying the recast Merger Regulation and the former Merger Regulation since the latter entered into force on 21 September 1990. The general principles governing the issues dealt with in this Notice have not been changed by the entry into force of Regulation (EC) No 139/2004, but where changes have occurred, the Notice deals

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1 Where it is necessary in this Notice to distinguish between Regulation 139/2004 and Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.19989, corrected version in OJ L 257, 21.9.1990, p.13, Regulation last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1, corrigendum in OJ L 40, 13.2.1998, p.17), the former will be referred to as the "recast Merger Regulation" whereas the latter will be referred to as the "former Merger Regulation". Articles without reference refer to the recast Merger Regulation.

2 OJ C 66, 02.03.1998, p. 5.

3 OJ C 66, 02.03.1998, p.1.

4 OJ C 66, 02.03.1998, p.14.

5 OJ C 66, 02.03.1998, p.25.

6 OJ C 56, 05.03.2005, p. 2.

with them explicitly. The principles contained in the Notice will be applied and further developed by the Commission in individual cases.

5. According to Article 1, the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The notion of a concentration (including the particular requirements for joint ventures), as the first condition, is dealt with under Part B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under Part C.

6. The Commission addresses the question of its jurisdiction over a concentration in decisions according to Article 6 of the Merger Regulation.[7]

B. The concept of concentration

7. According to Article 3(1) of the Merger Regulation, a concentration only covers operations where a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 in the preamble to the Merger Regulation further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.

8. Article 3(1) of the Merger Regulation defines two categories of concentrations:

- those arising from a merger between previously independent undertakings (point (a));
- those arising from an acquisition of control (point (b)).

These are treated respectively in Sections I and II below.

I. Mergers between previously independent undertakings

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7 See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 56 (not yet reported).

9. A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.[8]

10. A merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit[9]. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management[10] or the structure of a dual listed company.[11] If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of such a *de facto* merger is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The *de facto* amalgamation may be solely based on contractual arrangements[12], but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.

II. Acquisition of control

1. Concept of control

1.1 Person or undertaking acquiring control

8 See, for example, Case COMP/M. 1673 – Veba/VIAG of 13 June 2000; Case COMP/M.1806 – AstraZeneca/Novartis of 26 July 2000; Case COMP/M.2208 - Chevron/Texaco of 26 January 2001; and Case IV/M.1383 - Exxon/Mobil of 29 September 1999. A merger in the meaning of Article 3(1)(a) is not deemed to occur if a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking under Article 3(1)(b), see Case COMP/M.2510 – Cendant/Galileo of 24 September 2001.

9 In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also follows the general concept set out below and includes *de jure* as well as *de facto* control.

10 This could apply for example in the case of a "Gleichordnungskonzern" in German law, certain "Groupements d'Intérêt Economique" in French law, and the amalgamation of partnerships, as in Case IV/M.1016 – Price Waterhouse/Coopers&Lybrand of 20 May 1998.

11 Case IV/M.660 - RTZ/CRA of 7 December 1995; Case COMP/M.3071 – Carnival Corporation/P&O Princess II of 24 July 2002.

12 See Case IV/M.1016 – Price Waterhouse/Coopers&Lybrand of 20 May 1998; Case COMP/M.2824 – Ernst & Young/Andersen Germany of 27 August 2002.

11. Article 3 (1)(b) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.

Person controlling another undertaking

12. Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and undertakings. The term "person" in this context extends to public bodies[13] and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking.[14]

Acquirer of control

13. Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). However, there are also situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(3)(b)). The Court of First Instance concluded from this provision that control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders.[15] A controlling shareholding which is held by different entities in a group

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13 Including the State itself, e.g. Case IV/M.157 - Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhandanstalt in Case IV/M.308 - Kali und Salz/MDK/Treuhand, of 14 December 1993. See, however, recital 22 of the Merger Regulation.

14 Case IV/M.82 – Asko/Jakobs/Adia of 16 May 1991 including a private individual as undertaking concerned.; Case COMP/M3762 - Apax/Travelex of 16 June 2005 in which a private individual acquiring joint control was not considered an undertaking concerned.

15 Judgment in Case T-282/02 Cementbouw v Commission, paragraph 72, [2006] ECR II-319.

is normally attributed to the undertaking exercising control over the different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links.[16]

Acquisition of control by investment funds

14. Specific issues may arise in the case of acquisitions of control by investment funds. The Commission will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out on the basis of the Commission's past experience.

15. Investment funds are often set up in the legal form of limited partnerships, in which the investors participate as limited partners and normally do not exercise control, either individually or collectively. The investment funds usually acquire the shares and voting rights which confer control over the portfolio companies. Depending on the circumstances, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle; in more exceptional circumstances, control may be exercised by the fund itself. The investment company usually exercises control by means of the organisational structure, *e.g.* by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements, or by a combination of both. This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons (who may be linked to the investment company) or by a trust. Contractual arrangements with the investment company, in particular advisory agreements, will become even more important if the general partner does not have any own resources and personnel for the management of the portfolio companies, but only constitutes a company structure whose acts are performed by persons linked to the investment company. In these circumstances, the investment company normally acquires indirect control within the meaning of Article 3(1)(b) and 3(3)(b) of the Merger Regulation, and has the power to exercise the rights which are directly held by the investment fund.[17]

1.2 Means of control

[16] See Case M.754 – Anglo American Corporation/Lonrho of 23 April 1997.

17 This structure also has an effect on how the turnover is calculated in situations involving investment funds, see paragraphs 189ff.

16. Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective.[18] Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a *de facto* basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

Control by the acquisition of shares or assets

17. Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

Control on a contractual basis

18. Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market.[19] Examples of such contracts are organisational contracts under national company law[20] or other types of contracts, *e.g.* in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 3(2)(a) specifies that control may also be constituted by a right to use the assets of an undertaking.[21] Such contracts may also lead to a situation of joint

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18 Judgment in Case T-282/02 Cementbouw v Commission, paragraph 58, [2006] ECR II-319

19 In Case COMP/M.3858 – Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005 the management agreements had a duration of 10-15 years; in Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 the contract had a duration of 8 years.

20 Examples of such specific contracts under national company law are the "Beherrschungsvertrag" in German law or the "*Contrato de subordinação*" in Portuguese law; such contracts do not exist in all Member States.

21 See Case COMP/M.2060 – Bosch/Rexroth of 12 January 2001 concerning a control contract (Beherrschungsvertrag) in combination with a business lease; Case COMP/M.3136 – GE/Agfa NDT of 5

control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions.[22]

Control by other means

19. In line with these considerations, franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor.[23] Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.

20. Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.[24] In such a situation, the Commission will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis.[25]

21. There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from the inheritance of a shareholder or where the exit of a shareholder triggers a change of

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December 2003 concerning a specific contract to transfer control over entrepreneurial resources, management and risks; Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 concerning a business lease.

22 Case COMP/M.3858 – Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005; see also case IV/M.126 – Accor/Wagon-Lits of 28 April 1992 in the context of Article 5(4)(b) of the Merger Regulation.

23 Case M.940 – UBS/Mister Minit, in the context of Article 5(4)(b) of the Merger Regulation. For the treatment of franchising relationships in the competitive assessment, see Case COMP/M.4220 – Food Service Project/ Tele Pizza of 6 June 2006. The situation in Case IV/M.126 – Accor/Wagon-Lits of 28 April 1992 has to be distinguished from franchising agreements,. In this case, again in the context of Article 5(4)(b), the hotel company had a right to manage also hotels in which it only owned a minority stake as it had entered into long-term hotel management agreements giving it decisive influence over the day-to-day operations of these hotels, including decisions on budgetary matters.

24 See Case IV/M.794 – Coca-Cola/Amalgamated Beverages GB of 22 January 1997; Case IV/ESCS.1031 – US/Sollac/Bamesa of 28 July 1993; Case IV/M.625 – Nordic Capital/Transpool of 23 August 1995; for the criteria see also Case IV/M.697 - Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

25 See Case IV/M.258 - CCIE/GTE, of 25 September 1992 where the Commission did not find control due to the temporary nature of the commercial agreements involved.

control, in particular a change from joint to sole control.[26] Article 3(1)(b) covers such scenarios in specifying that control may also be acquired “by any other means”.

Control and national company law

22. National legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under the Merger Regulation is not related to such a means of influence as the Merger Regulation focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent de facto means. Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as a provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision-making bodies.[27] Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company.[28]

Control in other areas of legislation

23. The concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of “control” in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation

1.3 Object of control

26 See Case COMP/M.3330 – RTL/M6 of 12 March 2004; Case COMP/M.452 - Avesta (II) of 9 June 1994.
27 Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 70, 73, 74 [2006] ECR II-319.
28 Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 79 [2006] ECR II-319.

24. The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, *i.e.* a business with a market presence, to which a market turnover can be clearly attributed.[29] The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover.[30] A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity.[31] For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.

25. Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but it is usually the case that any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.

[29] See, *e.g.*, Case COMP/M. 3867 – Vattenfall/Elsam and E2 Assets of 22 December 2005.

[30] Case COMP/M.2857 – ECS/IEH of 23 December 2002.

[31] In addition, the granting of licences and the transfer of patent licences will only constitute a concentration if this is done on a lasting basis. In this respect, similar considerations as set out above in paragraph 18 for the acquisition of control by (long-term) agreements apply.

26. The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period of time (e.g. including existing contracts or brands).[32] As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, *e.g.*, marketing facilities).[33] The assets transferred therefore have to include at least those core elements that would allow an acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures as set out below under paragraphs 97, 100. As in the case of joint ventures, the Commission will take account of substantiated business plans and general market features for assessing this.

27. If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Notice in the section on full-function joint ventures.

1.4 Change of control on a lasting basis

32 See Case COMP/M.1841 – Celestica/IBM of 25 February 2000; Case COMP/M.1849 – Solectron/Ericsson of 29 February 2000; Case COMP/M.2479 – Flextronics/Alcatel – of 29 June 2001; Case COMP/M.2629 – Flextronics/Xerox of 12 November 2001.

33 See, in the context of joint ventures, Case IV/M.560 – EDS/Lufthansa of 11 May 1995; Case COMP/M.2478 - IBM Italia/Business Solutions/JV of 29 June 2001.

28. Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and, as recital 20 adds, in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned.[34]

29. The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.

30. In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.

[34] See, in cases of joint ventures, Case COMP/M.2903 – DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years. The acquisition of control by the acquisition of shares or assets is not normally confined to a definite period of time and is therefore assumed to lead to a change of control on a lasting basis. Only in the scenarios set out in paragraphs 29 ff., will an acquisition of control by shares or assets be exceptionally considered to be transitory in nature and thus not to lead to a lasting change in the control of the undertakings concerned.

31. The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year.[35]

32. If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking[36] or jointly by the undertakings which are also involved in the second step.[37] In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.

33. However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, *e.g.*, is the case if the first transaction may also proceed independently of the second transaction[38] or if a longer transitory period is needed to divide up the target undertaking.[39]

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35 See, e.g., Cases COMP/M. Case No COMP/M.3779 – Pernod Ricard/Allied Domecq of 24 June 2005 and COMP/M.3813 – Fortune Brands/Allied Domecq of 10 June 2005, where the split-up of the assets was foreseen to become effective within 6 months after the acquisition.

36 For a first acquisition by only one undertaking see Case COMP/M.3779 – Pernod Ricard/Allied Domecq of 24 June 2005 and Case COMP/M.3813 – Fortune Brands/Allied Domecq/Pernod Ricard of 10 June 2005; Case COMP/M.2060 – Bosch/Rexroth of 12 January 2001.

37 For a joint acquisition see Case COMP/M.1630 – Air Liquide/BOC of 18 January 2000; Case COMP/M.1922 – Siemens/Bosch/Atecs of 11 August 2000; Case COMP/M.2059 – Siemens/Dematic/VDO Sachs of 29 August 2000.

38 See Case COMP/M.2498 – UPM-Kymmene/Haindl of 21 November 2001 and Case COMP/M.2499 – Norske Skog/Parenco/Walsum of 21 November 2001.

39 Case COMP/M.3372 – Carlsberg/Holsten of 16 March 2004.

34. A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years.[40] Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and the joint control period should be only transitory in nature.[41] Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.

35. In a third scenario, an undertaking is "parked" with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares "on behalf" of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer. From the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.

1.5 Interrelated transactions

1.5.1 Relation between Article 3 and Article 5(2) second subparagraph

36. Several transactions can be treated as a single concentration under the Merger Regulation either according to the general rule of Article 3 – as the transactions are

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40 Case IV/M.425 – British Telecom/Santander of 28 March 1994.

41 See Case M.2389 – Shell/DEA of 20 December 2001 where the ultimate acquirer of sole control had a strong influence in the operational management during the joint control period; Case M.2854 – RAG/Degussa of 18 November 2002 where the transitional period was designed to facilitate internal post-merger restructuring.

interdependent - or according to the specific provision of Article 5(2) second subparagraph.

37. Article 5(2) second subparagraph governs a different question from that referred to by Article 3 of the Merger Regulation. Article 3 defines the existence of a "concentration" in general and material terms, but does not directly determine the question of the Commission's competence in respect of concentrations. Article 5 intends to specify the scope of the Merger Regulation, in particular by defining the turnover to be taken into account for the purpose of determining whether a concentration has Community dimension, and Article 5(2) second subparagraph allows the Commission in this respect to consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. The assessment whether, in application of Article 3, a number of transactions give rise to a single concentration or whether those transactions must be regarded as giving rise to a number of concentrations, is thereby logically precedent to the question addressed in Article 5(2) second subparagraph. [42]

1.5.2 Interdependent transactions under Article 3

38. The general and teleological definition of a concentration set out in Article 3(1) – the result being control of one or more undertakings – implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. It should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.[43]

39. Recital 20 to the Merger Regulation explains in this respect that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The requirement that the transactions are interdependent as set out by the

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[42] Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 113-119 [2006] ECR II-319.
[43] Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 104-109 [2006] ECR II-319:

Court of First Instance in the *Cementbouw* judgment[44] thereby corresponds to the explanation set out in recital 20 that the transactions are linked by condition.

40. This general approach reflects, on the one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation.

41. However, several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 3.[45] This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The Commission will consider those transactions as separate concentrations.[46] The same applies to transactions where two (or more) companies exchange assets in transactions involving de-mergers of joint ventures or assets swaps. Although the parties will normally consider those transactions as interdependent, the purpose of the Merger Regulation requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets; a separate combination of resources takes place for each of the acquiring undertakings; and the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.

42. The acquisition of different degrees of control (for example joint control of one business and sole control of another business) raises specific questions. An operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the Merger Regulation.[47] Those transactions constitute only one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control. In any case, such a scenario is considered to constitute one concentration

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44 Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 106-109 [2006] ECR II-319.

45 This also covers situations where an undertaking sells a business to a purchaser and then acquirers the seller including the business sold, see Case COMP/M.4521 – LGI/Telenet of 26 February 2007.

46 See parallel cases COMP/M.3293 – Shell/BEB and COMP/M.3294 – ExxonMobil/BEB of 20 November 2003; case IV/M.197 – Solvay/Laporte of 30 April 1992.

47 See Case IV/M.409 ABB/Renault Automation of 9 March 1994.

where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently. These transactions, if they are interdependent, therefore constitute a single concentration.

Requirement of conditionality of transactions

43. The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation.[48] Such conditionality is normally demonstrated if the transactions are linked *de jure, i.e.* the agreements themselves are linked by mutual conditionality. If *de facto* conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others.[49] Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally inter-conditional transactions may likewise put into doubt their true interdependence.

44. The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings – which could constitute concentrations in themselves - can be linked in such a way that it constitutes a single concentration. However, it is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.

48 Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 127 et seq. [2006] ECR II-319.

49 Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 131 et seq. [2006] ECR II-319. See Case COMP/M.4521 – LGI/Telenet of 26 February 2007, where the interdependence was based on the fact that two transactions were decided and carried out simultaneously and that, according to the economic aims of the parties, each of the transactions would not have been carried out without the other.

Acquisition of a single business

45. A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, *i.e.* a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, *i.e.* a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration.[50]

Parallel and serial acquisitions of control

46. For the treatment of several acquisitions of control as a single concentration, several scenarios have arisen in the Commission's past decisional practice. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed.[51] Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C, as illustrated by the Kingfisher case.[52]

Serial acquisition of sole/joint control

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[50] See Case IV/M.470 – Gencor/Shell of 29 August 1994; COMP/M.3410 – Total/Gaz de France of 8 October 2004; Case IV/M.957 – L'Oreal/Procasa/Cosmetique Iberica/Albesa of 19 September 1997; Case IV/M.861 – Textron/Kautex of 18 December 1996 where all the assets were also used in the same product market. The same considerations apply if a joint venture is created by several companies, forming a single business, see Case M.4048 - Sonae Industria/Tarkett of 12 June 2006 where the interdependence of transactions establishing, respectively, a production and a distribution joint venture was necessary in order to demonstrate that there was a single concentration that would create a full-function joint venture.

[51] Case COMP/M.2926 – EQT/H&R/Dragoco – of 16 September 2002; the same considerations apply to the question when several mergers constitute one concentration in the meaning of Article 3(1)(a), Case COMP/M. 2824 – Ernst & Young/Andersen Germany of 27 August 2002.

[52] Case IV/M.1188 - Kingfisher/Wegert/ProMarkt of 18 June 1998; case COMP/M.2650 – Haniel/Cementbouw/JV (CVK) of 26 June 2002;

47. In the same way as the Kingfisher scenario, the Commission approaches cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission.[53]

1.5.3 Series of transactions in securities

48. Recital 20 of the Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the "one and decisive" share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

1.5.4 Article 5(2) subparagraph 2

49. Article 5(2) subparagraph 2 provides a specific rule which allows the Commission. to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation.[54]

50. If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration[55], irrespective of whether or not those transactions relate to parts of the same business or concern the same sector. This does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging

53 Case COMP/M.2420 – Mitsui/CVRD/Caemi of 30 October 2001.

54 Judgment in Case T-282/02 Cementbouw v Commission, paragraph 118 [2006] ECR II-319.

55 See Case COMP/M.3173 – E.ON/Fortum Burghausen/Smaland/Endenderry of 13 June 2003. This also applies to situations where sole control is acquired whereby only parts of the undertaking were previously jointly controlled by the acquiring undertaking, case COMP/M. 2679 – EdF/TXU/ Europe/24 Seven of 20 December 2001.

to the same respective groups. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Whenever they lead to acquisitions of control by the same undertaking, such simultaneous transactions between the same parties form a single concentration even if they are not conditional upon each other.[56] However, Article 5(2) subparagraph 2 would not appear to apply to different transactions at least one of which involves an undertaking concerned which is distinct from the common seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction.

1.6 Internal Restructuring

51. A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies, e.g., to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of a dual listed company into a single legal entity or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

1.7 Concentrations involving State-owned undertakings

52. An exceptional situation exists where both the acquiring and acquired undertakings are companies owned by the same State (or by the same public body or municipality). In this case, whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring.[57] However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a

[56] Case IV/M.1283 – Volkswagen/RollsRoyce/Cosworth of 24 August 1998.

[57] Case IV/M.097 - Péchiney/Usinor, of 24 June 1991; Case IV/M.216 - CEA Industrie/France Telecom/SGS-Thomson, of 22 February 1993; Case IV/M.931 – Neste/IVO of 2 June 1998. See also recital 22 of the Merger Regulation.

single entity, such as a pure holding company.[58]

53. However, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking.[59]

2. Sole control

54. Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly-controls a company, *i.e.* the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3 (2) and therefore control within the meaning of the Merger Regulation.[60]

55. Sole control can be acquired on a *de jure* and/or *de facto* basis.

De jure sole control

56. Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an

58 Specific issues concerning the calculation of turnover for state-owned companies are dealt with in paragraphs 192-194

59 Case IV/M.493 - Tractebel/Distrigaz II, of 1 September 1994.

60 Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.

acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

57. Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).

58. A typical situation of negative sole control occurs where one shareholder holds 50% in an undertaking whilst the remaining 50% is held by several other shareholders (assuming this does not lead to positive sole control on a *de facto* basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder.[61]

De facto sole control

59. A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years.[62] Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders'

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[61] See consecutive Cases COMP/M.3537 – BBVA/BNL of 20 August 2004 and M.3768 – BBVA/BNL of 27 April 2005; Case M.3198 – VW-Audi/VW-Audi Vertriebszentren of 29 July 2003; Case COMP/M.2777 – Cinven Limited/Angel Street Holdings of 8 May 2002; Case IV/M.258 - CCIE/GTE, of 25 September 1992. In Case COMP/M.3876 – Diester Industrie/Bunge/JV of 30 September 2005, there was the specific situation that a joint venture held a stake in a company by which it had negative sole control over this company.

[62] Case IV/M.343 - Société Générale de Belgique/Générale de Banque, of 3 August 1993; Case COMP/M.3330 – RTL/M6 of 12 March 2004 ; Case IV/M.159 – Mediobanca/Generali of 19 December 1991.

presence which might arise in future following the operation.[63] The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis.[64] Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is taken to have sole control.[65]

60. An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements[66]. However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is *de facto* sole control.[67]

Sole control acquired by other means than voting rights

61. Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in section 1.2 concerning the acquisition of sole control by purchase of assets, by contract, or by any other means also apply.

3. Joint Control

62. Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the

63 See Case COMP/M.4336 – MAN/Scania of 20 December 2007 as regards the question whether Volkswagen hat acquired control of MAN.

64 Case IV/M.754 – Anglo American/Lonrho of 23 April 1997; Case IV/M.025 - Arjomari/Wiggins Teape, of 10 February 1990.

65 See also Case COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.1519 – Renault/Nissan of 12 May 1999.

66 Judgment in Case T 2/93, Air France v Commission [1994] ECR II-323. Even though an option does normally not in itself lead to a concentration, it can be taken into account for the substantive assessment in a related concentration, see Case COMP/M.3696 – E.ON/MOL of 21 December 2005, at paragraphs 12-14, 480, 762 et subseq.

67 Case IV/M.397 – Ford/Hertz of 7 March 1994.

power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate.[68]

63. As in the case of sole control, the acquisition of joint control can also be established on a *de jure* or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

3.1 Equality in voting rights or appointment to decision-making bodies

64. The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote[69]. Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

3.2 Veto rights

65. Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture[70]. These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory

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68 See also Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

69 Case COMP/M.3097 – Maersk Data/Eurogate IT; Global Transport Solutions JV of 12 March 2003; Case IV/M.272 - Matra/CAP Gemini Sogeti, of 17 March 1993.

70 Case T 2/93, Air France v Commission [1994] ECR II-323; Case IV/M.010 - Conagra/Idea, of 3 May 1991.

board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

66. These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned[71].

67. In contrast, veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

68. In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

Appointment of senior management and determination of budget

69. Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint

[71] Case IV/M.062 - Eridania/ISI, of 30 July 1991.

venture and, in particular, the investments it may make.

Business plan

70. The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

71. In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

Market-specific rights

72. Apart from the typical veto rights mentioned above, there exist a number of other possible veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture's activities. Another example relates to markets characterized by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

Overall context

73. In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to strategic commercial policy, to the appointment of senior management or to the budget or business plan cannot be regarded as giving joint control to its owner[72].

3.3 Joint exercise of voting rights

74. Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

75. The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

76. Very exceptionally, collective action can occur on a de facto basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.

77. Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements).[73] In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint

[72] Case IV/M.295 - SITA-RPC/SCORI, of 19 March 1993.

[73] Case COMP/JV.55 Hutchinson/RCPM/ECT of 3 July 2001; see also Case IV/M.553 – RTL/Veronica/Endemol of 20 September 1995.

venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate.[74] Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders related to the joint venture.[75]

78. Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a de facto basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor.[76] In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of *de facto* joint control which prevails over a pure *de jure* assessment according to which the majority shareholder could have been considered to have sole control.

79. These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing *de facto* joint control. In general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of *de facto* joint control.

80. In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority

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74 Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

75 Case COMP/JV.55 Hutchinson/RCPM/ECT of 3 July 2001. See also Case IV/M.553 – RTL/Veronica/Endemol of 20 September 1995.

76 Case IV/M. 967 - KLM/Air UK of 22 September 1997; Case COMP/M.4085 – Arcelor/Oyak/Erdemir of 13 February 2006.

shareholders (or a certain group thereof) will jointly control the undertaking.[77] In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties, where these fall short of strategic veto rights. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority.

3.4 Other considerations related to joint control

Unequal role of the parent companies

81. Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company on the basis of equality in voting rights or rights of appointment to decision making bodies or of veto rights related to strategic issues. Without this, there would be sole control.

Casting Vote

82. For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote. However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness. This may be the case when the casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field or if the exercise of the casting vote triggers a put option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote unlikely.[78]

III. Changes in the quality of control

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77 Case IV/JV.12 – Ericsson/Nokia/Psion/Motorola of 22 December 1998.

78 Case COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.553 – RTL/Veronica/Endemol of 20 September 1995; Case IV/M.425 - British Telecom/Banco Santander, of 28 March 1994.

83. The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control. In any case, mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore are not a notifiable concentration.

84. These changes in the quality of control will be discussed in two categories: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

1. Entry of controlling shareholders

85. An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

86. A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into

account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.

87. The entry of a new shareholder in a jointly controlled undertaking – either in addition to the already controlling shareholders or in replacement of one of them – also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation.[79] First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each others interests and are required to cooperate for the determination of the strategic behaviour of the joint venture.[80] The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control.[81]

88. However, the entry of new shareholders only results in a notifiable concentration if one or several shareholders acquire sole or joint control by virtue of the operation. The entry of new shareholders may lead to a situation where joint control can neither be established on a *de jure* basis nor on a *de facto* basis as the entry of the new shareholder leads to the consequence that changing coalitions between minority shareholders are possible.[82]

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79 See, *e.g.*, Case COMP/M.3440 – ENI/EDP/GdP of 9 December 2004.

80 Judgment in Case T-282/02 Cementbouw v Commission, paragraph 67 [2006] ECR II-319.

81 Generally, it should be noted that the Commission will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Commission will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking.

82 Case IV/JV.12 – Ericsson/Nokia/Psion/Motorola of 22 December 1998.

2. Reduction in the number of shareholders

89. A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved.[83]

90. Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.

IV. Joint Ventures – the concept of full-functionality

91. Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by *one or more* undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (*e.g.* because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion.[84]

92. Article 3(4) provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-

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83 See Case IV/M023 – ICI/Tioxide, of 28 November 1990; see also paragraph 5 (d) of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

84 These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3, paragraphs (1) and (4) relates to the applicability of the Merger Regulation to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The "creation of a joint venture constituting a concentration pursuant to Article 3", as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3, paragraphs (1) and (4).

function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a "greenfield operation" or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.

93. The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with.[85] It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

1. Sufficient resources to operate independently on a market

94. Full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement.[86] The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own

85 Judgment in Case T-282/02 Cementbouw v Commission, paragraph 62 [2006] ECR II-319.

86 Case IV/M.527 - Thomson CSF/Deutsche Aerospace, of 2 December 1994 -intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 - outsourcing, Case IV/M.585 - Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 - joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 - Nokia/Autoliv, of 5 February 1996 , joint venture able to terminate "service agreements" with parent company and to move from site retained by parent company, Case IV/M.791 - British Gas Trading Ltd/Group 4 Utility Services Ltd, of 7 October 1996, joint venture's intended assets will be transferred to leasing company and leased by joint venture.

employees or to obtain staff via third parties.

2. Activities beyond one specific function for the parents

95. A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture.[87]

96. A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full-function, as it lacks an autonomous, long term business activity on the market and will typically also lack the necessary resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality.[88]

3. Sale/purchase relations with the parents

97. The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character. Such a start-up period may be necessary in order to establish the joint venture on a market. But the period will normally not exceed a period of three years, depending on the specific

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87 Case IV/M.102 - TNT/Canada Post etc. of 2 December 1991.

88 See Case IV/M.929 – DIA/Veba Immobilien/Deutschbau of 23 June 1997; Case COMP/M. 3325 - Morgan Stanley/Glick/Canary Wharf of 23 January 2004.

conditions of the market in question[89].

Sales to the parents

98. Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50% of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions.[90] Under these circumstances, *i.e.* if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient that at least 20% of the joint venture's predicted sales will go to third parties. However, the greater the proportion of sales likely to be made to the parents, the greater will be the need for clear evidence of the commercial character of the relationship.

99. For the determination of the proportion between sales to the parents and to third parties, the Commission will take past accounts and substantiated business plans into account. However, especially where substantial third–party sales cannot be readily foreseen, the Commission will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an arm's length basis.

100. These issues frequently arise with regard to outsourcing agreements, where an

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89 Case IV/M.560 - EDS/Lufthansa of 11 May 1995 ; Case IV/M.686 Nokia/Autoliv of 5 February 1996 ; to be contrasted with Case IV/M.904 - RSB/Tenex/Fuel Logistics of 2 April 1997 and Case IV/M.979 - Preussag/Voest-Alpine of 1 October 1997. A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 - Siemens/Italtel of 17 February 1995, or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture, see Case IV/M.550 - Union Carbide/Enichem of 13 March 1995.

90 Case IV/M.556 - Zeneca/Vanderhave of 9 April 1996; Case IV/M.751 - Bayer/Hüls of 3 July 1996.

undertaking creates a joint venture with a service provider[91] which will carry out functions that were previously dealt with by the undertaking in-house. The JV typically cannot be considered to be full-function in these scenarios: it provides its services exclusively to the client undertaking, and it is dependent for its services on input from the service provider. The fact that the joint venture's business plan often at least does not exclude that the joint venture can provide its services to third parties does not alter this assessment, as in the typical outsourcing setup any third party revenues are likely to remain ancillary to the joint venture's main activities for the client undertaking. However, this general rule does not exclude that there are outsourcing situations where the joint venture partners, for example for reasons of economies of scale, set up a joint venture with the perspective of significant market access. This could qualify the joint venture as full function if significant third-party sales are foreseen and if the relationship between the joint venture and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

Purchases from the parents

101. In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

Trade markets

102. However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales and service personnel. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent

91 The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in paragraphs 25ff. of this Notice.

companies but also from other competing sources[92].

4. Operation on a lasting basis

103. Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies.[93] This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned[94], or where the agreement provides for the possible continuation of the joint venture beyond this period.

104. By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

105. A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (*e.g.,* in public tenders), licences (*e.g.,* in the telecoms sector) or access rights to property (*e.g.,* exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting basis and consequently does not qualify as full function. However, once a decision has been

92 Case IV/M.788 - AgrEVO/Marubeni of 3 September 1996.

93 Case IV/M.891 - Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997.

94 See Case COMP/M.2903 – DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.

taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises.[95]

5. Changes in the activities of the joint venture

106. The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration as explained in paragraph 24 of this Notice.[96]

107. A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture's scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4). [97]

108. If the scope of a joint venture is enlarged without additional assets, contracts, know-how or rights being transferred, no concentration will be deemed to arise.

109. A concentration arises if a change in the activity of an existing non-full-function joint venture occurs so that a full-function joint venture within the meaning of Article 3(4) is created. The following examples may be given: a change of the organisational structure of a joint venture so that it fulfils the full functionality criterion[98]; a joint venture that used to supply only the parent companies, which subsequently starts a significant activity on the market; or scenarios, as described in paragraph 105 above, where a joint venture can only start its activity on the market once it has essential input (such as a licence for a joint venture in the telecoms sector). Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

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95 Subject to the other criteria mentioned in this chapter of the Notice.

96 See Case COMP/M.3039 – Soprol/Céréol/Lesieur of 30 January 2003.

97 The triggering event for the notification in such a case will be the agreement or other legal act underlying the transfer of the assets, contracts, know-how or other rights.

98 Case COMP/M.2276 – The Coca-Cola Company/Nestlé/JV of 27 September 2001.

V. Exceptions

110. Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

111. First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception, the following requirements must be fulfilled:

- the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above;

- the securities must be acquired with a view to their resale;

- the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or the securities;

- the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.

112. Second, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3(5)(b));

113. Third, a concentration does not arise where a financial holding company within the meaning of Article 5(3) of the Council Directive 78/660/EEC[99] acquires control. The

[99] Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ L 222, 14.8.1978, p. 11, as last amended by Directive 2003/51/EC of 18 June 2003, OJ L 178, 17.7.2003, p.16. Article 5(3) of this Directive defines financial holding companies as "those companies the sole objective of which is to acquire holdings in other

notion of “financial holding company” is thus limited to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. The Merger Regulation provides for an additional condition for this exception to apply: such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

114. The exceptions under Article 3(5) of the Merger Regulation only apply to a very limited field. First, these exceptions only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader, single concentration, in circumstances in which the ultimate acquirer of control would not fall within the terms of Article 3(5) (see e.g. paragraph 35 above). Second, the exceptions under Article 3(5)(a) and (c) only apply to acquisitions of control by way of purchase of securities, not to acquisitions of assets.

115. The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 3(5)(a) and (c) that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking.[100]

116. The question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the Merger Regulation. Such a rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Where such an operation meets the criteria for joint control, as outlined above, it will normally be considered to be a concentration[101]. Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in Article 3(5)(a) is normally

undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. The limitations imposed on the activities of these companies must be such that compliance with them can be supervised by an administrative or judicial authority".

100 Case IV/M.669 – Charterhouse/Porterbrook, of 11 December 1995.

101 Case IV/M.116 - Kelt/American Express, of 28 August 1991.

not applicable to such an operation. In a similar way as set out for investment funds, the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally a realistic proposition to transform a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

VI. Abandonment of concentrations

117. A concentration ceases to exist and the Merger Regulation ceases to be applicable if the undertakings concerned abandon the concentration.

118. In this respect, the revised Merger Regulation 139/2004 introduced a new provision related to the closure of procedures concerning the control of concentrations without a final decision after the Commission has initiated proceedings under Article 6(1)(c) 1st sentence. That sentence reads as follows: “Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration”. Prior to the initiation of proceedings, such requirements do not apply.

119. As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the nature of the latest act.

120. In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the *status quo ante* has to be shown. The mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)(c). Likewise, minor modifications of a concentration which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original

concentration.[102]

- Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by (one of) the parties will not be considered sufficient.[103]

- Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.

- Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure or renouncing to the intention to make a public bid will be required. The format and public reach of this announcement must be comparable to the initial announcement.

- Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

121. It is for the parties to submit the necessary documentation to meet these requirements in due time.

VII. Changes of transactions after a Commission authorisation decision

122. In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. The question arises whether the Commission's authorisation decision still covers the changed structure of the transaction.

102 This paragraph does not prejudge the assessment whether the modification requires submitting additional information to the Commission under Art. 5 (3) Reg. 802/2004.

103 See Case COMP/M.4381 – JCI/VB/FIAMM of 10 May 2007, paragraph 15, where only one party did no longer wished to implement an agreement, whereas the other party still considered the agreement to be binding and enforceable.

123. Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or *vice versa*, then the change in the transactional structure is considered a different concentration under the Merger Regulation and a new notification is required.[104] However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission's authorisation decision.

104 See cases COMP/M.2706 – Carnival Corporation/P&O Princess of 11 April 2002 and COMP/M.3071 - Carnival Corporation/P&O Princess of 10 February 2003. In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only *subsequently* decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 3 of the Merger Regulation.

C. Community Dimension

I. Thresholds

124. A two fold test defines the operations to which the Merger Regulation applies. The first test is that the operation must be a concentration within the meaning of Article 3. The second comprises the turnover thresholds contained in Article 1, designed to identify those operations which have an impact upon the Community and can be deemed to be of "Community dimension". Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.

125. Two sets of thresholds are set out in Article 1 to establish whether the operation has a Community dimension. Article 1(2) establishes three different criteria: The worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.

126. This second set of thresholds, contained in Article 1(3), is designed to tackle those concentrations which fall short of achieving Community dimension under Article 1(2), but would have a substantial impact in at least three Member States leading to multiple notifications under national competition rules of those Member States. For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, and for a minimum level of activities of the undertakings concerned, jointly and individually, in at least three Member States. Similarly to Article 1(2), Article 1(3) also contains a two-thirds rule excluding predominantly domestic concentrations.[105]

127. The thresholds as such are designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective to provide a simple

105 A concentration is further deemed to have a Community dimension if it is referred to the Commission under Article 4(5) of the Merger Regulation. These cases are dealt with in the Commission Notice on Case Referral in respect of concentrations, OJ C 56, 05.03.2005, p. 2.

and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.

128. Whereas Article 1 sets out the numerical thresholds to establish jurisdiction, the purpose of Article 5 is to explain how turnover should be calculated to ensure that the resulting figures are a true representation of economic reality.

II. Notion of undertaking concerned

1. General

129. From the point of view of determining jurisdiction, the undertakings concerned are those participating in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1). The individual and aggregate turnover of those undertakings will be decisive in determining whether the thresholds are met.

130. Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction is to be calculated according to the rules set out in Article 5. Article 5(4) sets out detailed criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. The legislator's intention was to lay down concrete rules which, seen together, can be taken to establish the notion of a "group" for the purposes of the turnover thresholds in the Merger Regulation. The term "group" will be used in the following sections exclusively to refer to the collection of undertakings whose relations with an undertaking concerned come within the terms of one or more of the sub-paragraphs of Article 5(4) of the Merger Regulation.

131. It is important, when referring to the various undertakings which may be involved in a procedure, not to confuse the concept of "undertakings concerned" under Articles 1 and 5 with the terminology used elsewhere in the Merger Regulation and in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as the "Implementing Regulation")[106] referring to the various undertakings which may be involved in a procedure. This terminology refers to the notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments, and they are defined in Chapter IV of the

[106] OJ L 133, 30 April 2004, p. 1.

Implementing Regulation, along with their respective rights and duties.

2. Mergers

132. In a merger the undertakings concerned are each of the merging entities.

3. Acquisition of control

133. In the remaining cases, it is the concept of "acquiring control" that will determine which are the undertakings concerned. On the acquiring side, there can be one or more undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole or parts thereof. As a general rule, each of these undertakings will be an undertaking concerned within the meaning of the Merger Regulation.

Acquisition of sole control

134. Acquisition of sole control of the whole undertaking is the most straightforward case of acquisition of control. The undertakings concerned will be the acquiring undertaking and the target undertaking.

135. Where the target undertaking is acquired by a group through one of its subsidiaries, the undertakings concerned are the target undertaking and the acquiring subsidiary if this is not a mere acquisition vehicle. However, even though the subsidiary is normally the undertaking concerned for the purpose of calculating turnover, the turnover of all undertakings with which the undertaking concerned has the links as specified in Article 5(4) shall be included in the threshold calculations. In this respect, the group is considered to be a single economic unit and the different companies belonging to the same group cannot be considered as different undertakings concerned for jurisdictional purposes under the Merger Regulation. The actual notification can be made by the subsidiary concerned or by its parent company.

Acquisition of parts of an undertaking and staggered operations – Article 5(2)

136. The first subparagraph of Article 5(2) of the Merger Regulation provides that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The possible impact of the transaction on the market will depend only on the

combination of the economic and financial resources that are the subject of the transaction with those of the acquirer and not on the remaining business of the seller. In this case, the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining businesses of the seller will be ignored.

137. The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals. The previous concentrations (within two years) involving the same parties become (re)notifiable with the most recent transaction, provided this constitutes a concentration, if the thresholds are met whether for one or more of the transactions taken in isolation or cumulatively. In this case, the undertakings concerned are the acquirer(s) and the different acquired part(s) of the target company taken as a whole.

Change from joint to sole control

138. If the acquisition of control occurs by way of a change from joint control to sole control, one shareholder normally acquires the stake previously held by the other shareholder(s). In this situation, the undertakings concerned are the acquiring shareholder and the joint venture. As is the case for any other seller, the "exiting" shareholder is not an undertaking concerned.[107]

Acquisition of joint control

139. In the case of acquisition of joint control of a newly-created undertaking, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. In these circumstances, each of the jointly-controlling undertakings is considered an undertaking concerned whereas any company or business contributed to the joint venture is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.

140. The situation is different if undertakings newly acquire joint control of a pre-existing undertaking or business. The undertakings concerned are each of the undertakings acquiring joint control on the one hand, and the pre-existing acquired undertaking or

107 Case IV/M.023 - ICI/Tioxide, of 28 November 1990.

business on the other.

141. The acquisition of a company with a view to immediately split up the assets is, as explained above in paragraph 32, mostly not considered as an acquisition of joint control of the entire target company, but as the acquisition of sole control by each of the ultimate acquirers of the respective parts of the target company. In line with the considerations for the acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

Changes of controlling shareholders in cases of joint control of an existing joint venture

142. A notifiable concentration may arise, as explained above, where a change in the quality of control occurs in a joint control structure due to the entrance of new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders.

143. In the case where one or more shareholders acquire control, either by entry or by substitution of one or more shareholders, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself.[108] On the one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, as set out above, the entry of a new shareholder is not only in itself a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market. For these reasons, the newly entering controlling shareholders are undertakings concerned alongside with the remaining controlling shareholders. Due to the change of the quality in control, all of them are considered to undertake an acquisition of control.

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108 See Case IV/M.376 - Synthomer/Yule Catto, of 22 October 1993.

144. As Article 4(2) first sentence of the Merger Regulation foresees that all acquisitions of joint control shall be notified jointly by the undertakings acquiring joint control, existing and new shareholders in principle have to notify concentrations arising from such changes in joint control scenarios jointly.

Acquisition of control by a joint venture

145. In transactions where a joint venture acquires control of another company, the question arises whether or not the joint venture should be regarded as the undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. This question may be decisive for jurisdictional purposes.[109] Whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up "shell" companies and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

146. Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).

147. Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in

109 Assume the following scenario: The target company has an aggregate Community turnover of less than EUR 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding EUR 250 million. If the target is acquired by a "shell" company set up between the acquiring undertakings, there would only be one undertaking (the "shell" company) with a Community turnover exceeding EUR 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction, namely, the existence of at least two undertakings with a Community turnover exceeding EUR 250 million, would not be fulfilled. Conversely, if instead of acting through a "shell" company, the acquiring undertakings acquire the target undertaking themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction. The same considerations apply to the national turnover thresholds referred to in Article 1(3).

fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.

Break-up of joint ventures and exchange of assets

148. When two (or more) undertakings break up a joint venture and split the assets (constituting businesses) between them, this will normally be considered as more than one acquisition of control, as explained above in paragraph 41. For example, undertakings A and B form a joint venture and subsequently split it up, in particular with a new asset configuration. The break-up of the joint venture involves a change from joint control over the joint venture's entire assets to sole control over the divided assets by each of the acquiring undertakings.[110]

149. For each break-up operation, and in line with the consideration to the acquisition of sole control, the undertakings concerned will be, on the one hand, the acquiring party and, on the other, the assets that this undertaking will acquire.

150. Similar to the break-up scenario is the situation where two (or more) companies exchange assets constituting a business on each side. In this case, each acquisition of control is considered an independent acquisition of sole control. The undertakings concerned will be, for each transaction, the acquiring companies and the acquired undertaking or assets.

Acquisitions of control by natural persons

151. Control may also be acquired by natural persons, within the meaning of Article 3 of the Merger Regulation, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other economic undertakings. In such a situation, the undertakings concerned are the target undertaking and the individual acquirer (with the turnover of the undertaking(s) controlled by that natural person being included in the calculation of the natural person’s turnover to the extent that the terms of Article 5(4) are satisfied).[111]

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110 See parallel cases COMP/M.3293 – Shell/BEB and COMP/M.3294 – ExxonMobil/BEB of 20 November 2003; Case IV/M.197 – Solvay/Laporte of 30 April 1992.

111 See Case IV/M.082 - Asko/Jacobs/Adia, of 16 May 1991 where a private individual with other economic activities acquired joint control of an undertaking and was considered an undertaking concerned.

152. An acquisition of control of an undertaking by its managers is also an acquisition by natural persons, and paragraph 151 above is also relevant. However, the managers may pool their interests through a "vehicle company", so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general guidance given above in paragraphs 145-147 on acquisitions of control by a joint venture also applies here.

Acquisition of control by a State-owned undertaking

153. As described above, a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State.[112]

III. Relevant date for establishing jurisdiction

154. The legal situation for establishing the Commission's jurisdiction has been changed under the recast Merger Regulation. Under the former Merger Regulation, the relevant date was the triggering event for a notification according to Article 4(1) of this Regulation – the conclusion of a final agreement or the announcement of a public bid or the acquisition of a controlling interest – or, at the latest, the time when the parties were obliged to notify (i.e. one week after a triggering event for a notification).[113]

155. Under the recast Merger Regulation, there is no longer an obligation for the parties to notify within a certain time-frame (provided the parties do not implement the planned concentration before notification). Moreover, according to Article 4(1) second subparagraph, the undertakings concerned can already notify the transaction on the basis of a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid. At the time of the notification at the latest, the Commission – as well as national competition authorities – must be able to determine their jurisdiction. Article 4(1) subparagraph 1 of the Merger Regulation provides, generally, that concentrations shall be notified following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The dates of these events are therefore still decisive under the recast Merger Regulation in order to determine the relevant date for establishing

112 See recital 22 of the Merger Regulation, directly related to the calculation of turnover of a state-owned undertaking concerned in the context of Article 5(4).

113 See Case COMP/M.1741 – MCI Worldcom/Sprint of 28 June 2000.

jurisdiction, if a notification does not occur before such events on the basis of a good faith intention or an announced intention.[114]

156. The relevant date for establishing Community jurisdiction over a concentration is therefore the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier.[115] Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. The relevant date needs in particular to be considered for the question whether acquisitions or divestitures which occur after the period covered by the relevant account, but before the relevant date, require adaptations to those accounts according to the principles set out in paragraphs 172, 173.

IV. Turnover

1. The concept of turnover

157. The concept of turnover as used in Article 5 of the Merger Regulation comprises "the amounts derived […] from the sale of products and the provision of services". Those amounts generally appear in company accounts under the heading "sales". In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

158. In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.

114 The alternative possibility that turnover should be defined on the latest date when the relevant parties are obliged to notify (seven days after the "triggering event" under the former Merger Regulation) cannot be retained under the recast merger Regulation, because there is no deadline for notification.

115 See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 46 (not yet reported). Only the recast merger Regulation has provided for the possibility to take into account the first notification if this is earlier than the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest, see fn. 35 of the opinion.

159. In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries.[116] Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, *i.e.* those undertakings wishing to place advertising.

160. The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance. These issues will be dealt with in Section VI.

2. Ordinary activities

161. Article 5(1) provides that the amounts to be included in the calculation of turnover should correspond to the "ordinary activities" of the undertakings concerned. This is the turnover achieved from the sale of products or the provision of services in the normal course of its business. It generally excludes those items which are listed under the headers “financial income” or “extraordinary income” in the company’s accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets. However, company accounts do not necessarily delineate the revenues derived from ordinary activities in the way required for the purposes of turnover calculation under the Merger Regulation. In some cases, the qualification of the items in the accounts may have to be adapted to the requirements of the Merger Regulation.[117]

[116] An undertaking will normally not act as an intermediary if it sells products via a commercial act which involves a transfer of ownership, Judgment in Case T-417/05, Endesa v Commission, paragraph 213, [2006] ECR II-2533.

[117] In Case IV/M.126 - Accor/Wagons-Lits, of 28 April 1992, the Commission decided to consider certain income from car-hire activities as revenues from ordinary activities although they were included as "other operating proceeds" in Wagons-Lits’ profit and loss account.

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162. The revenues do not necessarily have to be derived from the customer of the products or services. With regard to aid granted to undertakings by public bodies, any aid has to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking. The aid is therefore an income of the undertaking from the sale of products or provision of services in addition to the price paid by the consumer.[118]

163. Specific issues have arisen for the calculation of turnover of a business unit which only had internal revenues in the past. This may in particular apply for transactions involving the outsourcing of services by transfer of a business unit. If such a transaction constitutes a concentration on the basis of the considerations outlined in paragraphs 25 ff. of this Notice, the Commission's practice is that the turnover should normally be calculated on the basis of the previously internal turnover or of publicly quoted prices where such prices exist (e.g. in the oil industry). Where the previously internal turnover does not appear to correspond to a market valuation of the activities in question (and, thus, to the expected future turnover on the market), the forecast revenues to be received on the basis of an agreement with the former parent may be a suitable proxy.

3. "Net" turnover

164. The turnover to be taken into account is "net" turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of the undertaking.

3.1 Deduction of rebates and taxes

165. Article 5(1) provides for the "deduction of sales rebates and of value added tax and other taxes directly related to turnover". "Sales rebates" mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.

166. As regards the deduction of taxes, the Merger Regulation refers to VAT and "other taxes directly related to turnover". The concept of "taxes directly related to turnover" refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes.

118 See Case IV/M.156 - Cereol/Continentale Italiana of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialized in the crushing of grain.

3.2 The treatment of "internal" turnover

167. The first subparagraph of Article 5(1) states that "the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4", *i.e.* the group to which the undertaking concerned belongs. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity in the form of market turnover. Thus, the "amounts" taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.

168. Article 5(5)(a) of the Merger Regulation applies the principle that double counting is to be avoided specifically to the situation where two or more undertakings concerned in a concentration jointly have the rights or powers listed in Article 5(4)(b) in another company. According to this provision, the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned (or any other undertaking connected with any one of them in the sense of Article 5(4)) should be excluded. As regards joint ventures between undertakings concerned and third parties, insofar as their turnover is taken into account according to Article 5(4)(b) as set out in paragraph 181 below, the turnover generated by sales between the joint venture and the undertaking concerned (as well as undertakings linked to the undertaking concerned in accordance with the criteria set out in Article 5(4)) is not taken into account according to Article 5(1).

4. Turnover calculation and financial accounts

4.1 The general rule

169. The Commission seeks to base itself upon the most accurate and reliable figures available. Generally, the Commission will refer to accounts which relate to the closest financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year.[119] An adjustment of the audited figures should only take place if this is required by the provisions of the Merger Regulation, including the cases explained in more

[119] See Case COMP/M.3986 – Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, Endesa v Commission, paragraphs 128, 131, [2006] ECR II-2533.

detail in paragraph 172.

170. The Commission is reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances.[120] Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, due to significant and permanent changes in the undertaking concerned, and, in particular, when the final draft figures for the most recent year have been approved by the board of management, the Commission may decide to take those figures into account.

171. Despite the general rule, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover.

4.2 Adjustments after the date of the last audited accounts

172. Notwithstanding the foregoing paragraphs, an adjustment must always be made to account for permanent changes in the economic reality of the undertakings concerned, such as acquisitions or divestments which are not or not fully reflected in the audited accounts. Such changes have to be taken into account in order to identify the true resources being concentrated and to better reflect the economic situation of the undertakings concerned. Those adjustments are only selective in nature and do not endanger the principle that there should be a simple and objective mechanism to determine the Commission’s jurisdiction as they do not require a complete revision of the audited accounts.[121] First, this applies to acquisitions, divestments or closure of part of its business subsequent to the date of the audited accounts. This is relevant if a company closes a transaction concerning the divestment and closure of part of its business at any time before the relevant date for establishing jurisdiction (see paragraph 154) or where such a divestment or closure of a business is a pre-condition for the operation.[122] In this case, the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. If an agreement for the sale of part of its business is signed, but the closing of

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120 See Case COMP/M.3986 – Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, Endesa v Commission, paragraphs 176,179, [2006] ECR II-2533.

121 Judgment in Case T-417/05, Endesa v Commission, paragraph 209, [2006] ECR II-2533.

122 See Judgment in Case T-3/93, Air France v Commission, [1994] ECR II-121 paragraphs 100 et seq. in relation to Case IV/M.278 – British Airways/Dan Air; Case IV/M.588 – Ingersoll-Rand/Clark Equipment.

the sale (in other words, its legal implementation and the transfer of the legal title to the shares or assets acquired) has not yet occurred, such a change is not taken into account[123], unless the sale is a pre-condition for the notified operation. Conversely, the turnover of those businesses whose acquisition has been closed subsequent to the preparation of the most recent audited accounts, but before the relevant date for establishing jurisdiction, must be added to a company's turnover for notification purposes.

173. Second, an adjustment may also be necessary for acquisitions, divestments or closure of part of the business which have taken place during the financial year for which the audited accounts are drawn up. If acquisitions, divestments or closure of part of the business within this period are made, the changes in the economic resources may only partly be reflected in the audited accounts of the undertaking concerned. As the turnover of the businesses acquired may be included in the accounts only from the time of their acquisition, this may not reflect the full annual turnover of the acquired business. Conversely, the turnover of the businesses divested or closed may still be included in the audited accounts up to the point in time of their actual divestment or closure. In these cases, adjustments have to be made to remove the turnover generated by the divested or closed businesses from the audited accounts until the time of de-consolidation and to add the turnover which the acquired businesses have generated in the year until the time they have been consolidated in the accounts. As a result, the turnover of the businesses divested or closed must be excluded in full and the full annual turnover of the businesses acquired must be included.

174. Other factors that may affect turnover on a temporary basis such as a decrease in orders for the product or a slow-down in the production process within the period prior to the transaction will be ignored for the purposes of calculating turnover. No adjustment to the definitive accounts will be made to incorporate them.

5. Attribution of turnover under Article 5(4)

5.1 Identification of undertakings whose turnover is taken into account

175. When an undertaking concerned by a concentration belongs to a group, not only the turnover of the undertaking concerned is considered, but the Merger Regulation

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[123] Case IV/M.632 – Rhône Poulenc Rorer/Fisons of 21 September 1995; Case COMP/M.1741 – MCI Worldcom/Sprint of 28 June 2000.

requires to also take into account the turnover of those undertakings with which the undertaking concerned has links consisting in the rights or powers listed in Article 5(4) in order to determine whether the thresholds contained in Article 1 of the Merger Regulation are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking concerned or whether they are undertaken indirectly via undertakings with which the undertaking concerned possesses the links described in Article 5(4).

176. The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain rights or powers. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as part of its group for purposes of turnover calculation under the Merger Regulation.

177. Article 5(4) of the Merger Regulation provides the following:

"Without prejudice to paragraph 2 [acquisitions of parts], the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) and (3) shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertaking's affairs;

(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

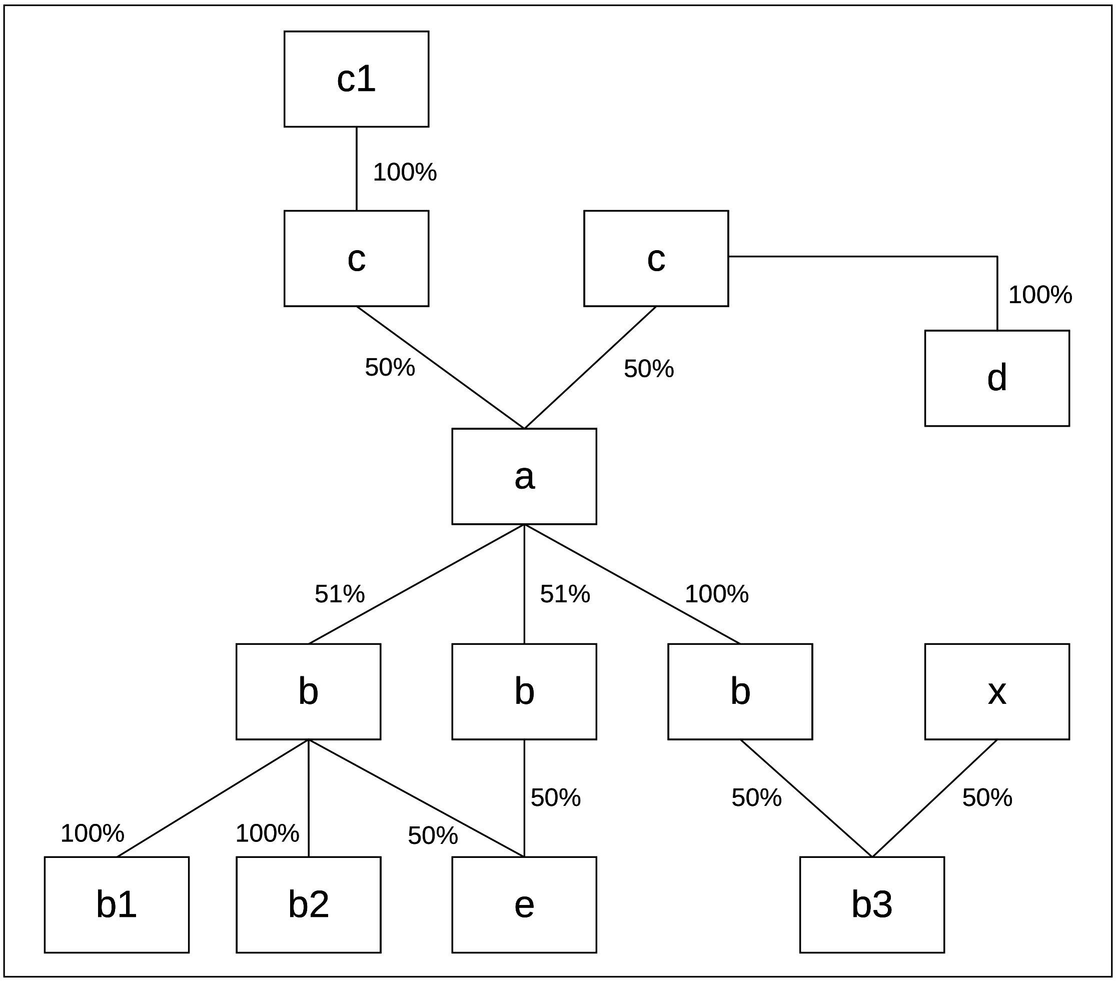
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b)."

An undertaking which has in another undertaking the rights and powers mentioned in Article 5(4)(b) will be referred to as the “parent” of the latter in the present section of this Notice dealing with the calculation of turnover, whereas the latter is referred to as “subsidiary” of the former. In short, Article 5(4) therefore provides that the turnover of the undertaking concerned by the concentration (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent undertakings (point (d)) and any other subsidiary jointly held by two or more of the undertakings identified under (a)-(d) (point (e)).

178. A graphic example is as follows:

The undertaking concerned and its group:



a: The undertaking concerned[124]

b: Its subsidiaries, jointly held companies together with third parties (b3) and their own subsidiaries (b1 and b2)

c: Its parent companies and their own parent companies (c1)

d: Other subsidiaries of the parent companies of the undertaking concerned

e: Companies jointly held by two (or more) companies of the group

x: Third party

Note: the letters a – e correspond to the relevant points of Article 5(4). Percentages set out in the graph relate to the percentage of voting rights held by the respective parent company.

179. The rights or powers listed in Article 5(4)(b)(i)-(iii) can be identified in a rather

[124] For the graph it is assumed that the joint venture itself is the undertaking concerned according to the criteria set out in paragraph 146 (acquisition by a full-function JV operating on the same market).

straightforward way as they refer to quantitative thresholds. These thresholds are fulfilled if the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights or has legally the power to appoint more than half of the board members in other undertakings. However, the thresholds are also met if the undertaking concerned *de facto* has the power to exercise more than half of the voting rights in the shareholders' assembly or the power to appoint more than half of the board members in other undertakings.[125]

180. The provision contained in Article 5(4)(b)(iv) refers to the right to manage the undertaking's affairs. Such a right to manage exists under company law in particular on the basis of organisational contracts such as a "*Beherrschungsvertrag*" under German law, on the basis of business lease agreements or on the basis of the organisation structure for the general partner in a limited partnership.[126] However, the "right to manage" may also result from the holding of voting rights (alone or in combination with contractual arrangements, such as a shareholders' agreement) which enable, on a stable, *de jure* basis, to determine the strategic behaviour of an undertaking.

181. The right to manage also covers situations in which the undertaking concerned jointly has the right to manage an undertaking's affairs together with third parties.[127] The underlying consideration is that the undertakings exercising joint control have jointly the right to manage the controlled undertakings' affairs even if each of them individually may have those rights only in a negative sense, *i.e.* in the form of veto rights. In the example, the undertaking (b3) which is jointly controlled by the undertaking concerned (a) and a third party (x) is taken into account as both (a) and (x) have veto rights in (b3) on the basis of their equal shareholding in (b3).[128] Under Article 5(4)(b)(iv) the Commission only takes into account those joint ventures in which the undertaking concerned and third parties have *de jure* rights that give rise to a clear-cut right to manage. The inclusion of joint ventures is therefore limited to situations where the undertaking concerned and third parties have a joint *right* to manage on the basis of an agreement, *e.g.* a shareholders' agreement, or where the undertaking concerned and a third party have an equality of voting rights to the effect that they have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

125 Case IV/M.187 – Ifint/Exor of 2 March 1992; Case IV/M.062 – Eridania/ISI of 30 July 1991.

126 Case IV/M.126 – Accor/WagonLits of 28 April 1992.

127 Case COMP/M.1741 – MCI Worldcom/Sprint; Case IV/ M. 187 – Ifint/Exor; Case IV/ M.1046 – Ameritech/Tele Danmark.

128 However, only half of the turnover generated by b3 is taken into account, see paragraph 187.

182. In the same way, where two or more companies jointly control the undertaking concerned in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them is included. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). This interpretation results from the referral from Article 5(4)(c), dealing with this case, to Article 5(4)(b), which is applicable to jointly controlled companies as set out in the preceding paragraph.

183. When any of the companies identified on the basis of Article 5(4) also has links as defined in Article 5(4) with other undertakings, these should also be brought into the calculation. In the example, one of the subsidiaries of the undertaking concerned a (called b) has in turn its own subsidiaries b1 and b2 and one of the parent companies (called c) has its own subsidiary (d).

184. Article 5(4) sets out specific criteria for identifying undertakings whose turnover can be attributed to the undertaking concerned. These criteria, including the "right to manage the undertaking's affairs", are not coextensive with the notion of "control" under Article 3(2). There are significant differences between Articles 3 and 5, as those provisions fulfil different roles. The differences are most apparent in the field of *de facto* control. Whereas under Article 3(2) even a situation of economic dependence may lead to control on a *de facto* basis (see in detail above), a solely controlled subsidiary is only taken into account on a *de facto* basis under Article 5(4)(b) if it is clearly demonstrated that the undertaking concerned has the power to exercise more than half of the voting rights or to appoint more than half of the board members. Concerning joint control scenarios, Article 5(4)(b)(iv) covers those scenarios where the controlling undertakings jointly have a right to manage on the basis of individual veto rights. However, Article 5(4) would not cover situations where joint control occurs on a *de facto* basis due to strong common interests between different minority shareholders of the joint venture company on the basis of shareholders' attendance. The difference is reflected in the fact that Article 5(4)(b)(iv) refers to the *right* to manage, and not a *power* (as in subparagraph (b)(ii) and (iii)) and is explained by the need for precision and certainty in the criteria used for calculating turnover so that jurisdiction can be readily verified. Under Article 3(3), however, the question whether a concentration arises can be much more comprehensively investigated. In addition, situations of negative sole control are only exceptionally covered (if the conditions of Article 5(4)(b)(i)-(iii) are met in the specific case); the "right to manage" under Article 5(4)(b)(iv) does not cover negative control scenarios. Finally,

Article 5(4)(b)(i), for example, covers situations where "control" under Article 3(2) may not exist.

5.2 Allocation of turnover of the undertakings identified

185. In general, as long as the test under Article 5(4)(b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding which the undertaking concerned holds in the subsidiary. In the chart, the whole turnover of the subsidiaries called b of the undertaking concerned a will be taken into account.

186. However, the Merger Regulation includes specific rules for joint ventures. Article 5(5)(b) provides that for joint ventures between two or more undertakings concerned, the turnover of the joint venture (as far as the turnover is generated from activities with third parties as set out above in paragraph 168) should be apportioned equally amongst the undertakings concerned, irrespective of their share of the capital or the voting rights.

187. The principle contained in Article 5(5)(b) is followed by analogy for the allocation of turnover for joint ventures between undertakings concerned and third parties if their turnover is taken into account according to Article 5(4)(b) as set out above in paragraph 181. The Commission's practice has been to allocate to the undertaking concerned the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control. In the example, half of the turnover of b3 is taken into account.

188. The rules of Article 5(4) also have to be adapted in situations involving a change from joint to sole control in order to avoid double counting of the turnover of the joint venture. Even if the acquiring undertaking has rights or powers in the joint venture which satisfy the requirements of Article 5(4), the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder.

5.3 Allocation of turnover in case of investment funds

189. The investment company, as set out above in paragraph 15, normally acquires indirect control over portfolio companies held by an investment fund. In the same way, the

investment company may be considered to indirectly have the powers and rights which are set out in Article 5(4)(b), in particular to indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies.

190. The same considerations, as set out above in the framework of Article 3 (paragraph 15), may also apply if an investment company sets up several investment funds with possibly different investors. Typically, on the basis of the organisational structure, in particular links between the investment company and the general partner(s) of the different funds organised as limited partnerships, or contractual arrangements, especially advisory agreements between the general partner or the investment fund and the investment company, the investment company will indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies or indirectly have one of the other powers or rights set out in Article 5(4)(b). In these circumstances, the investment company may exercise a common control structure over the different funds which it has set up and the common operation of the different funds by the investment company is often indicated by a common brand for the funds.

191. Consequently, such an organisation of the different funds by the investment company may lead to the result that the turnover of all portfolio companies held by different funds is taken into account for the purpose of assessing whether the turnover thresholds in Article 1 are met if the investment company acquires indirect control of a portfolio company via one of the funds.

5.4 Allocation of turnover for State-owned undertakings

192. As regards the calculation of turnover of State-owned undertakings, Article 5(4) should be read in conjunction with recital 22 of the Merger Regulation. This recital declares that, in order to avoid discrimination between the public and private sectors, "in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them".[129]

129 See also Case IV/M.216 - CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.

193. This recital clarifies that Member States (or other public bodies) are not considered as “undertakings” under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision.

194. Thus, where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent centre of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.

V. Geographic allocation of turnover

195. The thresholds concerning Community-wide and Member State turnover in Article 1(2) and (3) aim to identify cases which have sufficient turnover within the Community in order to be of Community interest and which are primarily cross-border in nature. They require turnover to be allocated geographically to the Community and to individual Member States. Since audited accounts often do not provide a geographical breakdown as required by the Merger Regulation, the Commission will rely on the best figures available provided by the undertakings. The second subparagraph of Article 5(1) provides that the location of turnover is determined by the location of the customer at the time of the transaction:

"Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be."

General rule

196. The Merger Regulation does not discriminate between "products sold" and "services provided" for the geographic allocation of turnover. In both cases, the general rule is that turnover should be attributed to the place where the customer is located. The underlying principle is that turnover should be allocated to the location where competition with alternative suppliers takes place. This location is normally also the

place where the characteristic action under the contract in question is to be performed, *i.e.* where the service is actually provided and the product is actually delivered. In the case of Internet transactions, it may be difficult for the undertakings to determine the location of the customer at the time when the contract is concluded via the Internet. If the product or the service itself is not supplied via the Internet, focusing on the place where the characteristic action under the contract is performed may avoid those difficulties. In the following, the sale of goods and the provision of services are dealt with separately as they exhibit certain different features in terms of allocation of turnover.

Sale of goods

197. For the sale of goods, particular situations may arise in situations in which the place where the customer was located at the time of concluding the purchase agreement is different from the billing address and/or the place of delivery. In these situations, the place where the purchase agreement was entered into and the place of delivery are more important than the billing address. As the delivery is in general the characteristic action for the sale of goods, the place of delivery may even be prevailing over the place where the customer was located at the time when the purchase agreement was concluded. This will depend on whether the place of delivery is to be considered the place where competition takes place for the sale of goods or whether competition rather takes place at the residence of the customer. In the case of a sale of mobile goods, such as a motor car, to a final consumer, the place where the car is delivered to the customer is decisive even if the agreement was concluded via the phone or the Internet before.

198. A specific situation arises in cases where a multinational corporation has a Community buying strategy and sources all its requirements for a good from one location. As a central purchasing organisation can take different forms, it is necessary to consider its concrete form since this may determine how to allocate the turnover. Where goods are purchased by and delivered to the central purchasing organisation and are subsequently re-distributed internally to different plants in a variety of Member States, turnover is allocated only to the Member State where the central purchasing organisation is located. In this case, competition takes place at the location of the central purchasing organisation and this is also the place where the characteristic action under the sales contract is performed. The situation is different in case of direct links between the seller and the different subsidiaries. This comprises the case where the central purchasing organisation concludes a mere framework agreement, but the individual orders are placed by and the products are directly delivered to the subsidiaries in different

Member States as well as the case where the individual orders are placed via the central purchasing organisation, but the products are directly delivered to the subsidiaries. In both cases, turnover is to be allocated to the different Member States in which the subsidiaries are located, irrespective of whether the central purchasing organisation or the subsidiaries receive the bills and effect the payment. The reason is that in both cases competition with alternative suppliers takes place for the delivery of products to the different subsidiaries even though the contract is concluded centrally. In the first case, in addition, the subsidiaries actually decide upon the quantities to be delivered and on an element essential for competition on their own.

Provision of services

199. For services, the Merger Regulation foresees that the place of their provision to the customer is relevant. Services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the turnover generated is to be allocated to the place of destination of the traveller, *i.e.* the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer. For the central sourcing of services the above outlined principles for the central purchasing of goods apply in an analogous way.

200. An example of the first category would be a situation where a non-European company provides special airplane maintenance services to a carrier in a Member State. In this case, the service provider travels to the Community where the service is actually provided and where also competition for this service takes place. If a European tourist hires a car or books a hotel directly in the United States, this falls into the second category as the service is provided outside the Community and also competition takes place between hotels and rental car companies at the location chosen. However, the case is different for package holidays. For this kind of holiday, the service starts with the sale of the package through a travel agent at the customer's location and competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though parts of the service may be provided in a number of distant locations. The case therefore falls into the third category and the turnover generated is to be allocated to the customer's location. The third category also comprises cases like the supply of software or the distribution of films which are made

outside the Community, but are supplied to a customer in a Member State so that the service is actually provided to the customer within the Community.

201. Cases concerning the transport of goods are different as the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover.

202. In telecom cases, the qualification of call termination services may raise problems. Although call termination would appear to fall into the third category, there are reasons to treat it differently. Call termination services are provided, *e.g.*, in situations where a call, originating from a European operator, is being terminated in the United States. Although neither the European nor the US operator travels, the signal travels and the service is provided by the US network to the European operator in the United States. This is also the place where competition takes place (if any). The turnover is therefore to be considered as non-Community turnover.[130]

Specific sectors

203. Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover. These will be dealt with in Section VI below.

VI. Conversion of turnover into EURO

204. When converting turnover figures into Euro great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the twelve months concerned. This average can be obtained via DG Competition's website.[131] The audited annual turnover figures should be converted as such and not be broken down into quarterly or monthly figures which would then be converted individually.

130 This does not affect the turnover which the European telephony operator generates vis-à-vis its own customer with this call.

131 See http://europa.eu.int/comm/competition/mergers/others/exchange_rates.html#footnote_1. The website makes reference to the European Central Bank's Monthly Bulletin.

205. When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into Euros at the yearly average rate. Local currency sales should not be converted directly into Euros since these figures are not from the consolidated audited accounts of the company.

VII. Provisions for credit and other financial institutions and insurance undertakings

1. Scope of application

206. Due to the specific nature of the sector, Article 5(3) contains specific rules for the calculation of turnover of credit and other financial institutions as well as insurance undertakings.

207. In order to define the terms "credit institutions and other financial institutions" under the Merger Regulation, the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector. The Directive on the taking up and pursuit of the business of credit institutions foresees that[132]:

- "Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account."

- "Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I."

208. Financial institutions within the meaning of Article 5(3) of the Merger Regulation are, accordingly, on the one hand holding companies and, on the other hand, undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the Annex of the banking Directive. These activities include:

- lending (comprising activities such as consumer credit, mortgage credit, factoring);

132 The definitions are to be found in Article 1 (1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1).

- financial leasing;
- money transmission services;
- issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts);
- guarantees and commitments;
- trading for own account or for account of customers in money market instruments, (cheques, bills, certificates of deposit, etc.), foreign exchange, financial futures and options, exchange and interest-rate instruments, transferable securities;
- participation in securities issues and the provision of services related to such issues;
- money broking;
- portfolio management and advice; and
- safekeeping and administration of securities.

2. Calculation of turnover

209. Article 5(3) of the Merger Regulation sets out the methods of calculation of turnover for credit and other financial institutions and for insurance undertakings. In the following Section, some supplementary questions related to turnover calculation for the abovementioned types of undertakings are addressed.

2.1 Calculation of turnover of credit and financial institutions (other than financial holding companies)

2.1.1 General

210. There are normally no particular difficulties in applying the banking income criterion for the definition of the worldwide turnover to credit institutions and other kinds of financial institutions.

For the geographic allocation of turnover to the Community and to individual Member States, the specific provision of Article 5 (3)(a) second subparagraph applies. It specifies that the turnover is to be allocated to the branch or division established in the Community or in the Member State which receives this income.

2.1.2 Turnover of leasing companies

211. There is a fundamental distinction to be made between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and

ownership is generally transferred to the lessee at the end of the lease term by means of a purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the costs of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset.

212. As already mentioned above, a company performing as its principal activity financial leasing is a financial institution within the meaning of Article 5(3)(a) and its turnover is to be calculated according to the specific rules set out in this provision. All payments on financial leasing contracts, except for the redemption part, are to be taken into account; a sale of future leasing payments at the beginning of the contract for re-financing purposes is not relevant.

213. Operational leasing activities are, however, not considered to be carried out by financial institutions, and therefore the general turnover calculation rules of Article 5(1) apply.[133]

2.2 Insurance undertakings

214. In order to measure the turnover of insurance undertakings, Article 5(3)(b) of the Merger Regulation provides that gross premiums written are taken into account. The gross premiums written are the sum of received premiums, including any received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance. Outgoing or outward reinsurance premiums, *i.e.* all amounts paid and payable by the undertaking concerned to get reinsurance cover, are only costs related to the provision of insurance coverage and are not to be deducted from the gross premiums written.

215. The premiums to be taken into account are not only related to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.

216. In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, usually hold a portfolio of investments in shares, interest-bearing securities, land and property and other assets providing annual revenues.

[133] See Case IV/M.234 - GECC/Avis Lease, 15 July 1992.

The annual revenues coming from those sources are not considered as turnover for insurance undertakings under Article 5(3)(b). However, a distinction has to be made between pure financial investments, which do not confer the rights and powers specified in Article 5(4) to the insurance undertaking in the undertakings in which the investment has been made, and those investments leading to the acquisition of an interest which meets the criteria specified in Article 5(4)(b). In the latter case, Article 5(4) of the Merger Regulation applies, and the turnover of this undertaking has to be added to the turnover of the insurance undertaking, as calculated according to Article 5(3)(b), for the determination of the thresholds laid down in the Merger Regulation.[134]

2.3 Financial holding companies

217. As an "other financial institution" within the meaning of Article 5(3)(a) of the Merger Regulation, the turnover of a financial holding company has to be calculated according to the specific rules set out in this provision. However, in the same way as mentioned above for insurance undertakings, Article 5(4) applies to those participations which meet the criteria specified in Article 5(4)(b). Thus, the turnover of a financial holding is to be basically calculated according to Article 5(3), but it may be necessary to add turnover of undertakings falling within the categories set out in Article 5(4) ("Art. 5(4) companies").[135]

218. In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Art. 5(4) companies must be added, whilst taking care to deduct dividends and other income distributed by those companies to the financial holdings. The following provides an example for this kind of calculation:

		EURO Million
1.	Turnover related to financial activities (from non-consolidated P&L)	3 000
2.	Turnover related to insurance Art. 5(4) companies (gross premiums written)	300
3.	Turnover of industrial Art. 5(4) companies	2 000
4.	Deduct dividends and other income derived from Art. 5(4) companies 2 and 3	<200>

[134] See Case IV/M.018 - AG/AMEV, of 21 November 1990.

[135] The principles for financial holding companies may to a certain extent be applied to fund management companies.

Total turnover financial holding and its group	5 100

219. In such calculations different accounting rules may need to be taken into consideration. Whilst this consideration applies to any type of undertaking concerned by the Merger Regulation, it is particularly important in the case of financial holding companies[136] where the number and the diversity of enterprises controlled and the degree of control the holding holds on its subsidiaries, affiliated companies and other companies in which it has shareholding requires careful examination.

220. Turnover calculation for financial holding companies as described above may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

[136] See for example Case IV/M.166 - Torras/Sarrió, of 24 February 1992.

Case C-280/06

Autorità Garante della Concorrenza e del Mercato and Others

v

Ente tabacchi italiani – ETI SpA and Others

(Reference for a preliminary ruling from the Consiglio di Stato)

(Competition – Imposition of fines where undertakings succeed each other – Principle of personal responsibility – Entities answering to the same public authority – National law referring to Community competition law as source of interpretation – Questions referred for a preliminary ruling – Jurisdiction of the Court of Justice)

Summary of the Judgment

1. *Preliminary rulings – Jurisdiction of the Court – Limits*

(Art. 234 EC)

2. *Competition – Community rules – Infringements – Attribution*

(Art. 81(1), EC)

1. Neither the wording of Article 234 EC nor the aim of the procedure established by that article indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State.

Where, in regulating purely internal situations, domestic legislation provides the same solutions as those adopted in Community law, it is clearly in the Community interest that, in order to avoid future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

(see paras 21-22)

2. Where, irrespective of its legal status and the way in which it is financed, any entity engaged in an economic activity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. An entity that is not the author of the infringement can nevertheless be penalised for it in certain circumstances. That situation arises if the entity that has committed the infringement has ceased to exist, either in law or economically. Moreover, bearing in mind the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, that change does not necessarily create a new undertaking free of liability for the conduct of its predecessor when, from an economic point of view, the two are identical. The legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant, as is the fact that the decision to transfer an activity is taken not by individuals, but by the legislature in view of a privatisation.

Where the economic activities of an entity on the market affected by an infringement of the competition rules have been continued by another entity, the latter may be regarded, in the context of the procedure regarding that infringement, as the economic successor of the first entity, even if the first entity continues to exist as an economic operator on other markets. In that event, the fact that the first entity does not have legal personality is not a factor that can justify imposing a penalty for the infringement which it committed on its successor, although such an imposition may be justified by the fact that the two entities answer to the same public authority. Where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred. In particular, applying penalties in this way is permissible where those entities have been subject to control by the same person within the group and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions.

It follows that, in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for the infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

(see paras 38-49, 52, operative part)

Council Regulation (EC) No 139/2004
of 20 January 2004
on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance)

Council Regulation (EC) No 139/2004

of 20 January 2004

on the control of concentrations between undertakings

(the EC Merger Regulation)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings(4) has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common

market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to

the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

(17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

(19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

(21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

(22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

(23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however,

not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

(26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

(27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

(28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

(29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

(30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

(31) The Commission should have at its disposal appropriate instruments to ensure the enforcement

of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

(32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

(33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

(35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

(36) The Community respects the fundamental rights and observes the principles recognised in particular

by the Charter of Fundamental Rights of the European Union(5). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

(38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.

(39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

(40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

(41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.

(42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.

(43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.

(44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed,

and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.

(45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.

(46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council,

acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies(6) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the

Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply mutatis mutandis.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may,

before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC(7), after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:

- income from shares and other variable yield securities,
- income from participating interests,
- income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

Article 8

Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article

81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market, or

(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

(a) it finds that a concentration has been implemented

(i) in contravention of a condition attached to a decision under Article 6(1)(b), or

(ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or

(b) a decision has been revoked pursuant to paragraph 6.

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities

of the Member States without delay.

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in accordance with this Regulation; or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

(a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

(b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

Article 10

Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2)or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court

of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

Article 12

Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct

all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the

information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

(a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);

(b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);

(c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

(d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);

(e) in response to a question asked in accordance with Article 13(2)(e),

- they give an incorrect or misleading answer,

- they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);

(b) implement a concentration in breach of Article 7;

(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);

(d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

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

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);

(b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);

(c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;

(d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

2. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).

4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the Official Journal of the European Union.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003(8), (EEC) No 1017/68(9), (EEC) No 4056/86(10) and (EEC) No 3975/87(11) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

Article 22

Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23

Implementing provisions

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:

(a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;

(b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;

(c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);

(d) implementing provisions concerning hearings pursuant to Article 18.

2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.

(a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.

(b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.

(c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

Relations with third countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.

2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having

their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

Article 26

Entry into force and transitional provisions

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 January 2004.

For the Council

The President

C. McCreevy

(1) OJ C 20, 28.1.2003, p. 4.

(2) Opinion delivered on 9.10.2003 (not yet published in the Official Journal).

(3) Opinion delivered on 24.10.2003 (not yet published in the Official Journal).

(4) OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in

OJ L 40, 13.2.1998, p. 17.

(5) OJ C 364, 18.12.2000, p. 1.

(6) OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

(7) OJ L 372, 31. 12. 1986, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council.

(8) OJ L 1, 4.1.2003, p. 1.

(9) OJ L 175, 23. 7. 1968, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

(10) OJ L 378, 31. 12. 1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.

(11) OJ L 374. 31. 12. 1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003.

ANNEX

Correlation table

>TABLE>

DOCNUM	32004R0139
AUTHOR	Council
FORM	Regulation
TREATY	European Community
PUBREF	Official Journal L 024 , 29/01/2004 P. 0001 - 0022
PUB	2004/01/29
DOC	2004/01/20
INFORCE	2004/02/18=EV ; 2004/05/01=MA
ENDVAL	9999/99/99
LEGBASE	12002E083 12002E308
LEGCIT	12002E003 12002E005 12002E081 12002E082

	12002EN01 12002E202 12002E296 12002E086 12002E002 12002M002 32000X1218(01) 12002E229 31978L0660 31986L0635 32003R0001 31968R1017 31986R4056 31987R3975 12002E307 12002E004
MODIFIES	31989R4064Repeal 31997R1310Repeal 52002PC0711Adoption
MODIFIED	Corrected by32004R0139R(01) Implemented by32004R0802from 01/05/2004
SUB	Competition ; Rules applying to undertakings - concentrations
REGISTER	08400000
PREPWORK	PR;COMM;CO 2002/0711 FIN ; JO C 20/2003 P 4 PCONS;; AV;PE;RENDU 09/10/2003 AV;CES;RENDU 24/10/2003
MISCINF	CNS 2002/0296 P/EEE
DATES	of document: 20/01/2004 of effect: 18/02/2004; Entry into force Date pub. + 20 See Art 26.1 of effect: 01/05/2004; Implementation See Art 26.1 end of validity: 99/99/9999

Judgment of the Court (Grand Chamber)
of 11 December 2007
Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani - ETI SpA and Others and Philip Morris Products SA and Others v Autorità Garante della Concorrenza e del Mercato and Others. Reference for a preliminary ruling: Consiglio di Stato - Italy. Competition - Imposition of fines where undertakings succeed each other - Principle of personal responsibility - Entities belonging to the same group of undertakings or answering to the same public authority - National law referring to Community competition law as source of interpretation - Questions referred for a preliminary ruling - Jurisdiction of the Court of Justice. Case C-280/06.

In Case C280/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Consiglio di Stato (Italy), made by decision of 8 November 2005, received at the Court on 27 June 2006, in the proceedings

Autorità Garante della Concorrenza e del Mercato

v

Ente tabacchi italiani - ETI SpA,

Philip Morris Products SA,

Philip Morris Holland BV,

Philip Morris GmbH,

Philip Morris Products Inc.,

Philip Morris International Management SA,

and

Philip Morris Products SA,

Philip Morris Holland BV,

Philip Morris GmbH,

Philip Morris Products Inc.,

Philip Morris International Management SA,

v

Autorità Garante della Concorrenza e del Mercato,

Ente tabacchi italiani - ETI SpA,

and

Philip Morris Products SA,

Philip Morris Holland BV,

Philip Morris GmbH,

Philip Morris Products Inc.,

Philip Morris International Management SA,

v

Autorità Garante della Concorrenza e del Mercato, Amministrazione autonoma dei monopoli di Stato,

Ente tabacchi italiani - ETI SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lohmus, Presidents of Chambers, E. Juhasz, A. Borg Barthet, M. Ilei (Rapporteur), J. Kluka, E. Levits and A. O Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2007,

after considering the observations submitted on behalf of:

- Ente tabacchi italiani - ETI SpA, by S. D'Alberti, A. Clarizia and L. D'Amario, avvocati,

- Philip Morris Products SA, Philip Morris Holland BV, Philip Morris GmbH, Philip Morris Products Inc. and Philip Morris International Management SA, by L. Di Via, C. Tesauro and P. Leone, avvocati,

- the Italian Government, by I. M. Bragulia and F. Arena, acting as Agents, assisted by D. Del Gaizo, avvocato dello Stato,

- the Commission of the European Communities, by F. Castillo de la Torre and V. Di Bucci, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2007,

gives the following

Judgment

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

Article 81 EC et seq. must be interpreted as meaning that, in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for that infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

1. This reference for a preliminary ruling relates to the interpretation of Article 81 et seq. EC and the general principles of Community law.

2. The reference has been made in the course of proceedings between Autorità Garante della Concorrenza e del Mercato (national competition authority, the Authority'), Ente tabacchi italiani - ETI SpA, Philip Morris Products SA, Philip Morris Holland BV, Philip Morris GmbH, Philip Morris Products Inc. and Philip Morris International Management SA (the last five companies together, the companies in the Philip Morris group') and the Amministrazione autonoma dei monopoli di Stato (the autonomous body administering State monopolies, the AAMS'), relating to a cartel on the sale price of cigarettes.

Legal context

3. In Italian law, Law No 287 of 10 October 1990 adopting provisions for the protection of competition and the market (norme per la tutela della concorrenza e del mercato) (GURI No 240 of 13 October

1990, p. 3; Law No 287/90'), contains in its Title I the following provisions in particular:

Article 1

...

1. The provisions of this Law, which is enacted under Article 41 of the Constitution for the purposes of protecting and guaranteeing the right to economic initiative, shall apply to cartels, abuses of a dominant position and concentrations of undertakings which do not come within the scope of application of Article 65 and/or Article 66 of the Treaty establishing the European Coal and Steel Community, Article 85 and/or Article 86 of the Treaty establishing the European Economic Community (EEC), Regulations of the EEC, or Community acts having the same legal effect.

...

4. The provisions in this Title shall be interpreted in accordance with the principles laid down in the competition law of the European Communities.

Article 2

...

1. Cartels' means agreements and/or concerted practices of undertakings as well as decisions of consortia, associations of undertakings and similar organisations, even where made on the basis of their statutes or administrative rules.

2. Cartels between undertakings which have as their object or effect the material prevention, restriction or distortion of competition within the national market or a substantial part of that market are prohibited, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, access to the market, investment, technical development, or technological advancement;

(c) share markets or sources of supply;

(d) apply objectively dissimilar conditions to equivalent transactions with other trading parties, thereby unjustifiably placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3. Prohibited cartels shall be void for all purposes.'

4. Title II of Law No 287/90 deals entirely with the Authority, created on the basis of Article 10(1). Article 15(1) of the Law, which appears in that Title II, provides:

If ... the Authority establishes the existence of infringements of Article 2 or 3, it shall lay down a time-limit for the undertakings and operations concerned to cease the infringements. In case of serious breaches, it may also impose, having regard to their gravity and duration, an administrative fine of up to 10% of the turnover which the undertaking or establishment in question achieved in the last accounting year prior to the issue of the notice, and shall fix the time-limits within which the undertaking must pay the fine.'

5. Article 31, which appears in Title VI of Law No 287/90, provides:

So far as applicable, the provisions of Chapter I, Sections I and II, of Law No 689 of 24 November 1981 apply in relation to administrative fines for breaches of this Law.'

6. On 8 December 1927, Royal Legislative Decree No 2258 was promulgated, which provides for the creation of AAMS (istitutivo dell'Amministrazione autonoma dei monopoli di Stato, GURI No 288 of 14 December 1927). This organ of the State administration, which answered to the Ministry of the Economy and Finance, was entrusted, until February 1999, with managing the tobacco monopoly. Subsequently, AAMS continued to carry out public functions in the tobacco sector. In addition, AAMS pursues a commercial activity in the gambling sector, in particular lotteries. As regards both its administration and its finance and accounting functions, it is autonomous, although it does not have its own legal personality.

7. As from 1 March 1999, all manufacturing and sales activities in the tobacco sector that had been assigned, until then, to AAMS were transferred to another public body created by Decree-Law No 283 of 9 July 1998 setting up the Italian tobacco office (istituzione dell'Ente tabacchi italiani) (GURI No 190 of 17 August 1998, p. 3; Decree-Law No 283/98'). That body received the assets and liabilities of AAMS relating to the branches of activity which had been assigned to it. By decision of its administrative board of 23 June 2000, it was transformed into a public limited company, becoming Ente tabacchi italiani - ETI SpA (ETI'). Initially, 100% of its shares were owned by the Ministry of the Economy and Finance. Following a call for tenders which that Ministry launched in 2003, ETI was privatised and came under the sole control of British American Tobacco plc (BAT'), a holding company established under English law, which belongs to the BAT-British American Tobacco group.

The disputes in the main proceedings and the questions referred for a preliminary ruling

8. Following an investigation commenced in June 2001, the Authority found by decision of 13 March 2003 that the companies in the Philip Morris group had - with AAMS, then with Ente tabacchi italiani and finally with ETI - formed and implemented a cartel which had as its object and effect the distortion of competition as regards the sale price of cigarettes on the national market between 1993 and 2001, in breach of Article 2(2)(a) and (b) of Law No 287/90. The Authority imposed administrative fines totalling EUR 50 million on the companies in the Philip Morris group and EUR 20 million on ETI.

9. In its decision, the Authority attributed the conduct adopted by AAMS prior to 1 March 1999 to ETI, on the ground that AAMS ceased its manufacturing and sales activities in the tobacco sector once Ente tabacchi italiani - which became ETI - became operational. In those circumstances, even though AAMS did not cease to exist, ETI was AAMS' successor in accordance with the principle of economic continuity.

10. All the companies concerned challenged that decision before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court for Lazio). It dismissed the action brought by the companies in the Philip Morris group and in part upheld the action brought by ETI, annulling the decision in so far as it attributed responsibility to ETI for acts committed by AAMS. The Tribunale amministrativo regionale del Lazio based its assessment on the criterion of personal responsibility.

11. Appeals against the judgments of the Tribunale amministrativo regionale del Lazio were brought before the Consiglio di Stato (Council of State), which, by a first decision of 8 November 2005, dismissed the appeals brought by ETI and the companies in the Philip Morris group in so far as they contested the existence of a breach of the rules in the sphere of competition. As regards

the question of attributing AAMS' conduct to ETI, the Consiglio di Stato points out, in the order for reference, that the transfer of AAMS' activities to Ente tabacchi italiani marked a clear break of continuity with the previous model of organisational management. That model - before the relevant activities were transferred to Ente tabacchi italiani, which became ETI - was characterised by the attribution to AAMS, in its role as an autonomous State administration, of a mass of economic tasks and administrative duties of a public nature such as to create a dependence on the political powers. That connection can no longer be found in relation to the new entity, whose functions are purely commercial. In addition, the Consiglio di Stato states that, even though AAMS no longer carries out any commercial activities in the tobacco sector, it still carries on an economic activity that is subject to competition law. According to the Consiglio di Stato, those particular circumstances argue against application of the criterion of economic continuity.

12. The Consiglio di Stato nevertheless considered it appropriate to ask the Court about the criteria to be applied under Community competition law, to which Article 1(4) of Law No 287/90 refers. It thus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. What, in accordance with Article 81 et seq. [EC] and with the general principles of Community law, is the criterion to be adopted in determining the undertaking on which a penalty is to be imposed for contravention of the rules in the sphere of competition when, in connection with conduct penalised as a whole, the last part of those actions was carried out by an undertaking having succeeded the original undertaking in the economic sphere concerned[, and when] the original body, while still in existence, no longer operates as a commercial undertaking, or at least not in the economic sector affected by the penalty?

2. Does it fall to the national authority responsible for the application of antitrust rules, when determining the person to be penalised, to assess at its own discretion whether circumstances exist which warrant the attribution to the economic successor of responsibility for contraventions of the competition rules committed by the legal person which it has succeeded, even when that latter has not ceased to exist at the date of the decision, so that the effectiveness of the competition rules is not compromised by alterations made to the legal form of the undertakings?'

The jurisdiction of the Court

13. Given that the Commission of the European Communities has expressed doubts as to the jurisdiction of the Court, that must be examined first.

Observations submitted to the Court

14. The Commission submits that the main proceedings concern the validity of a decision of a national competition authority which, prior to the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1, p. 1), exclusively applied national provisions prohibiting cartels, and not Article 81 EC.

15. The Commission submits that Article 1(4) of Law No 287/90, according to which the provisions of Title I of that Law are to be interpreted on the basis of the principles of Community competition law, is irrelevant in this respect. The issue in the main proceedings is to identify the undertakings and operations concerned' within the meaning of Articles 15 and 31 of Law No 287/90, which fall under Titles II and VI thereof, respectively. Article 1(4) could be taken into consideration if it were a question of interpreting the concept of an undertaking, which appears both in Article 81 EC and in Article 2 of Law No 287/90, but not in order to determine which undertakings are to be penalised.

16. The Commission adds that, even if it were accepted that the reference, in Law No 287/90, to the principles of Community law is applicable in the main proceedings, the case-law of the Court would nevertheless lead to the conclusion that the questions referred for a preliminary ruling are inadmissible. In this respect, the Commission cites the judgment in Case C346/93 Kleinwort Benson [1995] ECR I615 and points out that Law No 287/90 does not specify that national courts must apply interpretations provided by the Court absolutely and unconditionally.

17. On this last point, the Commission notes that the Tribunale amministrativo regionale del Lazio based its judgment on Italian provisions concerning administrative fines, to which Article 31 of Law No 287/90 refers. Likewise, the Consiglio di Stato relied on arguments which the Authority has taken from the Italian law on responsibility. This shows that, for Italian courts and lawyers, Community law constitutes merely one of a number of elements for the purposes of interpreting the relevant provisions of national law.

18. ETI and the companies in the Philip Morris group submit on the contrary that the Court has jurisdiction to adjudicate on the reference for a preliminary ruling. Without taking a position on the jurisdiction of the Court, the Italian Government points out that an answer from the Court would be useful for the Consiglio di Stato, taking into consideration the reference to Community law in Article 1(4) of Law No 287/90.

The Court's assessment

19. Article 234 EC is an instrument of judicial cooperation, by means of which the Court provides national courts with the points of interpretation of Community law which may be helpful to them in assessing the effects of a provision of national law at issue in the disputes before them (Case C300/01 Salzmann [2003] ECR I4899, paragraph 28 and the case-law cited, and Case C448/01 EVN and Wienstrom [2003] I14527, paragraph 77).

20. When the reference for a preliminary ruling concerns the interpretation of Community law, the Court is as a rule bound to give a ruling (Salzmann , paragraph 29, and Case C-119/05 Lucchini [2007] ECR I-0000, paragraph 43).

21. In adjudicating on references for a preliminary ruling in which the rules of Community law whose interpretation was requested were applicable only because of a reference made to them by national law, the Court has held consistently that, where, in regulating purely internal situations, domestic legislation provides the same solutions as those adopted in Community law, it is clearly in the Community interest that, in order to avoid future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, in particular, Joined Cases C297/88 and C197/89 Dzodzi [1990] ECR I3763, paragraph 37; Case C28/95 Leur-Bloem [1997] ECR I4161, paragraph 32; Case C1/99 Kofisa Italia [2001] ECR I207, paragraph 32; Case C222/01 British American Tobacco [2004] ECR I4683, paragraph 40; and Case C3/04 Poseidon Chartering [2006] ECR I2505, paragraph 16).

22. Neither the wording of Article 234 EC nor the aim of the procedure established by that article indicates that the EC Treaty makers intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State (Dzodzi , paragraph 36; Leur-Bloem , paragraph 25, and Case C217/05 Confederacion Española de Empresarios de Estaciones de Servicio [2006] ECR I11987, paragraph 19).

23. As regards the application of the abovementioned case-law to the present reference for a preliminary ruling, the fact remains that, in regulating purely internal situations, the provisions of Title I of Law No 287/90 provide the same solutions as those adopted in Community law.

24. Article 1(4) of Law No 287/90 provides that the provisions in Title I of that Law are to be interpreted in accordance with the principles laid down in Community competition law. Articles 2 and 3 of Law No 287/90, which fall under the same Title, reproduce mutatis mutandis the wording of Articles 81 EC and 82 EC.

25. Furthermore, there is no suggestion in the wording of Article 1(4) of Law No 287/90, the order for reference, or the other documents before the Court that the reference to Community law in that provision is subject to any condition whatsoever.

26. Therefore, pursuant to the abovementioned case-law, it is clearly in the Community interest that the rules of Community law can - where doubts arise in the context of applying the reference made to them by national law - be interpreted uniformly by means of Court judgments given on references for a preliminary ruling.

27. As regards the Commission's argument that the disputes in the main proceedings are governed exclusively by Titles II and VI of Law No 287/90, so that Article 1(4) of the same Law, which falls under Title I thereof, is not relevant, the fact remains that that assessment is not shared by the Consiglio di Stato, which expressly referred to Article 1(4) as a ground for its reference for a preliminary ruling. In this respect, it should be recalled that it is not for the Court to determine the accuracy of the legislative context which the national court is responsible for defining (Salzmann , paragraph 31; Case C213/04 Burtscher [2005] ECR I10309, paragraph 35; and Joined Cases C222/05 to C225/05 van der Weerd and Others [2007] ECR I-0000, paragraph 22).

28. Lastly, as to the Commission's argument that Community law is merely one of a number of factors for the purposes of interpreting the provisions of Title I of Law No 287/90, and that Italian courts are not required to apply interpretations provided by the Court absolutely and unconditionally, it suffices to note that the Authority and the Tribunale amministrativo regionale del Lazio based their decision and judgment on Community rules and case-law, and that the Consiglio di Stato made its reference for a preliminary ruling on the ground that it considered it necessary for the purposes of knowing the criterion to be taken into consideration in accordance with the principles of Community competition law, to which Article 1(4) of Law No 287/90 refers.

29. In the light of all the foregoing, the Court has jurisdiction to adjudicate on the reference for a preliminary ruling.

The questions referred for a preliminary ruling

30. By the two questions, which should be examined together, the Consiglio di Stato asks, essentially, what, in accordance with Article 81 et seq. EC and, where appropriate, with any other relevant rule of Community law, are the criteria to be adopted in determining the undertaking to be penalised for breach of the competition rules where undertakings have succeeded each other, more specifically where the last part of an infringement of the competition rules was carried out by the economic successor of the entity that commenced the infringement and the latter entity, while no longer operating in the economic sector concerned by the penalty, is still in existence.

Observations submitted to the Court

31. According to ETI, the relevant criterion is that of personal responsibility. It is not possible to derogate from that criterion other than in exceptional cases, in order to protect the effectiveness of the rules in the sphere of competition. In such exceptional cases, responsibility for the infringement can be attributed to a person other than the one that controlled the undertaking at the time of the infringement, even where the latter undertaking is still in existence.

32. However, such exceptional circumstances do not exist where, as in the main proceedings, it is possible to attribute responsibility for the infringement to the person who operated the undertaking

at the time when the infringement was committed.

33. The companies in the Philip Morris group submit that the criterion of personal responsibility applies in all cases in which the person that factually committed the infringing act is still in existence, carries out commercial activities and is in a position to comply with the decision of the competition authority that imposes the penalty.

34. Those companies submit that, apart from a situation in which the legal entity has disappeared, making it impossible for it to be the subject of penalties, the Community legal order does not allow derogation from the criterion of personal responsibility. Reliance on the criterion of economic continuity is only justified where it is necessary to ensure effective application of the competition rules.

35. According to the Italian Government, the criterion of economic continuity means that - whenever the undertaking concerned by the infringement and transferred from one person to another is identical from an economic, structural and functional point of view -, responsibility lies with the person who continued and brought to completion the conduct that is contrary to the competition rules and was commenced by another person. In this respect, it is irrelevant whether the person who has sold the undertaking is still formally in existence and whether or not that person carries on other activities.

36. In the present case, it follows from Decree-Law No 283/98 that the undertaking managed by AAMS and the undertaking managed by Ente tabacchi italiani, which became ETI, are effectively the same. In addition, AAMS and ETI have structural links, given that both are emanations of the Ministry of the Economy and Finance.

37. According to the Commission, where the infringement was committed by an undertaking managed by a body of a Member State endowed with its own decision-making powers, and the relevant economic activity was transferred to another legal entity, penalties relating to that conduct must be imposed on the State body if, following the transfer, that body continues to carry on commercial activity, even if it is in sectors other than the one affected by the said conduct. By contrast, the penalties ought to be imposed on the legal entity that has acquired the economic activity in question if, following the transfer, the State body ceases commercial activity.

The Court's response

38. It is apparent from the case-law that Community competition law refers to the activities of undertakings (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 59) and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (see, in particular, Joined Cases C189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I-5425, paragraph 112; Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 107; and Case C-205/03 P FENIN v Commission [2006] ECR I-6295, paragraph 25).

39. When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect, Case C49/92 P Commission v Anic Partecipazioni [1999] ECR I4125, paragraph 145, and Case C279/98 P Cascades v Commission [2000] ECR I9693, paragraph 78).

40. As to the circumstances in which an entity that is not responsible for the infringement can nevertheless be penalised for that infringement, it must be held first that this situation arises if the entity that has committed the infringement has ceased to exist, either in law (see, to that effect, Commission v Anic Partecipazioni , paragraph 145) or economically. With regard to the

latter, it is worth noting that a penalty imposed on an undertaking that continues to exist in law, but has ceased economic activity, is likely to have no deterrent effect.

41. Next, it must be noted that if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties (Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 173; Case C289/04 P Showa Denko v Commission [2006] ECR I5859, paragraph 61; and Case C76/06 P Britannia Alloys & Chemicals v Commission [2007] ECR I-0000, paragraph 22).

42. Consequently, as the Court has already held, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical (see, to that effect, Joined Cases 29/83 and 30/83 CRAM and Rheinzink v Commission [1984] ECR 1679, paragraph 9, and Aalborg Portland and Others v Commission , paragraph 59).

43. In accordance with that case-law, the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because, as in the main proceedings, the successor has a different legal status and is operated differently from the entity that it succeeded.

44. The fact that the decision to transfer an activity is taken not by individuals, but by the legislature in view of a privatisation, is equally irrelevant. Measures to restructure or reorganise undertakings adopted by the authorities of a Member State cannot have the effect, lawfully, of compromising the effectiveness of Community competition law (see, to that effect, Case C415/03 Commission v Greece [2005] ECR I3875, paragraphs 33 and 34).

45. In the main proceedings, it is apparent from the order for reference and the documents before the Court that ETI continued AAMS' economic activities on the market affected by the cartel. In those circumstances, even though AAMS continued to exist as an economic operator on other markets, ETI could be regarded - for the purposes of the procedure relating to the cartel on the sale price of cigarettes - as the economic successor of AAMS.

46. As to whether a case such as that in the main proceedings corresponds to circumstances in which an economic entity can be penalised for an infringement committed by another entity, it must be held, first, that the fact that AAMS does not have legal personality (see paragraph 6 of this judgment) is not a factor that can justify imposing on its successor a penalty for the infringement committed by AAMS.

47. By contrast, imposing on ETI the penalty for the infringement committed by AAMS could be justified by the fact that ETI and AAMS answer to the same public authority.

48. In this respect, it must be recalled that, where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred (see, to that effect, Aalborg Portland and Others v Commission , paragraphs 355 to 358).

49. In particular, applying penalties in this way is permissible where those entities have been subject to control by the same person within the group and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions (see, by analogy, Case C-294/98 P Metsä-Serla and Others v Commission [2000]

ECR I-10065, paragraphs 26 and 27, and Dansk Rørindustri and Others v Commission , paragraph 117).

50. In the main proceedings, it is not disputed that at the time of their infringing conduct, AAMS and ETI were owned by the same public entity, namely the Ministry of the Economy and Finance.

51. It is for the Consiglio di Stato to determine whether, by participating in the cartel on the sale price of cigarettes, AAMS and ETI were subject to the control of that public entity. If that were the case, it would have to be concluded that the principle of personal responsibility does not preclude the penalty for the infringement commenced by AAMS and continued by ETI from being imposed in its entirety on ETI.

52. In the light of all the preceding considerations, the answer to the questions referred must be that Article 81 EC et seq. must be interpreted as meaning that, in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for the infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

Costs

53. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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NOTES Arcelin, Linda: Bien mal acquis ne profite jamais?, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 14 p.33 ; Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (3e trimestre 2007), Petites affiches. La Loi / Le Quotidien juridique 2008 no 30 p.13-15 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Chronique de jurisprudence communautaire. Droit de la concurrence, L'actualité juridique ; droit administratif 2008 p.246-247 ; Idot, Laurence: Imputabilité de l'infraction dans un groupe étatique, Europe 2008 Février Comm. no 59 p.27-28 ; Mayer, Christian: The art of fining: Penalties in EC competition law between personal responsibility and economic continuity, European Law Reporter 2008 p.38-45 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2008 no 161 ; Sélinsky, Véronique: Imputabilité, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 15 p.26 ; Sélinsky, Véronique: Imputabilité, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 15 p.26 ; Figus Diaz, J.: La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt "ETI", Revue du droit de l'Union européenne 2008 no 1 p.163-167 ; von Engelhardt, Benjamin: Europäisches Wirtschafts- & Steuerrecht - EWS 2008 p.184-186

PROCEDU Reference for a preliminary ruling

ADVGEN Kokott

JUDGRAP Ilei

DATES of document: 11/12/2007

of application: 27/06/2006

Case T-112/05

Akzo Nobel NV and Others

v

Commission of the European Communities

(Competition – Cartels in the vitamin products sector – Choline chloride (Vitamin B4) – Decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area – Attributability of the infringement)

Summary of the Judgment

1. *Actions for annulment – Conditions of admissibility – Action brought by several companies in a group againt a Commission decision fining them jointly and severally*

   (Art. 230 EC)

2. *Competition – Community rules – Infringements – Attribution – Parent company and subsidiaries*

   (Arts 81 EC and 82 EC)

3. *Competition – Fines – Amount – Determination – Maximum amount – Calculation*

   (Council Regulation No 1/2003, Art. 23(2))

1. In one and the same action for annulment brought by several companies in a group against a Commission decision fining them jointly and severally, reasons of procedural economy justify not examining a plea of inadmissibility raised against some of those companies where the action is nevertheless admissible in relation to others, with the result that the court must examine the action as a whole, and that, having regard to the pleas submitted in the application, possible annulment might not benefit the companies whose action is claimed to be inadmissible.

   (see paras 31-32)

2. The Commission is able to address a decision imposing a fine for breach of the competition rules by a subsidiary to the parent company of a group of companies not because of a relationship between the parent and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because those companies constitute an economic entity and therefore a single undertaking within the meaning of Articles 81 EC and 82 EC if they do not independently determine their own conduct on the market.

   In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary, and that they therefore constitute a single undertaking within the sense above. It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent. It is therefore sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.

Whilst it is true that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing, it cannot be inferred that it is only those aspects that are covered by the concept of the business policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company. On the contrary, it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. When making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case.

Thus, in the case of a company which holds 100% of the capital of its subsidiaries and plays a significant role in several essential aspects of their strategy by reserving the power of final decision with respect to a range of matters that define their course of conduct on the market, the presumption that the parent company exercises decisive influence over its subsidiaries' policies cannot be rebutted by the fact that decisions concerning the specific area in which the infringement occurred are, in principle, taken by the subsidiaries, or by the fact that the group is structured at two levels with the aim of removing commercial policy in the strict sense from the control of the parent company. Attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred. On the other hand, the economic and legal organisational links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore that they can be viewed as a single economic entity, without there being any need to ascertain whether the parent company exercised influence over the anti-competitive conduct at issue.

(see paras 58, 60, 62, 64-65, 82-83, 85)

3. The fact that several companies are held jointly and severally liable for a fine on the ground that they form an undertaking for the purposes of Article 81 EC does not mean, as regards the application of the maximum amount laid down by Article 23(2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, that the obligation of each of them is limited to 10% of the turnover which it achieved during the last business year. The maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question.

(see paras 90-91)

Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)December 2007. Akzo Nobel NV and Others v Commission of the European Communities. Competition - Cartels in the vitamin products sector - Choline chloride (Vitamin B4) - Decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area - Attributability of the infringement. Case T-112/05.

In Case T112/05,

Akzo Nobel NV, established in Arnhem (Netherlands),

Akzo Nobel Nederland BV, established in Arnhem,

Akzo Nobel Chemicals International BV, established in Amersfoort (Netherlands),

Akzo Nobel Chemicals BV, established in Amersfoort,

Akzo Nobel Functional Chemicals BV, established in Amersfoort, represented initially by C. Swaak and J. de Gou, and subsequently by C. Swaak, M. van der Woude and M. Mollica, lawyers,

applicants,

v

Commission of the European Communities, represented by A. Whelan and F. Amato, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E2/37.533 - Choline chloride) (summary published in OJ 2005 L 190, p. 22),

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

composed of A.W.H. Meij, acting as President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 13 February 2007,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV to pay the costs.

Background and contested decision

1. By Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E2/37.533 - Choline chloride) (summary published in OJ 2005 L 190, p. 22; the Decision'), the Commission found that a number of undertakings had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a complex of agreements and concerted practices consisting of price fixing,

market sharing and agreed actions against competitors in the choline chloride sector in the EEA (Article 1 of the Decision).

2. The Commission states that the product concerned, choline chloride, is a member of the B-complex group of water-soluble vitamins (vitamin B4). It is mainly used in the animal feed industry (poultry and swine) as a feed additive and is marketed in two forms: it may take the form of an aqueous solution of 70% choline chloride or be sprayed on a dry cereal or silica carrier to give a choline chloride potency of 50 to 60%. Choline chloride which is not used as an animal feedingstuff additive is refined to provide a higher purity food grade (pharmaceutical grade). In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier, either on behalf of the producer or on their own behalf, and distributors.

3. Recital 3 to the Decision states that the Commission initiated an investigation into the global choline chloride industry after it received a leniency application in April 1999 from the United States producer Bioproducts. The investigation covered the period from 1992 to the end of 1998. At recital 45 to the Decision, the Commission states that the Canadian producer Chinook had already approached it about the cartel in question on 25 November and 16 December 1998 but that it had not opened an investigation at that time.

4. So far as the EEA is concerned, according to recital 64 to the Decision the choline chloride cartel operated at two different but closely-related levels: the global level and the European level. At the global level, the producers Bioproducts (United States), Chinook (Canada), Chinook Group Limited (Canada), DuCoa (United States), BASF AG (Germany), UCB SA (Belgium) and the applicants, five companies in the Akzo Nobel group (Netherlands), participated (directly or indirectly) in anti-competitive activities between June 1992 and April 1994. Those activities were designed, essentially, to increase prices worldwide, including in the EEA, and to control converters, including in the EEA, in order to ensure that converters would not undermine the agreed increases, and to allocate markets worldwide: the North American producers would withdraw from the European markets and, in return, the European producers would withdrawing from the North American markets. The Commission identifies nine meetings of the cartel at global level between June 1992 (in Mexico City, Mexico) and April 1994 (in Johor Bahru, Malaysia). The most important meeting was the one held in Ludwigshafen (Germany) in November 1992.

5. Only the European producers (BASF, UCB and the applicants) are stated to have participated in the meetings implementing the cartel at European level, which continued from March 1994 to October 1998. The Commission identifies 15 meetings in that regard, between March 1994 (in Schoten, Belgium) and October 1998 (in Brussels, Belgium, or Aachen, Germany). According to recital 65 to the Decision, those meetings served to continue the agreement reached at the global level. The purpose of the meetings was to ensure regular price increases across the EEA and to share markets and allocate individual customers, and also to control converters in Europe in order to protect the higher price levels.

6. The Commission found that the worldwide arrangements and the European arrangements all formed part, so far as the EEA was concerned, of a global plan which determined the conduct of the members of the cartel and restricted their individual commercial conduct in order to pursue a single anti-competitive economic objective, namely to distort the normal conditions of competition in the EEA. Accordingly, in the Commission's view, the arrangements concluded at worldwide level and at European level must be considered to constitute a single complex and continuous infringement concerning the EEA, in which the North American producers participated for a certain time and the European producers participated throughout the whole of the period in question.

7. As regards the identification of the addressees of the Decision, the Commission stated at recital

166 that the applicants, BASF, Bioproducts, Chinook, DuCoa and UCB must bear responsibility for the infringement. Ertisa, a Spanish company with 50% of the Spanish market, on the other hand, was not an addressee of the Decision, as the Commission concluded at recital 178 that the evidence was, on the whole, insufficient to hold that undertaking liable for the alleged facts.

8. In Article 3 of the Decision the Commission ordered the undertakings to which the Decision was addressed to bring immediately to an end the infringements referred to in Article 1 of the Decision, in so far as they had not already done so, and to refrain from repeating any of the anti-competitive acts or conduct established and from any act or conduct having the same or similar object or effect.

9. For the purpose of imposing fines, the Commission considered that the North American producers (Bioproducts, Chinook and DuCoa) had ceased to participate in the infringement no later than 20 April 1994, following the Johor Bahru meeting (see paragraph 4 above). According to recital 165 to the Decision, the Commission had no evidence of further meetings or contacts involving North American producers whereby they fixed prices for the EEA or confirmed their original commitment not to export to Europe. Since the first measure taken by the Commission with respect to that infringement was taken on 26 May 1999, or more than five years after the North American producers ceased to participate in the infringement, the Commission did not impose fines on those producers, in accordance with Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) and Article 25 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

10. Since the European producers' participation had lasted until 30 September 1998, on the other hand, the Commission imposed on them fines totalling EUR 66.34 million.

11. With regard more particularly to the Akzo Nobel group, the Commission decided to address the Decision to Akzo Nobel NV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Chemicals BV, Akzo Nobel Chemicals International BV and Akzo Nobel Nederland BV jointly and severally. The last three undertakings (or their legal predecessors) all participated directly in the infringement. Akzo Nobel Functional Chemicals was created in June 1999 as a subsidiary of Akzo Nobel Chemicals, at which time the latter became a holding company. Therefore, the Commission considered that Akzo Nobel Functional Chemicals is the legal successor to most of the choline chloride activities previously carried on by its parent company and should, accordingly, also be an addressee of the Decision.

12. Akzo Nobel forms an economic unit with the other legal entities in the Akzo Nobel group to which the Decision is addressed. It was this economic unit that was responsible for the production of chlorine chloride in the EEA and which participated in the cartel. The conclusion could be different only if the operational subsidiaries of Akzo Nobel were able to operate an autonomous commercial policy in the period concerned and actually did so. Akzo Nobel, far from being simply an investment vehicle, serves as the corporate centre of the Akzo Nobel group of companies which coordinates its main activities with regard to general group strategy, finances, legal affairs, and human resources. The Commission assumed that, through these functions, Akzo Nobel exerted a decisive influence over the commercial policy of its subsidiaries, all of which were directly or indirectly wholly owned by it. The Commission therefore found that the subsidiaries of Akzo Nobel lacked commercial autonomy, which entitled the Commission to address the Decision to Akzo Nobel, notwithstanding that it had not participated individually in the cartel (recital 172 to the Decision).

13. The lack of commercial autonomy of the Akzo Nobel group's operating companies or business units is also clear from the documents entitled Authority Schedules' which Akzo Nobel submitted during the administrative procedure. Those documents show that the corporate objectives for the

Akzo Nobel group as a whole and guidelines for the strategic plans of business units are set by the Board of Management of Akzo Nobel. The strategic plan of an individual business unit can be endorsed only if it fits within the corporate strategic plan. Portfolio positioning within that strategic plan is also decided by the Board of Management of Akzo Nobel, whereas the operational plan of each business unit must comply with the guidelines and group targets set by the Board of Management. Last, any investments of more than EUR 2.5 million need the approval of the Board Committee, the Full Board of Management or the Supervisory Board of Akzo Nobel, depending on their financial impact. The Board of Management also decides on the allocation of profits and on dividends, and also on appointments, remuneration and dismissals (recital 173 to the Decision).

14. Akzo Nobel Chemicals SpA, which was an addressee of the statement of objections because it was suspected of having participated in certain activities regarding choline chloride in Spain, was not an addressee of the Decision because the Commission considered that the evidence gathered was insufficient to hold it liable (recital 176 to the Decision).

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

16. For the purpose of determining the starting amount of the fines, the Commission stated that it would apply differential treatment to the companies involved in order to take account of differences in their effective economic capacity to cause significant damage to competition. Thus, in view of the fact that the infringement had begun at the global level, with the participation of North American companies which agreed, inter alia, to withdraw from the European market, the Commission considered that it should take as a basis the global market shares of the participants in the infringement in order to determine their individual importance (recitals 200 and 201 to the contested decision).

17. Thus, on the basis of the global market shares in 1997, the Commission placed the applicants in the third category, with a market share of 12%. In order to ensure sufficient deterrence, the Commission, by reference to Akzo Nobel's turnover in 2003 (EUR 13 000 million), multiplied the starting amount by a factor of 1.5.

18. Next, the Commission increased the starting amount by 10% for each full year of the infringement and by 5% for each additional period of six months or more but less than one year. As the infringement had lasted for 5 years and 11 months (from 13 October 1992 until 30 September 1998), the Commission increased the starting amount by 55%. Thus, the basic amount of the fine imposed jointly and severally on the applicants was fixed at EUR 29.99 million.

19. As regards the application of the Leniency Notice to the applicants, the Commission emphasised the importance of a voluntary submission of 8 January 2002, concerning five further meetings at European level. That, according to recital 233 to the Decision, was what enabled the Commission to prove the full scope and duration of the infringement at European level. Furthermore, the applicants did not substantially contest the facts relied on by the Commission. The Commission therefore considered that the applicants were entitled to a 30% reduction in the amount of the fine that would otherwise have been imposed on them (recitals 233 to 236 to the Decision).

20. At the end of that procedure, the fine imposed on the applicants was fixed at EUR 20.99 million.

Procedure and forms of order sought by the parties

21. By application lodged at the Registry of the Court of First Instance on 2 March 2005, the applicants brought the present action.

22. By applications lodged at the Court Registry on 25 February (registered as Case T111/05)

and 1 March 2005 (registered as Case T101/05), UCB and BASF, which were also addressees of the Decision, each brought an action against it.

23. By order of 7 September 2006, the President of the Second Chamber of the Court decided, after hearing the parties, to join Cases T101/05, T111/05 and the present case for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

24. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure, and, in the context of the measures of organisation of procedure, put a question in writing to the parties.

25. After hearing the parties' views on the matter at the hearing, the Court decided, by its judgment in Cases T101/05 and T111/05, to disjoin the present case from Cases T101/05 and T111/05 for the purposes of the judgment, in accordance with Article 50 of the Rules of Procedure.

26. The applicants claim that the Court should:

- annul the Decision;

- order the Commission to pay the costs.

27. The Commission contends that the Court should:

- dismiss the action as inadmissible or as manifestly unfounded with respect to Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals;

- dismiss the remainder of the action;

- order the applicants to pay the costs.

Law

28. The applicants raise three pleas in law, alleging, first, that the Commission wrongly attributed joint and several liability for the infringement to Akzo Nobel; second, breach of Article 23(2) of Regulation No 1/2003 in that the amount of the fine exceeds 10% of Akzo Nobel Functional Chemicals' turnover for 2003; and, third, breach of the obligation to state reasons for attributing joint and several liability for the infringement to Akzo Nobel.

1. Admissibility of the action as regards Akzo Nobel Nederland, Akzo Nobel Chemicals Internati onal and Akzo Nobel Chemicals

Arguments of the parties

29. The Commission submits that the action, which must be analysed as five individual actions, contains no pleas capable of justifying annulment of the Decision or a reduction in the amount of the fine as regards Akzo Nobel Nederland, Akzo Chemicals International and Akzo Nobel Chemicals. It is therefore consistent with neither Article 21 of the Statute of the Court of Justice nor Article 44 of the Rules of Procedure so far as those three applicants are concerned. In any event, the action should be dismissed with respect to those applicants as manifestly unfounded in law.

30. The applicants contend that the action is admissible with respect to Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals. They maintain that the action fulfils the conditions of Article 21 of the Statute of the Court of Justice and Article 44 of the Rules of Procedure of the Court of First Instance and claim that the possibility that the Decision will be annulled shows that they have an interest in bringing the action.

Findings of the Court

31. It should be noted at the outset that, since the present case concerns one and the same action which is admissible so far as Akzo Nobel and Akzo Nobel Functional Chemicals are concerned, there is no need to examine the plea of inadmissibility raised by the Commission (see, to that effect and by analogy, Case C313/90 CIRFS and Others v Commission [1993] ECR I1125, paragraphs 30 and 31).

32. In that regard, the argument put forward by the Commission at the hearing, that the assessment in the preceding paragraph applies only where annulment benefits every person irrespective of whether that person brought an action, is not sufficient to make it necessary to examine the plea of inadmissibility. While it is true that the annulment of a decision imposing fines on a number of entities under Article 81 EC must not operate to the advantage of those who did not bring an action (see, to that effect, Case C310/97 P Commission v AssiDomän Kraft Products and Others [1999] ECR I5363, paragraph 63), or whose action is inadmissible, the fact remains that the Commission did not explain in what way annulment of the Decision on the basis of the pleas set out at paragraph 30 above might operate to the advantage of Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals. The Commission itself, moreover, maintains in the rejoinder that in light of the pleas raised in the application, any annulment could affect only the liability of the top holding company in the group or the amount of the fine imposed on Akzo Nobel Functional Chemicals. Furthermore, even on the assumption that Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals are not admissible, the Court must none the less examine the action in its entirety. In those circumstances, for reasons of procedural economy the Court should not examine the plea of inadmissibility raised by the Commission.

2. Substance

First plea: incorrect attribution of joint and several liability to Akzo Nobel

Arguments of the parties

33. The applicants submit that the Commission erred in law in imposing the fine jointly and severally on Akzo Nobel, the parent company of the group, holding, directly or indirectly, 100% of the capital of its subsidiaries. They explain the organisational and legal structures of the Akzo Nobel group as follows. The organisational structure is composed of a corporate centre (Akzo Nobel NV), business units and sub-units. The group's activities are in fact organised in such a way that a business unit (or sub-unit) undertakes activities carried on by various Akzo Nobel subsidiaries (for example the methylamines and choline chloride sub-unit encompasses activities by various Akzo Nobel subsidiaries). The legal structure includes Akzo Nobel as top holding' company in the group and more than 1 000 different legal entities wholly owned directly or indirectly by Akzo Nobel. Those legal entities must be regarded as portfolio holders, carrying on commercial activities managed by the business units (and sub-units). In this case, Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals are the owners of, inter alia, the activity carried out by the methylamines and choline chloride sub-unit. It follows that the organisational and legal structures of the Akzo Nobel group are parallel.

34. The Akzo Nobel group is therefore a two-tier organisational structure: a corporate centre that deals with strategic issues (major investments, finance, legal affairs, human resources) and 20 business units directly below. Each unit has a general manager, a management team and supporting services, responsible for the entire operational management. Provided that the management of the business unit stays within the financial and strategic targets set and approved by Akzo Nobel, the management of that unit is entirely independent and bound solely by the business principles' (the core values of the business world, such as entrepreneurial spirit, personal integrity, social responsibility, etc.) and corporate directives' (the directives of the undertaking, on legal and tax matters, human resources, health and safety and environmental matters, etc.) applicable to the

entire Akzo Nobel group. Each unit is divided into sub-units with their own management. In this case, the business activities relating to choline chloride were conducted by Akzo Nobel Chemicals, Akzo Nobel Functional Chemicals and Akzo Nobel Chemicals SpA.

35. It is the business units (and sub-units) responsible for the relevant product area that determine, autonomously from Akzo Nobel, policy, strategy and business operations. However, that does not mean that the units (or sub-units) have the same decision-taking power with regard to the subsidiaries. The business policy of each business unit and sub-unit cannot be said to determine the business policy of the various subsidiaries.

36. According to Akzo Nobel's analysis of the case-law, the decisive influence which a parent company must exercise in order to be considered liable for the activities of its subsidiary must relate to the subsidiary's commercial policy in the strict sense. The Commission must therefore show, first, that the parent company has the power to direct the conduct of the subsidiary to the point of depriving it of any independence in determining its commercial course of action and, second, that it exerted that power.

37. However, the applicants claim that the case-law has created a presumption that a wholly-owned subsidiary has carried out the instructions of its parent company. In those circumstances, in order for the Commission to be required to find the subsidiary alone liable in such a case, the subsidiary must determine its commercial policy largely on its own. Where that is shown to be the case, the Commission must again show that the parent company did in fact exert a decisive influence in a specific case. It follows that organisation into units of the kind seen in the Akzo Nobel group does not in itself suffice to make proof of the actual involvement of the parent company unnecessary. Furthermore, Akzo Nobel claims that the Commission, in exercising its power to take decisions, and the Community judicature always employ facts in order to support the presumption in question.

38. Akzo Nobel's subsidiaries determine their commercial policy largely on their own, each having its own decision-taking body. Since Akzo Nobel does not carry on any commercial activity or produce or distribute any product, it does not have the power to direct its subsidiaries' conduct to the point of depriving them of any real independence in determining their own course of action in the market. Akzo Nobel merely determines the group's general macroeconomic strategy and claims no role in relation to purely commercial decisions. Decisions on pricing and price increases are in principle taken within each subsidiary by the marketing directors for the relevant products. Akzo Nobel therefore deals exclusively with major strategic questions (finance, legal affairs, health and safety and environmental rules and policy, etc.), which excludes matters of commercial policy. Thus, responsibility for commercial policy matters lies with the business units and sub-units, which include all the operational subsidiaries of the group.

39. The international in-house magazine published by Akzo Nobel evidences a very detailed structure within the subsidiaries. That structure would serve no purpose if commercial policy had to be decided by the Board of Akzo Nobel. However, no parent company owning all the shares in its subsidiary would allow it to operate without any supervision. Thus, Akzo Nobel determines policies and rules on health and safety, the environment, corporate identity and collective labour agreements with which the subsidiaries must comply. That type of control cannot be assimilated to control stricto sensu of the subsidiaries' commercial strategy.

40. Furthermore, each of the subsidiaries involved in these proceedings has its own management board, while commercial policy (pricing, distribution) is determined at the level of the business units and subunits responsible for the relevant products. Turnover in the choline chloride sector appears in the accounts of Akzo Nobel Chemicals, Akzo Nobel Functional Chemicals and Akzo Nobel Chemicals SpA.

41. The marketing director for choline chloride is, as his job title suggests, mainly responsible for preparing the draft sales plan with regard to quantities, prices, product range and marketing strategy. The fact that there is no documentary evidence to support all the factual claims does not diminish the value of the evidence produced by Akzo Nobel, especially since it produced copious evidence during the administrative procedure.

42. Since, on the basis of the foregoing, the presumption in question has been rebutted, the applicants contend that the Commission's arguments would have been correct if Akzo Nobel had given instructions with regard to price-fixing and sharing the choline chloride market. However, a parent company of more than 1 000 legal entities cannot materially instruct even just one of its subsidiaries with regard to pricing policy or commercial behaviour. The Commission has failed to prove that Akzo Nobel was aware of or directly involved in the infringement or that it had instructed its subsidiaries to commit it. The evidence on which the Decision relies in order to attribute joint and several liability for the infringement to Akzo Nobel does not relate to its subsidiaries' commercial policy in the strict sense. As the applicants have shown that the methylamines and choline chloride sub-unit was, at the very least, largely commercially autonomous, the Commission ought to have proved that Akzo Nobel had exercised decisive influence on the commercial policy of the other applicants or on the methylamines and choline chloride business sub-unit. However, the Commission has failed to satisfy that obligation, since Akzo Nobel had no reason to exercise such influence.

43. In that context, it is scarcely relevant to seek out the natural or legal person who appoints the vice-presidents of the group, the managers and other players in the methylamines and choline chloride business subunit and to whom those persons are accountable. The crucial question is whether Akzo Nobel exercised decisive influence on the commercial policy of its subsidiaries or the methylamines and choline chloride business sub-unit. It is therefore even arguable that the methylamines and choline chloride sub-unit should be the addressee of the Decision.

44. The applicants observe that if all the legal entities in the choline chloride sector were to be regarded as a single economic unit, there would be no reason to exclude Akzo Nobel Chemicals from the addressees of the Decision on the sole ground that the Commission did not have sufficient evidence to hold it liable. Its exclusion also contradicts the Commission's assertion that Akzo Nobel is the only link between choline chloride production in Italy and in the Netherlands.

45. The applicants emphasise that Akzo Nobel never held itself out as the Commission's only interlocutor during the administrative procedure. In addition, each of the applicants gave a separate authority to the lawyers representing them.

46. In light of the foregoing considerations, and since the evidence, other than the 100% shareholding, on which the Commission relied is either irrelevant or wrong, Akzo Nobel maintains that it has rebutted the presumption of the liability of the group's holding company. As the Commission has adduced no evidence showing that Akzo Nobel had exercised decisive influence on its subsidiaries' commercial policy, the present plea must be upheld.

47. The Commission contends that, according to the case-law, a parent company may be presumed to exercise decisive influence over a subsidiary where the conduct of the subsidiary is essentially subject to instructions issued to it, that is to say, where the parent company decides the commercial strategy and operations of its subsidiary. The case-law imposes no requirement that the parent company instruct its subsidiary to commit an infringement in order for the Commission to address to it a decision imposing a fine. It is therefore sufficient that the parent company exercised decisive influence over the general commercial strategy of its subsidiaries in order for it to be held jointly and severally liable and the Commission does not have to show that the parent company was aware of or directly involved in the infringement.

48. It follows from the case-law that in order to rebut that presumption it must be proved that the parent company was not in a position to have decisive influence over the commercial policy of its subsidiary or that the subsidiary was autonomous. It must therefore be demonstrated by sufficiently persuasive evidence that the parent company was not in a position to exercise, or did not effectively exercise, decisive influence over its subsidiary's commercial strategy and operations, notwithstanding its 100% shareholding. It cannot, on the other hand, be sufficient for the parent company to show that the subsidiary conducted its business largely on its own and that it had its own board of directors, which was not in any event proved in this case.

49. The applicants are wrong to claim that they rebutted the presumption against Akzo Nobel by the evidence produced in response to the statement of objections, nor can they challenge the legality of the Decision on the basis of documents which were not produced during the administrative procedure.

50. The evidence adduced by the applicants is not in any event sufficient to rebut the presumption against Akzo Nobel. The applicants did not identify the legal entities which appoint the group vice-presidents, the managers of the business units or the persons or bodies to whom the vice-presidents are accountable. The Commission therefore contends that it may reasonably suppose that the group vice-presidents are appointed by Akzo Nobel, to which they are accountable for their management.

51. According to the Commission, the applicant's state in the application that the subsidiaries' commercial policy is not determined by them but by the business units and sub-units, while the management of Akzo Nobel is responsible for coordination and for establishing general guidelines. The fact that the applicant subsidiaries have their own boards of directors does not necessarily mean that they take all basic commercial decisions on the production and marketing of choline chloride in complete autonomy. The fact that they belong to the methylamines and choline chloride business sub-unit, which has its own management bodies, suggests the opposite. On the basis of the applicants' assertion that the management of each business sub-unit is accountable to the management of a business unit, the Commission presumes that the management of each business unit is in turn accountable to the management of Akzo Nobel. It is precisely that obligation that justifies the characterisation of the Akzo Nobel group as an economic unit. Even on the assumption that the marketing manager of the choline chloride business sub-unit acts in complete autonomy when determining the prices of the product, that confirms that the subsidiaries are not autonomous and does not preclude decisive influence on the part of Akzo Nobel.

52. The Commission further submits that the applicants' argument that it ought to have addressed the Decision to the methylamines and choline chloride business sub-unit cannot be accepted because that sub-unit is not a legal entity, the only legal entities being the subsidiaries of the group coordinated by Akzo Nobel. Those legal entities cannot avoid liability simply because they are structured as units without legal personality. In addition, the fact that Akzo Nobel is the sole shareholder in its subsidiaries by definition gives it the power to control their course of action in all essential respects.

53. The documents produced by the applicants, moreover, simply show that day-to-day commercial decisions on choline chloride are taken by members of the management of the methylamines and choline chloride business sub-unit and do not identify the persons who appoint and employ those members. The applicants have therefore failed to rebut the presumption that Akzo Nobel is liable.

54. In any event, Akzo Nobel may properly be held liable on the basis of factors other than the presumption created by its 100% shareholding in its subsidiaries. It is proved on the basis of the authority schedules that any project of a business unit involving investment requires the approval of the board committee, board of management or supervisory board of Akzo Nobel, depending on the size of the investment. The role played by Akzo Nobel in appointing the directors of each business unit and its administrative functions show that it operates as a single economic unit with those

business units. Commercial independence relates not only to decisions of secondary importance (such as daytoday sales) but also to more important decisions, such as the appointment of managers, the determination of business objectives and investment decisions. Akzo Nobel is the entity responsible for settling those questions.

55. The fact that Akzo Nobel, Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals do not carry on any commercial activity also confirms the conclusion that none of those legal entities can be considered to constitute an autonomous economic player on its own.

56. Akzo Nobel also represents the only ownership link between the activities of the choline chloride sector in Italy and those in the Netherlands. That finding is not inconsistent with the fact that the Decision was not addressed to Akzo Nobel Chemicals SpA. The Commission does not have sufficient evidence to show that that undertaking participated in the infringement. Furthermore, Akzo Nobel Chemicals SpA is not a managing company liable for the behaviour of the entities that are directly involved. In any event, the Commission is not required to attribute liability to all the legal entities which together form an undertaking. The fact that the applicants are represented by the same lawyers also militates in favour of the Commission's analysis.

Findings of the Court

- Preliminary observations on the attributability to a parent company of the unlawful conduct of a subsidiary

57. It must be borne in mind, first of all, that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see Case T9/99 HFB and Others v Commission [2002] ECR II1487, paragraph 54 and the case-law cited).

58. It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori , because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market (Case T203/01 Michelin v Commission [2003] ECR II4071, paragraph 290).

59. It should also be noted that, for the purpose of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality (see, to that effect, Joined Cases T305/94 to T307/94, T313/94 to T316/94, T318/94, T325/94, T328/94, T329/94 and T335/94 Limburgse Maatschappij and Others v Commission (PVC II ') [1999] ECR II931, paragraph 978).

60. In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 AEG v Commission [1983] ECR 3151, paragraph 50, and PVC II , paragraph 59 above, paragraphs 961 and 984), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (Joined Cases T71/03, T74/03, T87/03 and T91/03 Tokai Carbon and Others v Commission , not published in the ECR, paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption

by adducing evidence to establish that its subsidiary was independent (Case T314/01 Avebe v Commission [2006] ECR II0000, paragraph 136; see also, to that effect, Case C286/98 P Stora Kopparbergs Bergslags v Commission [2000] ECR I9925 (Stora '), paragraph 29).

61. In that regard, it must be made clear that, while it is true that at paragraphs 28 and 29 of Stora , paragraph 60 above, the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of AEG v Commission , paragraph 60 above, is amended.

62. That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.

63. The Court must also examine, in the context of these preliminary observations, the argument central to the applicants' pleadings that the influence which the parent company is presumed to exercise because it holds the entire capital of its subsidiary relates to the latter's commercial policy in the strict sense (see paragraph 36 above). That policy, in the applicants' submission, includes, for example, distribution and pricing strategy. Accordingly, so the argument goes, the parent company could rebut the presumption by showing that it is the subsidiary that manages those specific aspects of its business policy, without receiving instructions.

64. On that point, it should be noted that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy (see, to that effect, Case 48/69 ICI v Commission [1972] ECR 619, paragraph 137, and Case 52/69 Geigy v Commission [1972] ECR 787, paragraph 45), production and distribution activities (see, to that effect, Joined Cases 6/73 and 7/73 Commercial Solvents v Commission [1974] ECR 223, paragraphs 37 and 39 to 41), sales objectives, gross margins, sales costs, cash flow, stocks and marketing (Case T102/92 Viho v Commission [1995] ECR II17, paragraph 48). However, it cannot be inferred that it is only those aspects that are covered by the concept of the business policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company.

65. On the contrary, it follows from that case-law, read together with the considerations set out at paragraphs 57 and 58 above, that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. It also follows that when making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case.

66. It is by reference to those considerations that the Court must ascertain whether Akzo Nobel and its subsidiaries to which the Decision was addressed constitute a single economic entity.

- The existence of a single economic entity between Akzo Nobel and its subsidiaries to which the Decision was addressed

67. In the present case, the parties are agreed that Akzo Nobel directly or indirectly holds 100% of the capital of its subsidiaries to which the Decision was addressed. It is therefore for Akzo Nobel, on the basis of the foregoing considerations, to show that those subsidiaries determine their business policy autonomously in such a way that they and their parent company do not constitute a single economic entity and therefore a single undertaking for the purposes of Article 81 EC (see paragraph 57 above).

68. In that regard, the authority schedules produced by Akzo Nobel during the administrative procedure (see paragraph 13 above) and briefly analysed at recital 173 to the Decision contain, in the introduction, a description of the allocation of powers relating to the decision-taking procedure within the Akzo Nobel group on 14 topics.

69. Those schedules cover, more particularly, Strategy, Operational Plan, Investments, Acquisition/divestment, Restructuring plans, General policies on functional issues, Finance, Control/Accounting, Human Resources, Legal Affairs, Risk and Insurance Management, Technology & Environment, Informational Technology and a subject headed Miscellaneous'.

70. The introduction to the authority schedules states:

Detailed authorities and instructions (possibly also for items not mentioned in the Akzo Nobel Authority Schedules) are laid down in separate directives and/or charters or are agreed upon between the [business unit/sub-unit] manager and the responsible Board Member.

As to subsidiaries not wholly owned by Akzo Nobel, either directly or indirectly, this allocation of authorities shall be integrally enforced as much as possible.'

71. The Court must also examine a number of aspects of the authority schedules, namely strategy, investment, general policies on functional issues, control and accounting, human resources and legal affairs.

72. As regards strategy, it follows from the authority schedules that each business unit or sub-unit prepares and submits its strategic plan for an opinion to [confidential] (1) of Akzo Nobel, which subsequently submits it to [confidential] for review within guidelines set by Akzo Nobel's Board of Management, which, within the context of [confidential], decides on major strategic moves.

73. When drawing up its operational plan, each business unit must obtain advice from [confidential] of Akzo Nobel, which, in turn, submits each question to the management of Akzo Nobel for a decision within the guidelines and group targets.

74. With respect to investments (including rentals, leases, disposal or acquisition of intangible assets), each business unit or sub-unit has the power to take decisions, but within limits previously agreed upon with [confidential] of Akzo Nobel. The latter decides on projects up to EUR [confidential], while decisions are taken by [confidential], [confidential] or [confidential], depending on whether the value is between EUR 2.5 million and EUR 10 million, between EUR 10 million and EUR 20 million or above EUR 20 million.

75. For general policies on functional issues, [confidential] of Akzo Nobel submits a proposal for a functional area and the decision is taken by [confidential], within [confidential].

76. For the purposes of control and auditing, each business unit or sub-unit reports its results periodically, while [confidential] of Akzo Nobel, [confidential] and [confidential] periodically review corporate performance at unit (or sub-unit) and group level.

77. In connection with human resources, the business units or sub-units are required to submit

their proposals on main organisational changes to the [confidential] of Akzo Nobel for approval of conformity with organisational concepts, while the final decision is taken by [confidential] of Akzo Nobel. It is important to note that where the proposal does not conform to the organisational concept, it is for [confidential] of Akzo Nobel to adopt a definitive decision.

78. As regards legal affairs, in the case of important contracts concerning know-how, patents, trade marks, research cooperation and strategic alliances, each unit or sub-unit submits proposals to [confidential] of Akzo Nobel, which, in turn, depending on the value of the operation, advises [confidential], [confidential] or [confidential], which decides the matter. Powers are allocated in a similar fashion for the purpose of important long-term supply and purchasing contracts, depending on their duration and the financial commitment involved.

79. It is apparent from the authority schedules, moreover, that Akzo Nobel is involved, through [confidential], [confidential], [confidential] or [confidential], in the decision-taking procedure for all of the matters concerned (see paragraph 69 above).

80. Questioned on that point at the hearing, the applicants maintained that the authority schedules illustrated the allocation of powers within the Akzo Nobel group but did not demonstrate that those powers were actually used in connection with the infringement in question. However, it must be held that that last assertion is inoperative at this stage of the examination, which seeks to establish whether Akzo Nobel exercised influence over the business policy of its subsidiaries and not whether Akzo Nobel played a specific role in connection with the infringement in question (see paragraph 58 above).

81. As regards the organisational relationship between the subsidiaries of the Akzo Nobel group to which the Decision was addressed and the methylamines and choline chloride business sub-unit, it is sufficient to observe that, as the applicants stated (see paragraph 33 above), Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals are the owners' of, inter alia, the activity carried out by that sub-unit. Since the Decision could be addressed only to entities having legal personality (see paragraph 59 above), which, moreover, participated directly in the infringement or are the successors in law to the entities which participated therein (see paragraph 11 above), the applicants cannot claim that the Commission ought to have distinguished the determination of the policy of the business units or sub-units of the group from the determination of the policy of the subsidiaries of Akzo Nobel. In any event, the applicants stated at paragraphs 16, 17 and 54 of their reply that the crucial question was whether they had been able to rebut the presumption that Akzo Nobel had exercised decisive influence either over the business sub-unit concerned or over the subsidiaries to which the Decision was addressed.

82. In those circumstances, it must be concluded that, as stated at recital 173 to the Decision, the competent personnel, and in particular the management of Akzo Nobel, play a significant role in several essential aspects of the strategy of the subsidiaries in question and reserve the power of final decision with respect to a range of matters that define their course of conduct on the market.

83. The argument that decisions relating to pricing and price increases are in principle taken by the marketing managers for the products concerned, who act within their respective subsidiaries, and in particular by the choline chloride marketing manager (see paragraphs 38 and 41 above), cannot refute that conclusion. The same applies to the arguments based on the two-level structure of the Akzo Nobel group, which is claimed to have the objective of removing commercial policy in the strict sense from the control of Akzo Nobel (see paragraph 38 above). As stated at paragraph 58 above, attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred, in the present case distribution and pricing. On the other hand, the economic and legal

organisational links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore that they can be viewed as a single economic entity.

84. The argument based on the fact that each subsidiary has its own management board (see paragraph 40 above) lacks conviction. Every incorporated company has a management board appointed by its shareholders, in this case by Akzo Nobel. Furthermore, the applicants stated in that regard at paragraph 45 of their reply that the group vice-presidents (who manage the business units) are appointed by the division presidents of the chemical divisions of the group, after approval of the responsible member of the Board of Management of Akzo Nobel. They report to the President of Akzo Nobel Chemicals, who in turn reports to the responsible member of the Board of Management of Akzo Nobel. Furthermore, Akzo Nobel's in-house magazine (see paragraph 39 above) states that the group vice-president at the head of a business unit maintains hierarchical control within that unit.

85. Therefore, even on the assumption that the applicants' reasoning in respect of the burden of proof, illustrated at paragraph 37 above, is correct, the fact remains that they have not succeeded in rebutting the presumption that Akzo Nobel, the parent company owning 100% of the capital of the subsidiaries to which the Decision was addressed, exercised decisive influence over its subsidiaries' policies. It must therefore be concluded that Akzo Nobel, together with those subsidiaries, constitutes an undertaking for the purposes of Article 81 EC, without there being any need to ascertain whether Akzo Nobel exercised influence over the conduct at issue. Consequently, the first plea must be rejected.

Second plea: breach of Article 23(2) of Regulation No 1/2003

Arguments of the parties

86. The applicants claim that by imposing the fine jointly and severally on Akzo Nobel Functional Chemicals, the Commission exceeded the ceiling of 10% of turnover laid down in Article 23(2) of Regulation No 1/2003. As Akzo Nobel Functional Chemicals' turnover in 2003 was EUR 124.5 million, the amount of the fine (EUR 20.99 million) was in excess of that ceiling.

87. Consequently, since liability was wrongly attributed to Akzo Nobel, there is no single economic entity capable of justifying the 10% ceiling being calculated on the basis of its consolidated turnover. According to the Decision, Akzo Nobel Chemicals, Akzo Nobel Chemicals International and Akzo Nobel Nederland also participated directly in the infringement, yet the Commission failed to establish that one of them exercised decisive influence over another.

88. The Commission states that it calculated the 10% ceiling on the basis of Akzo Nobel's consolidated turnover. The word undertaking' has the same meaning in Regulation No 1/2003 and in Articles 81 EC and 82 EC. Akzo Nobel was held liable on the ground that, together with the subsidiaries to which the Decision was addressed, it formed an undertaking within the meaning of Article 23(2) of Regulation No 1/2003. The Commission therefore did not err in calculating the ceiling.

89. Even on the assumption that the Commission was wrong to attribute joint and several liability to Akzo Nobel, first, the fact remains that the applicants did not base their second plea on such an error. The fact that they developed their second plea in that way for the first time in the reply constitutes, in reality, a new plea which is inadmissible under Article 48(2) of the Rules of Procedure. Second, the applicants did not seek a reduction in the amount of the fine, in the exercise of the Court's unlimited jurisdiction, in the event that the Court should consider that the Commission ought not to have addressed the Decision to Akzo Nobel. Third, the applicants did not claim that Akzo Nobel's subsidiaries did not form an undertaking for the purposes of Regulation No 1/2003.

Findings of the Court

90. The fact that several companies are held jointly and severally liable for a fine on the ground that they form an undertaking for the purposes of Article 81 EC does not mean, as regards the application of the maximum amount of 10% of turnover laid down by Article 23(2) of Regulation No 1/2003, that the obligation of each of them is limited to 10% of the turnover which it achieved during the last business year. The maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question (HFB and Others v Commission , paragraph 57 above, paragraphs 528 and 529).

91. Accordingly, regard being had to the considerations which gave rise to the rejection of the first plea, the Commission did not err by taking Akzo Nobel's consolidated turnover as a reference for the calculation of the ceiling in question. The second plea must therefore be rejected, without there being any need to adjudicate on the plea of inadmissibility raised by the Commission.

Third plea: breach of the obligation to state reasons

Arguments of the parties

92. The applicants contend that the reasoning which the Commission employed in order to establish Akzo Nobel's liability was based on incorrect grounds, in that the facts on which it relied are inadequate and inappropriate to justify that conclusion. Nor did the Commission explain why it ordered Akzo Nobel Functional Chemicals to pay a fine greater than 10% of its turnover. Those flaws render the reasoning in the Decision insufficient if not absent, which in itself constitutes sufficient ground for annulment of the Decision.

93. The Commission disputes the correctness of those arguments. The Decision contains clear grounds with regard to the liability of Akzo Nobel at recitals 172 to 175. So far as the fine imposed on Akzo Nobel Functional Chemicals is concerned, the Commission submits that it was not bound to state reasons for its calculation, since the 10% ceiling was not exceeded. In any event, the Decision provided the applicants with all the information necessary to bring their action and to submit their arguments. In the Commission's submission, the third plea must therefore also be rejected in its entirety.

Findings of the Court

94. As regards the reasons for Akzo Nobel's liability, it must be borne in mind that the obligation to provide a statement of reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see Case C17/99 France v Commission [2001] ECR I2481, paragraph 35 and the case-law cited).

95. In the present case, it must be held that the part of the present plea relating to the liability of Akzo Nobel goes to the correctness of the reasons for the decision, which have been examined in the context of the first plea (see paragraphs 67 to 85 above). In so far as that part of the present plea does not claim or substantiate a breach of essential procedural requirements, moreover, it is wholly unfounded in fact.

96. Furthermore, in so far as the present plea concerns the turnover of Akzo Nobel Functional Chemicals, it must be rejected on the ground that, as the turnover that could be lawfully taken into account was not exceeded (see paragraphs 90 and 91 above), the Commission was under no obligation to state reasons for the amount of the fine with particular regard to that company. The third plea must therefore be rejected.

97. It follows from the foregoing considerations that the application must be dismissed in its entirety.

Costs

98. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

(1) .

(1) Confidential data omitted.

DOCNUM	62005A0112
AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/12/12
LODGED	2005/03/02
JURCIT	11997E081 : N 32 58 64 67 85 90 11997E082 : N 58 64 32003R0001-A23P2 : N 90 32005D0566 : N 1 - 97 61969J0048 : N 64 61969J0052 : N 64 61973J0006 : N 64 61982J0107 : N 60 61 61990J0313 : N 31 61992A0102 : N 64 61994A0305 : N 59 60 61997J0310 : N 32 61998J0286 : N 60 61 61999A0009 : N 57 90 61999J0017 : N 94 62001A0203 : N 58 62001A0314 : N 60 62003A0071 : N 60
CONCERNS	Confirms 32005D0566 -
SUB	Competition

AUTLANG	English
MISCINF	POURVOI : C-97/08
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Netherlands
NOTES	Idot, Laurence: Nouvelles précisions sur les amendes, Europe 2008 Février Comm. no 60 p.28-29
PROCEDU	Action for annulment - unfounded
DATES	of document: 12/12/2007 of application: 02/03/2005

Case C-446/05

Criminal proceedings

against

Ioannis Doulamis

(Reference for a preliminary ruling from the Tribunal de Première Instance de Bruxelles)

(Article 81 EC, read in conjunction with Article 10 EC – National legislation prohibiting advertising of dental care services)

Summary of the Judgment

Competition – Community rules – Obligations of the Member States
(Arts 3(1)(g) EC, 10 EC and 81 EC)

Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector. Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. Such a law does not fall within any of the situations for the combined application of Articles 10 EC and 81 EC.

(see paras 20-21, 24, operative part)

Judgment of the Court (Second Chamber)
of 13 March 2008
Criminal proceedings against Ioannis Doulamis. Reference for a preliminary ruling: Tribunal de première instance de Bruxelles - Belgium. Article 81 EC, read in conjunction with Article 10 EC - National legislation prohibiting advertising of dental care services. Case C-446/05.

In Case C446/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de Première Instance de Bruxelles (Belgium), adjudicating on a criminal matter, made by decision of 7 December 2005, received at the Court on 14 December 2005, in the criminal proceedings against

Ioannis Doulamis,

intervening parties:

Union des Dentistes et Stomatologistes de Belgique (UPR),

Jean Totolidis,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk (Rapporteur), J.-C. Bonichot and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr. Doulamis, by E. Koeune, avocat,

- the Belgian Government, by A. Hubert, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

- the Commission of the European Communities, by F. Arbault, O. Beynet and K. Mojzesowicz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2007,

gives the following

Judgment

1. The reference for a preliminary ruling concerns the interpretation of Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC.

2. This reference was made in criminal proceedings brought against Mr Doulamis, a dental technician, for infringement of, first, legislation governing the exercise of the dental profession and the medical profession and, secondly, legislation governing advertising in dental care matters.

Legal context

3. Article 3 of the Law of 15 April 1958 on advertising in dental care matters (Moniteur belge of 5 May 1958, p. 3542) (the Law of 15 April 1958') imposes penalties on those who infringe Article 1 of that law, which is worded as follows:

No person may, whether directly or indirectly, engage in advertising of any kind with a view to treating or providing treatment, whether or not by a qualified person, in Belgium or abroad, for dental or oral ailments, lesions or abnormalities, by means, inter alia, of displays or signs, inscriptions or plaques liable to be misleading as to the lawful nature of the activity advertised, leaflets, circulars, handouts and brochures, via the media of the press, radio or the cinema, by conferring or promising to confer benefits of any kind such as discounts or the provision of free transport for patients, or through the intermediary of canvassers or other such intermediaries.

The act on the part of mutual clinics and hospitals of informing their members of the dates and times of consultations, the names of those holding consultations and any changes to these shall not constitute advertising for the purposes of this article.'

The dispute in the main proceedings and the question referred for a preliminary ruling

4. It is apparent from the order for reference that Mr Doulamis is charged, inter alia, with having placed advertisements in a telephone directory for the John Doulamis Dental Laboratory' and the John Doulamis Dental Clinic', which is prohibited under the Law of 15 April 1958. The first advertising insert was published in the dental laboratories section and the second in the dental clinics section. Those inserts contained factual information, such as the services provided, the address, telephone number and opening hours of the two establishments.

5. Before the national court, Mr Doulamis submitted that advertising is an indispensable instrument for free economic competition. Thus, having invoked the combined provisions of Articles 10 EC and 81 EC, he relied on the judgment in Case 267/86 Van Eycke [1988] ECR 4769 to assert that, in view of the obligation upon the Member States not to introduce or maintain in force measures which may render ineffective the competition rules applicable to undertakings, that part of the criminal proceedings brought against him which relate to advertising in health care matters are unfounded.

6. Mr Doulamis maintained that, in view of the activities in which he is engaged, the dental clinic of which he is the proprietor meets the criteria for constituting an undertaking' for the purpose of Article 81 EC, which applies to members of the liberal professions. The national court is inclined to the view that the defendant was engaged in the supply of professional services and in the capacity of operator and proprietor of a dental clinic.

7. The Tribunal de Première Instance de Bruxelles states that Article 3(1)(g), the second paragraph of Article 10 EC and Article 81 EC, read in conjunction, would appear to suggest that a Member State cannot introduce or maintain in force measures likely to undermine the effectiveness of competition rules applicable to undertakings.

8. In that connection, it states that the possibility that the provisions in the Law of 15 April 1958 are liable to undermine free trade between the Member States, in so far as they may jeopardise the attainment of the objectives of a single market between those States, cannot be excluded.

9. According to the national court, which refers in that regard to point 89 of the Opinion of Advocate General Jacobs in the case which gave rise to the judgment in Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I6451, owing to the heterogeneity of the professions and the specificities of the market in which they operate, it is necessary to assess, on a case by case basis, whether a restriction of conduct leads in fact on the market in issue to a restriction on competition within the meaning of Article 81 EC, when considered in the light of other Treaty provisions, such as Article 152 EC and Article 153 EC on the protection of public health and consumer protection, respectively.

10. Lastly, the national court observes that it is apparent from the Report of the Commission of the European Communities of 9 February 2004 on Competition in Professional Services [COM(2004)

83 final] that restrictions on advertising in that sector constitute interference with free competition.

11. In those circumstances, the Tribunal de Première Instance de Bruxelles decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

Must Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, be interpreted as precluding a national law - in the present case the Law of 15 April 1958 - which prohibits (any person or) dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind, whether directly or indirectly, in the dental care sector?'

The question referred for a preliminary ruling

Admissibility

12. The Belgian and Italian Governments express doubts as to the admissibility of the present request for a preliminary ruling.

13. In that regard, it must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see Case C-379/98 PreussenElektra [2001] ECR I2099, paragraph 38, and Case C-35/99 Arduino [2002] ECR I-1529, paragraph 24).

14. Nevertheless, in exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Arduino , paragraph 25, and Case C-425/06 Part Service [2008] ECR I0000, paragraph 34).

15. However, none of those conditions is satisfied in this case.

16. It must be noted that the order for reference defines the national factual and legislative context in which the question referred arises. Moreover, the referring court has set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling.

17. The reference for a preliminary ruling from the Tribunal de Première Instance de Bruxelles is therefore admissible.

Substance

18. By its question, the national court asks, in essence, whether Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector, in so far as such a prohibition is liable to constitute interference with free competition.

19. According to settled case-law, although it is true that Articles 81 EC and 82 EC are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating

from Member States, those articles, read in conjunction with Article 10 EC, which lays down a duty to cooperate, none the less require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see Joined Cases C94/04 and C202/04 Cipolla and Others [2006] ECR I11421, paragraph 46).

20. The Court has held that Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (Cipolla and Others , paragraph 47).

21. It must be noted that a law such as the Law of 15 April 1958, in so far as it prohibits dental care providers from advertising, does not fall within any of the situations for the combined application of Articles 10 EC and 81 EC.

22. As the Advocate General stated at point 71 of his Opinion, there is no evidence in the case in the main proceedings to show that the Law of 15 April 1958 encourages, reinforces or codifies concerted practices or decisions by undertakings. Nor is there anything in the order for reference to suggest that the law at issue has been divested of the character of legislation in that the Member State in question has delegated to private economic operators responsibility for taking decisions affecting the economic sphere.

23. Lastly, even if it were possible to classify Mr Doulamis, in his capacity as proprietor of a dental clinic, as an undertaking' for the purpose of Article 81 EC, as interpreted by the Court (see, to that effect, Case C41/90 Höfner and Elser [1991] ECR I1979, paragraph 21), it does not follow from the order for reference that what is at issue here is any kind of agreement between undertakings, decision by associations of undertakings or concerted practice which may affect trade between the Member States, the object or effect of which is to prevent, restrict or distort competition within the common market.

24. The answer to the question referred must therefore be that Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

Costs

25. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

DOCNUM 62005J0446

AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2008 Page 00000
DOC	2008/03/13
LODGED	2005/12/14
JURCIT	11997E003-P1LG : N 24 11997E010-L2 : N 19 - 22 24 11997E081 : N 19 - 24 11997E234 : N 12 - 17 61990J0041 : N 23 61998J0379 : N 13 61999J0035 : N 13 14 62004J0094 : N 19 20 62006J0425 : N 14
CONCERNS	Interprets 11997E003 -P1LG Interprets 11997E010 -L2 Interprets 11997E081 -
SUB	Competition
AUTLANG	French
OBSERV	Belgium ; Italy ; Member States ; Commission ; Institutions
NATIONA	Belgium
PROCEDU	Reference for a preliminary ruling
ADVGEN	Bot
JUDGRAP	Makarczyk
DATES	of document: 13/03/2008 of application: 14/12/2005

Judgment of the Court (Grand Chamber)
of 5 December 2006
Federico Cipolla v Rosaria Fazari, née Portolese (C-94/04) and Stefano Macrino and Claudia Capoparte v Roberto Meloni (C-202/04). References for a preliminary ruling: Corte d'appello di Torino (C-94/04) and Tribunale di Roma (C-202/04) - Italy. Community competition rules -National rules concerning lawyers' fees - Setting of professional scales of charges - Freedom to provide services. Joined cases C-94/04 and C-202/04.

1. Preliminary rulings - Jurisdiction of the Court

(Art. 234 EC)

2. Competition - Community rules - Obligations of the Member States

(Arts 10 EC, 81 EC and 82 EC)

3. Freedom to provide services - Treaty provisions - Field of application

(Art. 49 EC)

4. Freedom to provide services - Restrictions

(Art. 49 EC)

1. Where, in a reference for a preliminary ruling, all aspects of the main proceedings before the national court are confined within a single Member State, a reply might none the less be useful to the national court, in particular if its national law were to require that a national of that Member State must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation.

(see para. 30)

2. Although it is true that Articles 81 EC and 82 EC are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC, which lays down a duty to cooperate, none the less require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

In that connection, the view cannot be taken that a Member State has delegated to private economic operators responsibility for taking decisions affecting the economic sphere, which would have the effect of depriving the provisions of the character of legislation where, first, the trade organisation concerned is responsible only for producing a draft scale which, as such, is not binding since the Minister has the power to have the draft amended by that organisation and, secondly, the national legislation provides that fees are to be settled by the courts on the basis of the criteria referred to by that same legislation and, moreover, in certain exceptional circumstances and by duly reasoned decision, the court may depart from the maximum and minimum limits fixed. In those circumstances, the Member State is not open to the criticism that it requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC of the Treaty or reinforces their effects, or requires or encourages abuses of a dominant position contrary to Article 82 EC or reinforces the effects of such abuses.

It follows that Articles 10 EC , 81 EC and 82 EC do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of members of the Bar, a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those, such as out-of-court services, which may also be provided by any other economic operator not subject to that scale.

(see paras 46-47, 50-54, operative part 1)

3. Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

Furthermore, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.

(see paras 56-57)

4. A Member State's prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyers' fees for services which are (a) court services and (b) reserved to lawyers is liable to render access to the legal services market in that Member State more difficult for lawyers established in another Member State and therefore is likely to restrict the exercise of their activities providing services in that Member State. That prohibition therefore amounts to a restriction within the meaning of Article 49 EC.

That prohibition deprives lawyers established in another Member State of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad.

Likewise, the prohibition thus laid down limits the choice of service recipients in that Member State, because they cannot resort to the services of lawyers established in other Member States who would offer their services in that Member State at a lower rate than the minimum fees set by the scale.

However, such a prohibition may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.

In that respect, first, the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest capable of justifying a restriction on freedom to provide services, on condition, first, that the national measure at issue in the main proceedings is suitable for securing the attainment of the objective pursued and, secondly, it does not go beyond what is necessary in order to attain that objective.

It is a matter for the national court to decide whether the restriction on freedom to provide services introduced by that national legislation fulfils those conditions. For that purpose, it is for that court to take account of the factors set out in the following paragraphs.

Thus, it must be determined, in particular, whether there is a correlation between the level of fees and the quality of the services provided by lawyers and whether, in particular, the setting of such minimum fees constitutes an appropriate measure for attaining the objectives pursued, namely the protection of consumers and the proper administration of justice.

Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in the context of a market which is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.

Account must also be taken of the specific features both of the market in question and the services in question and, in particular, of the fact that, in the field of lawyers' services, there is usually an asymmetry of information between client-consumers' and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them.

However, the national court will have to determine whether professional rules in respect of lawyers, in particular rules relating to organisation, qualifications, professional ethics, supervision and liability, suffice in themselves to attain the objectives of the protection of consumers and the proper administration of justice.

It follows that legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyers' fees, for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49 EC. It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate having regard to those objectives.

(see paras 58-61, 64-70, operative part 2)

In Joined Cases C94/04 and C202/04,

REFERENCES for a preliminary ruling under Article 234 EC from the Corte d'appello di Torino (Italy) and the Tribunale di Roma (Italy), the first made by decisions of 4 February and 5 May 2004 and the second by decision of 7 April 2004, received at the Court on 25 February, 18 May and 6 May 2004 respectively, in the proceedings

Federico Cipolla (C94/04)

v

Rosaria Fazari, née Portolese,

and

Stefano Macrino,

Claudia Capodarte (C202/04)

v

Roberto Meloni,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C. W. A. Timmermans, A. Rosas, R. Schintgen, J. Kluka, Presidents of Chambers, J. Malenovsku, U. Lhmus (Rapporteur) and E. Levits, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator, having regard to the written procedure and further to the hearing on 25 October 2005,

after considering the observations submitted on behalf of:

- Mr Cipolla, by G. Cipolla, avvocatessa,

- Mr Meloni, by S. Sabbatini, D. Condello, G. Scassellati Sforzolini and G. Rizza, avvocati,

- the Italian Government, by I.M. Braguglia, acting as Agent, and by P. Gentili, avvocato dello Stato,

- the German Government, by A. Dittrich, C.D. Quassowski and M. Lumma, acting as Agents,

- the Austrian Government, by E. Riedl, acting as Agent,

- the Commission of the European Communities, by E. Traversa, R. Wainwright, F. Amato and K. Mojzesowicz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 February 2006,

gives the following

Judgment

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

1. Articles 10 EC , 81 EC and 82 EC do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers such as the Consiglio nazionale forense (National Lawyers' Council), a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those, such as out-of-court services, which may also be provided by any other economic operator not subject to that scale.

2. Legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyers' fees, such as that at issue in the main proceedings, for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49 EC. It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate having regard to those objectives.

1. These references for a preliminary ruling concern the interpretation of Articles 10 EC, 49 EC, 81 EC and 82 EC.

2. The references were made in the course of proceedings between two lawyers and their respective clients in respect of the payment of fees.

Relevant provisions

3. Royal Decree-Law No 1578 of 27 November 1933 (GURI No 281 of 5 December 1933), converted into Law No 36 of 22 January 1934 (GURI No 24 of 30 January 1934), as subsequently amended (the Royal Decree-Law'), provides that the Consiglio Nazionale Forense (National Lawyers' Council, the CNF') established under the auspices of the Minister of Justice, is to be composed of lawyers elected by their fellow members, with one representative for each appeal court district.

4. Article 57 of the Royal Decree-Law provides that the criteria for determining fees and emoluments payable to lawyers and procuratori' in respect of civil and criminal proceedings and out-of-court work are to be set every two years by decision of the CNF. When the CNF has decided upon the

scale of lawyers' fees (the scale'), it must be approved under Italian legislation by the Minister of Justice after he has obtained the opinion of the Comitato Interministeriale dei Prezzi (Interministerial Committee on Prices, the CIP) and consulted the Consiglio di Stato (Council of State).

5. Article 58 of the Royal Decree-Law provides that those criteria are to be based on the monetary value of disputes, the level of the court seised and, in criminal matters, the duration of the proceedings. For each procedural step, or series of steps, the scale sets maximum and minimum fees.

6. Article 60 of the Royal Decree-Law provides that fees are to be settled by the court on the basis of those criteria, having regard to the seriousness and number of the issues dealt with. That settlement must remain within the maximum and minimum limits set beforehand. However, in cases of exceptional importance, taking account of the special nature of the disputes and where the inherent value of the service justifies it, the court may exceed the maximum limit set by the scale. Conversely, where the case is easy to deal with, the court may fix fees below the minimum limit. In both cases, the court must give reasons for its decision.

7. Article 2233 of the Italian Civil Code provides, generally, that remuneration under a contract for provision of services which has not been agreed between the parties and cannot be determined by reference to the applicable scales or custom and practice is to be determined by the court after it has heard the opinion of the professional association to which the provider of services belongs. However, as regards the profession of lawyer, Article 24 of Law No 794 of 13 June 1942 (GURI No 172 of 23 July 1942) provides that derogation may not be made from the minimum fees set by the scale for lawyers' court services and that any agreement to the contrary is void. According to the case-law of the Corte suprema di cassazione (Court of Cassation), that rule also applies to lawyers' out-of-court services.

8. The scale at issue in Case C-202/04 was set by decision of the CNF of 12 June 1993, as amended on 29 September 1994, and was approved by Ministerial Decree No 585 of 5 October 1994 (GURI No 247 of 21 October 1994). Article 2 of that decree provides that the increases set out in the tables in the annex shall apply with effect from 1 October 1994 as to 50%, and as to the remaining 50% with effect from 1 April 1995'. That staggered increase originated in the comments made by the CIP, which had taken particular account of the rise in inflation. Before approving the scale, the Minister of Justice had consulted the CNF a second time, which had accepted the proposal to postpone the application of the scale at its meeting of 29 September 1994.

9. The scale comprises three categories of remuneration: (a) fees, disbursements and emoluments in respect of lawyers' court services in civil and administrative proceedings; (b) fees in respect of legal services in criminal proceedings; (c) fees and emoluments in respect of out-of-court work.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C94/04

10. Mrs Fazari (née Portolese) and two other owners of adjoining land located in the municipality of Moncalieri appointed a lawyer, Federico Cipolla, to bring proceedings against that municipality for compensation for the emergency occupation of that land which was ordered solely by decision of the mayor of Moncalieri and was not followed by an expropriation order. Mr Cipolla drew up three separate summonses and registered three actions against that municipality with the Tribunale di Torino (Turin District Court).

11. The dispute was subsequently resolved by means of a settlement made on the initiative of one of the owners in question but without Mr Cipolla's involvement.

12. Mr Cipolla, who before drawing up and notifying the three summonses had received LIT 1 850 000 from each of the three applicants in the main proceedings, apparently as advance payment for

his professional services, issued Mrs Fazari with an invoice totalling LIT 4 125 000 covering his fees and various disbursements. Mrs Fazari refused to pay that sum. The ensuing dispute was brought before the Tribunale di Torino which, by judgment of 12 June 2003, took judicial notice of the payment of the sum of LIT 1 850 000 and rejected Mr Cipolla's demand for payment of LIT 4 125 000. Mr Cipolla appealed against that judgment before the Corte d'appello di Torino (Turin Court of Appeal) seeking, inter alia, application of the scale.

13. According to the decision of the national court, in the proceedings brought before that court the question arises whether, if the existence an agreement between the parties relating to the flat-rate remuneration of the lawyer is proved, that alleged agreement relating to the flat-rate sum of LIT 1 850 000, such an agreement ought, despite the Italian legislation, to be deemed valid on the ground that it would be contrary to the Community competition rules for it to be automatically replaced by a calculation of the lawyer's remuneration on the basis of the scale.

14. In addition, the national court notes that, if a professional who did not live in Italy supplied legal services to a recipient living in that Member State and the contract concerning those services was subject to Italian law, that provision of legal services would be subject to the absolute prohibition of derogation from the remuneration set by the scale. Therefore in that case the binding minimum amount would have to be applied. That prohibition would therefore have the consequence of hindering other lawyers' access to the Italian services market.

15. In those circumstances, the Corte d'appello di Torino decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Does the principle of competition under Community law, as set out in Articles 10 EC, 81 EC and 82 EC, also apply to the provision of legal services?

(2) Does that principle permit a lawyer's remuneration to be agreed between the parties, with binding effect?

(3) Does that principle preclude an absolute prohibition of derogation from the lawyers' fees?

(4) Does the principle of free movement of services, as laid down in Articles 10 EC and 49 EC, also apply to the provision of legal services?

(5) If so, is that principle compatible with the absolute prohibition of derogation from lawyers' fees?'

Case C-202/04

16. On the basis of an opinion from the lawyers' association and in accordance with the scale, Mr Meloni, a lawyer, sought and obtained an order that Ms Capodarte and Mr Macrino pay fees relating to certain out-of-court services he had provided to them concerning copyright, comprising inter alia oral opinions and letters to the opposing party's lawyer.

17. Ms Capodarte and Mr Macrini contested that order before the Tribunale di Roma (District Court of Rome), pleading inter alia that the fees demanded by Mr Meloni were disproportionate having regard to the importance of the case dealt with and the services actually performed by the latter.

18. In order to determine the amount of the fees payable to Mr Meloni for those services, the Tribunale di Roma considers that it must assess whether that scale, in so far as it applies to lawyers in respect of outofcourt work, is compatible with the rules of the EC Treaty, having regard in particular to the fact that the persons concerned did not have to appoint a lawyer in order to obtain the out-of-court services in question.

19. Accordingly, the Tribunale di Roma decided to stay the proceedings and refer the following

question to the Court for a preliminary ruling:

Do Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of lawyers, a scale fixing minimum and maximum fees for members of the profession in respect of services rendered in connection with activities (so-called out-of-court work) that are not reserved to lawyers but may be performed by anyone?'

20. On account of the connection between the two main proceedings, they should be joined for the purposes of the judgment under Article 43 of the Rules of Procedure, read in conjunction with Article 103 of those Rules.

The questions referred to the Court

Admissibility

Case C-94/04

- Observations submitted to the Court

21. According to Mr Cipolla, the questions referred by the national court are inadmissible on the grounds that they are not relevant to the resolution of the dispute in the main proceedings and are hypothetical.

22. As regards the first plea of inadmissibility, Mr Cipolla maintains that the applicable national law does not require the national court to decide on the existence and lawfulness of an agreement between a lawyer and his client, contrary to what is stated in the decision making the reference. The absence of agreement between those parties and the description of the sum paid by the client as an advance payment' for professional services have become res judicata since they were not challenged on appeal.

23. As for the second plea of inadmissibility, Mr Cipolla claims that the validity of an agreement made between a lawyer and his client must be assessed only if it is shown that such an agreement exists. However, that is not the case here. Accordingly, the questions referred by the Corte d'appello di Torino should be treated in the same way as a request for an advisory opinion.

24. The German Government considers that since the facts at issue in the main proceedings do not include any transborder element, Article 49 EC does not apply. The Commission of the European Communities, for its part, relying on recent case-law of the Court, and takes the view that the reference for a preliminary ruling is admissible as it concerns the interpretation of Article 49 EC.

- The Court's answer

25. As regards Mr Cipolla's pleas of inadmissibility, it should be recalled that questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see Case C300/01 Salzmann [2003] ECR I-4899, paragraphs 29 and 31). The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39, and Case C-466/04 Acereda Herrera [2006] ECR I-0000, paragraph 48).

26. That presumption of relevance cannot be rebutted by the simple fact that one of the parties

to the main proceedings contests certain facts, such as those set out in paragraph 22 of this judgment, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject-matter of those proceedings depend.

27. Accordingly, it must be considered that, as is clear from the decision making the reference, the main proceedings concern whether there was an agreement concluded between a lawyer and his clients relating to the lawyer's flat-rate remuneration and whether it should be deemed valid on the ground that it would be contrary to the Community competition rules for it to be automatically replaced by a calculation of the lawyer's remuneration on the basis of the scale in force in the Member State concerned.

28. In that regard, it must be stated that it is not manifest that the interpretation of Community law sought by the national court bears no relation to the actual facts of the main action or its purpose or that the questions on the interpretation of those rules are hypothetical.

29. Accordingly, even if the existence of the agreement at issue in the main proceedings is not established, it is conceivable that the interpretation of Community law sought by the national court, which may make it possible for the latter to assess the compatibility of the scale with the competition rules introduced by the Treaty, will be of use to that court for the purpose of deciding the dispute before it. That dispute relates principally to the settlement of lawyer's fees which, as stated in paragraph 6 of this judgment, is to be decided by the court and, subject to certain exceptions, within the maximum and minimum limits set beforehand by the Minister of Justice.

30. Finally, as regards particularly the questions concerning the interpretation of Article 49 EC, although it is common ground that all aspects of the main proceedings before the national court are confined within a single Member State, a reply might none the less be useful to the national court, in particular if its national law were to require, in proceedings such as those in this case, that an Italian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (see, in particular, Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941, paragraph 29).

31. It must therefore be considered whether the provisions of the Treaty on freedom to provide services, of which the interpretation is sought by that court, preclude the application of national legislation law such as that at issue in the main proceedings in so far as it applies to persons who live in Member States other than the Italian Republic.

32. Having regard to the foregoing, it must be held that the reference for a preliminary ruling is admissible.

Case C-202/04

- Observations submitted to the Court

33. Mr Meloni pleads the inadmissibility of the question referred by the Tribunale di Roma on the ground that there is no link between that question and the outcome of the proceedings before that court, which concerns the application of the scale to the provision of out-of-court services by a lawyer enrolled at the Bar.

34. In addition, the national court did not indicate the precise reasons for its uncertainty as to the interpretation of Community law.

35. The Italian Government submits that, when the parties have not fixed the fees by contract and the client unilaterally challenges the fees invoiced by the professional, as in the dispute in the main proceedings, under Italian law it is for the court before which the dispute has been brought to set those fees as it sees fit. Accordingly, the question of the compatibility of the scale in respect of out-of-court services provided by lawyers with Article 10 EC and 81 EC is

irrelevant for the purposes of the outcome of the main proceedings.

36. That government also challenges the relevance of the question referred by the national court in the light of the fact that there is no anti-competitive practice in the case in the main proceedings, either in establishing the scale or on account of the conduct of operators.

- The Court's answer

37. In respect of the first plea of inadmissibility relied on by Mr Meloni, it should be noted that the dispute relates to the application of the scale to out-of-court services provided by a lawyer enrolled at the Bar. By its question, the national court asks whether the competition rules preclude such application where that same scale does not apply to out-of-court services provided by a person not enrolled at the Bar. In those circumstances, the presumption of relevance attaching to the questions on the interpretation of Community law referred by the national court cannot be rebutted.

38. The plea of inadmissibility alleging that the national court did not indicate the precise reasons for its uncertainty as to the interpretation of Community law cannot succeed either. According to the case-law of the Court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (see, inter alia, order in Case C-116/00 Laguillaumie [2000] ECR I-4979, paragraph 16). The decision making the reference fully satisfies such a requirement, as moreover the Advocate General pointed out in paragraph 24 of his Opinion.

39. As regards the first plea of inadmissibility put forward by the Italian Government, the national court takes as its premise that, in the context of the dispute before it, under Italian law it must set the fee payable to the lawyer by reference to the scale applicable to lawyers in respect of out-of-court work.

40. As is recalled at paragraph 25 of this judgment, it is not a matter for the Court to determine the accuracy of the factual and legislative context defined by the national court and in which the questions on the interpretation of Community law which it submits to the Court arise.

41. In those circumstances, the presumption of relevance attaching to the question referred to the Court has not been rebutted.

42. As regards the second plea of inadmissibility raised by the Italian Government, it should be recalled that, as was stated in paragraph 37 of this judgment, by its question the national court asks whether the competition rules established by the Treaty preclude application of the scale in the dispute before it. Accordingly, whether there is an anti-competitive practice in the case in the main proceedings is part of the very subject-matter of the question of interpretation referred by the national court and cannot be regarded as irrelevant in this case.

43. It follows that the reference for a preliminary ruling from the Tribunale di Roma is admissible.

Substance

The first three questions referred in Case C-94/04 and the question referred in Case C-202/04

44. By those questions, which can conveniently be dealt with together by way of a reformulation which takes account of the relevant aspects of the two cases and in particular of the fact that, in the disputes in the main proceedings, minimum fees are at issue, the national courts ask, essentially, whether Articles 10 EC, 81 EC and 82 EC preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers such as the CNF, a scale fixing a minimum fee for members of the legal profession from which there

can generally be no derogation in respect of either services reserved to those members or those such as out-of-court services which may also be provided by any other economic operator not subject to that scale.

45. As a preliminary point, it should be noted that, since the scale extends to the whole of the territory of a Member State, it may affect trade between Member States within the meaning of Articles 81(1) EC and 82 EC (see, to that effect, Case 8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29; Case C-179/90 Merci convenzionali porto di Genova [1991] ECR I-5889, paragraphs 14 and 15; and Case C-35/99 Arduino [2002] ECR I-1529, paragraph 33).

46. According to settled case-law, although it is true that Articles 81 EC and 82 EC are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC, which lays down a duty to cooperate, none the less require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see, in particular, the order in Case C250/03 Mauri [2005] ECR I-1267, paragraph 29, and the case-law cited).

47. The Court has held, in particular, that Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (order in Mauri , paragraph 30, and the case-law cited).

48. In that respect, the fact that a Member State requires a professional organisation composed of lawyers, such as the CNF, to produce a draft scale of fees does not, in the circumstances specific to the cases in the main proceedings, appear to establish that that State has divested the scale finally adopted of its character of legislation by delegating to lawyers responsibility for taking decisions concerning them.

49. Although the national legislation at issue in the main proceedings does not contain either procedural arrangements or substantive requirements capable of ensuring with reasonable probability that, when producing the draft scale, the CNF conducts itself like an arm of the State working in the public interest, it does not appear that the Italian State has waived its power to make decisions of last resort or to review implementation of that scale (see Arduino , paragraphs 39 and 40).

50. First, the CNF is responsible only for producing a draft scale which, as such, is not binding. Without the Minister of Justice's approval, the draft scale does not enter into force and the earlier approved scale remains applicable. Accordingly, that Minister has the power to have the draft amended by the CNF. Furthermore, the Minister is assisted by two public bodies, the Consiglio di Stato and the CIP, whose opinions he must obtain before the scale can be approved (see Arduino, paragraph 41).

51. Secondly, Article 60 of the Royal Decree-Law provides that fees are to be settled by the courts on the basis of the criteria referred to in Article 57 of that decree-law, having regard to the seriousness and number of the issues dealt with. Moreover, in certain exceptional circumstances and by duly reasoned decision, the court may depart from the maximum and minimum limits fixed pursuant to Article 58 of the Royal Decree-Law (see, to that effect, Arduino , paragraph 42).

52. In those circumstances, the view cannot be taken that the Italian State has waived its power by delegating to private economic operators responsibility for taking decisions affecting the economic sphere, which would have the effect of depriving the provisions at issue in the main proceedings of the character of legislation (see Arduino , paragraph 43, and the order in Mauri , paragraph

36.)

53. Nor, for the reasons set out in paragraphs 50 and 51 of this judgment, is the Italian State open to the criticism that it requires or encourages the adoption by the CNF of agreements, decisions or concerted practices contrary to Article 81 EC of the Treaty or reinforces their effects, or requires or encourages abuses of a dominant position contrary to Article 82 EC or reinforces the effects of such abuses (see, to that effect, Arduino , paragraph 43, and the order in Mauri , paragraph 37).

54. The answer to the first three questions referred to the Court in Case C94/04 and to the question referred in Case C-202/04 must be that Articles 10 EC, 81 EC and 82 EC do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers such as the CNF, a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those such as out-of-court services which may also be provided by any other economic operator not subject to that scale.

The fourth and fifth questions referred in Case C-94/04

55. By those two questions, the Corte d'appello di Torino asks, essentially, whether Article 49 EC precludes legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale, such as that at issue in the main proceedings, for services which are (a) court services and (b) reserved to lawyers.

56. Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in particular, Case C17/00 De Coster [2001] ECR I-9445, paragraph 29, and Joined Cases C544/03 and C545/03 Mobistar and Belgacom Mobile [2005] ECR I7723, paragraph 29).

57. Furthermore, the Court has already held that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see De Coster , paragraph 30, and the case-law cited, and Mobistar and Belgacom Mobile , paragraph 30).

58. The prohibition of derogation, by agreement, from the minimum fees set by a scale such as that laid down by the Italian legislation is liable to render access to the Italian legal services market more difficult for lawyers established in a Member State other than the Italian Republic and therefore is likely to restrict the exercise of their activities providing services in that Member State. That prohibition therefore amounts to a restriction within the meaning of Article 49 EC.

59. That prohibition deprives lawyers established in a Member State other than the Italian Republic of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad (see, by analogy, Case C-442/02 CaixaBank France [2004] ECR I-8961, paragraph 13).

60. Likewise, the prohibition thus laid down limits the choice of service recipients in Italy, because they cannot resort to the services of lawyers established in other Member States who would offer their services in Italy at a lower rate than the minimum fees set by the scale.

61. However, such a prohibition may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues

and does not go beyond what is necessary in order to attain it (see, inter alia, Case C-398/95 SETTG [1997] ECR I-3091, paragraph 21, and Servizi Ausiliari Dottoro Commercialisti , paragraph 37).

62. In order to justify the restriction on freedom to provide services which stems from the prohibition at issue, the Italian Government submits that excessive competition between lawyers might lead to price competition which would result in a deterioration in the quality of the services provided to the detriment of consumers, in particular as individuals in need of quality advice in court proceedings.

63. According to the Commission, no causal link has been established between the setting of minimum levels of fees and a high qualitative standard of professional services provided by lawyers. In actual fact, quasi-legislative measures such as, inter alia, rules on access to the legal profession, disciplinary rules serving to ensure compliance with professional ethics and rules on civil liability have, by maintaining a high qualitative standard for the services provided by such professionals which those measures guarantee, a direct relationship of cause and effect with the protection of lawyers' clients and the proper working of the administration of justice.

64. In that respect, it must be pointed out that, first, the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest capable of justifying a restriction on freedom to provide services (see, to that effect, Case C3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 31, and the case-law cited, and Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 33), on condition, first, that the national measure at issue in the main proceedings is suitable for securing the attainment of the objective pursued and, secondly, it does not go beyond what is necessary in order to attain that objective.

65. It is a matter for the national court to decide whether, in the main proceedings, the restriction on freedom to provide services introduced by that national legislation fulfils those conditions. For that purpose, it is for that court to take account of the factors set out in the following paragraphs.

66. Thus, it must be determined, in particular, whether there is a correlation between the level of fees and the quality of the services provided by lawyers and whether, in particular, the setting of such minimum fees constitutes an appropriate measure for attaining the objectives pursued, namely the protection of consumers and the proper administration of justice.

67. Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.

68. Account must also be taken of the specific features both of the market in question, as noted in the preceding paragraph, and the services in question and, in particular, of the fact that, in the field of lawyers' services, there is usually an asymmetry of information between client-consumers' and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them (see, in particular, the Report on Competition in Professional Services in Communication from the Commission of 9 February 2004 (COM(2004)83 final, p. 10)).

69. However, the national court will have to determine whether professional rules in respect of lawyers, in particular rules relating to organisation, qualifications, professional ethics, supervision and liability, suffice in themselves to attain the objectives of the protection of consumers and

the proper administration of justice.

70. Having regard to the foregoing, the answer to the fourth and fifth questions referred in Case C-94/04 must be that legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyer's fees such as that at issue in the main proceedings for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49 EC. It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.

Costs

71. Since these proceedings are, for the parties to the main proceedings, a step in the actions before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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OBSERV Italy ; Federal Republic of Germany ; Austria ; Member States ; Commission ; Institutions

NATIONA Italy

NATCOUR *P1* Corte d'appello di Torino, ordinanza del 26/03/2008 17/04/2008 (723/08)

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PROCEDU Reference for a preliminary ruling

ADVGEN Poiares Maduro

JUDGRAP Lohmus

DATES of document: 05/12/2006
of application: 25/02/2004

Affaire C-49/07

Motosykletistiki Omospondia Ellados NPID (MOTOE)

contre

Elliniko Dimosio

(demande de décision préjudicielle, introduite par le Dioikitiko Efeteio Athinon)

«Articles 82 CE et 86 CE — Notion d'‘entreprise’ — Association à but non lucratif représentant, en Grèce, la Fédération internationale de motocyclisme — Notion d'‘activité économique’ — Droit spécial en vertu de la loi de donner un avis conforme sur les demandes d'autorisation présentées en vue de l'organisation de courses de motocycles — Exercice en parallèle d'activités telles que l'organisation de courses de motocycles ainsi que la passation de contrats de parrainage, de publicité et d'assurance»

Sommaire de l'arrêt

1. *Concurrence — Règles communautaires — Entreprise — Notion*

(Art. 81 CE et 82 CE)

2. *Concurrence — Entreprises publiques et entreprises auxquelles les États membres accordent des droits spéciaux ou exclusifs*

(Art. 82 CE et 86 CE)

1. Une personne morale dont les activités consistent à organiser des compétitions sportives et à conclure dans ce cadre des contrats de parrainage, de publicité et d'assurance, destinés à exploiter commercialement ces compétitions, et constituent pour cette entité une source de revenus, doit être qualifiée d'entreprise au sens du droit communautaire de la concurrence. La circonstance qu'une activité économique a un rapport avec le sport ne fait pas obstacle à l'application des règles du traité, dont celles qui régissent le droit de la concurrence.

Cette conclusion n'est pas remise en cause par le fait que l'entité dispose du pouvoir de donner son avis conforme sur les demandes d'autorisation présentées aux autorités publiques en vue de l'organisation des compétitions, car il y a lieu de distinguer la participation de cette entité au processus décisionnel de ces autorités et les activités économiques qu'elle exerce, telles l'organisation et l'exploitation commerciale des compétitions. La circonstance qu'elle ne poursuit pas de but lucratif, dès lors que son offre de biens et de services se trouve en concurrence avec celle d'autres opérateurs, ne fait pas obstacle non plus à cette conclusion. À cet égard, des associations sans but lucratif, qui offrent des biens ou des services sur un marché donné, peuvent se trouver mutuellement en position de concurrence. En effet, le succès ou la survie économique de telles associations dépend, à long terme, de la capacité de ces dernières à imposer, sur le marché concerné, les prestations qu'elles offrent, au détriment de celles qui sont proposées par les autres opérateurs.

(cf. points 22-23, 26-28)

2. Les articles 82 CE et 86 CE s'opposent à une réglementation nationale qui confère à une personne morale, qui organise des compétitions sportives et conclut dans ce cadre des contrats de parrainage, de publicité et d'assurance, le pouvoir de donner un avis conforme sur les demandes d'autorisation présentées en vue de l'organisation de telles compétitions, sans que ce pouvoir soit assorti de limites, d'obligations et d'un contrôle.

En effet, un système de concurrence non faussée, tel que celui prévu par le traité, ne peut être garanti que si l'égalité des chances entre les différents opérateurs économiques est assurée. Confier à une personne morale, qui, elle-même, organise et exploite commercialement des compétitions sportives, la tâche de donner à l'administration compétente un avis conforme sur les demandes d'autorisation présentées en vue de l'organisation de telles compétitions, revient de facto à lui conférer le pouvoir de désigner les personnes autorisées à organiser lesdites compétitions ainsi que de fixer les conditions dans lesquelles ces dernières sont organisées, et à octroyer, ainsi, à cette entité, un avantage évident sur ses concurrents. Un tel droit peut donc amener l'entreprise qui en dispose à empêcher l'accès des autres opérateurs au marché concerné ou à fausser la concurrence en favorisant les compétitions qu'elle organise ou celles à l'organisation desquelles elle participe.

(cf. points 51-53 et disp.)

JUDGMENT OF THE COURT (Grand Chamber)

1 July 2008 (*)

(Articles 82 EC and 86 EC – Concept of 'undertaking' – Non-profit-making association representing, in Greece, the International Motorcycling Federation – Concept of 'economic activity' – Special legal right to give consent to applications for authorisation to organise motorcycling events – Exercise in parallel of activities such as the organisation of motorcycling events and the conclusion of sponsorship, advertising and insurance contracts)

In Case C-49/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Diikitiko Efetio Athinon (Greece), made by decision of 21 November 2006, received at the Court on 5 February 2007, in the proceedings

Motosykletistiki Omospondia Ellados NPID (MOTOE)

v

Elliniko Dimosio,

THE COURT (Grand Chamber),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, J.N. Cunha Rodrigues, A. Borg Barthet, M. Ilešič, J. Malenovský, J. Klučka (Rapporteur), T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 January 2008,

after considering the observations submitted on behalf of:

– the Motosykletistiki Omospondia Ellados NPID (MOTOE), by A. Pliakos, dikigoros,

– the Greek Government, by S. Spyropoulos, K. Boskovits, S. Trekli and Z. Chatzipavlou, acting as Agents,

– the Commission of the European Communities, by T. Christoforou and F. Amato, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 82 EC and 86 EC.

2 The reference has been made in the course of proceedings between the Motosykletistiki

Omospondia Ellados NPID (MOTOE) (Greek Motorcycling Federation; 'MOTOE') and the Elliniko Dimosio (Greek State) regarding financial compensation for the non-material harm which MOTOE claims to have suffered as a result of the implicit refusal by the Greek State to grant it authorisation to organise motorcycling competitions.

Legal context

3 Under Article 49 of the Greek Road Traffic Code, in the version resulting from Law No 2696/1999 (FEK A' 57):

'1. Competitions involving … motorcycles or mopeds on public or private roads or spaces are allowed to take place only after authorisation has been granted.

2. Authorisation under the previous paragraph shall be given:

…

(c) for all competitions involving … motorcycles or mopeds, by the Minister for Public Order or the authorities empowered by him, following the consent of the legal person which officially represents in Greece the … Fédération Internationale de Motocyclisme (International Motorcycling Federation) [("the FIM")]'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

4 MOTOE is a non–profit–making association governed by private law whose object is the organisation of motorcycling competitions in Greece. Its members include various regional motorcycling clubs.

5 On 13 February 2000, that association submitted to the competent minister an application for authorisation to organise competitions within the framework of the MOTOE Panhellenic Cup in accordance with a programme appended to that application.

6 In accordance with Article 49(2) of the Greek Road Traffic Code, that programme was sent to Elliniki Leskhi Aftokinitou kai Periigiseon (Automobile and Touring Club of Greece; 'ELPA'), a legal person and a non–profit–making association which represents the FIM in Greece, for it to consent for the purposes of granting the authorisation applied for.

7 By letter of 16 March 2000 ELPA requested MOTOE, first, to communicate to it specific rules for each of the planned events two months before the date upon which it would take place, so as to allow scrutiny of the list of participants, the route or track for the race, the safety measures adopted and, more generally, all the conditions for the safe running of the event. Second, it asked the clubs organising the events to lodge a copy of their statutes with Ethniki Epitropi Agonon Motosykletas (the National Motorcycle-Racing Committee; 'ETHEAM'), created by ELPA and entrusted with organising and supervising motorcycling events.

8 By application No 28/5.5.2000 sent to the competent ministry, MOTOE restated its request, in respect of six clubs, for authorisation to hold six races on dates from 9 July 2000 to 26 November 2000. It appended to that application the specific rules for the holding of those events as well as copies of those clubs' statutes. That application was also forwarded to ELPA with a view to its giving a declaration of consent for the holding of those events.

9 ELPA and ETHEAM sent MOTOE a document reminding it of certain rules relating to the organisation of motorcycling events in Greece. In particular, it is stated in that document that championships, cups and prizes organised in the framework of motorcycling events are announced by ETHEAM following authorisation from ELPA, which is the only legal representative of the FIM in Greece. If an entity or club which satisfies the necessary requirements for the organising and holding of events wishes a specific cup or prize to be announced, it must, according to that document, submit the announcement to ETHEAM. ETHEAM, after assessing the terms of that announcement, makes a decision in which it also defines the conditions for holding the event, in accordance with the international and national rules. For consent for organisation of an event to be granted, including within the framework of a cup or prize, each organiser who has taken on one of those events must

satisfy the requirements laid down in the National Motorcycle Competition Code and ETHEAM's circulars. ELPA and ETHEAM also reminded MOTOE that if, in the course of the year, an organiser requests that additional events be announced, the dates of those events must not affect the dates already scheduled, and this must be in the interests of both the racers and the organisers. For that reason, the programme of events to be organised during 2001 had to be lodged with ELPA and ETHEAM no later than 15 September 2000.

10 In reply to MOTOE's request seeking information on the outcome of its applications for authorisation, the competent ministry indicated to MOTOE, in August 2000, that it had not received a document from ELPA with its consent under Article 49 of the Greek Road Traffic Code.

11 Pleading the unlawfulness of that implicit rejection, MOTOE brought an action before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens), seeking compensation of GRD 5 000 000 for the non-material damage that it claims to have suffered on account of its being unable to hold the events in question.

12 MOTOE claimed that Article 49 of the Greek Road Traffic Code is contrary, first, to the constitutional principle that administrative organs must be impartial and, second, to Articles 82 EC and 86(1) EC, on the ground that the national provision at issue enables ELPA, which itself organises motorcycling competitions, to impose a monopoly in that field and to abuse that position.

13 ELPA intervened before the Diikitiko Protodikio Athinon in support of the Greek State. ELPA annexed to its statement in intervention, amongst other documents, its statutes of association of 1924, and its yearbook for 2000 regarding motorcycling events which was published by ETHEAM. That yearbook includes ETHEAM's circulars for 2000, which relate, inter alia, to the supporting documents that competitors had to provide in order to be entitled to a licence, to the rules for events which had to be lodged, to the determination of fees and to other issues of a financial nature. The yearbook also contains the Ethnikos Athlitikos Kanonismos Motosikletas (National Sporting Rules for Motorcycling; 'the EAKM').

14 As regards EAKM, the following must be mentioned:

– Article 10.7 thereof states that every sports meeting which includes events in respect of ELPA and ETHEAM championships, cups or prizes may be combined with the commercial promotion of a sponsor referred to in the events' title or secondary title, but only after ELPA and ETHEAM have given their consent;

– Article 60.6 of the EAKM states that, during sports meetings, advertising on riders' clothes, helmets (on condition that the advertising does not affect helmets' technical characteristics) and motorcycles is permitted. In speed events and motocross within the framework of ELPA and ETHEAM championships, cups and prizes, the organisers may not require a racer, passenger or motorcycle to advertise any product, unless the competitor has given his consent. However, when a sponsorship agreement concluded by ETHEAM and ELPA is applicable, riders, passengers and motorcycles are obliged to observe the terms of that agreement;

– according to Article 110.1 of the EAKM, '[t]he organiser [of a motorcycling event], either directly or through the supervisory authority [namely ELPA and ETHEAM], must ensure that the sports meeting is covered by insurance which should include his own liability and that of manufacturers, riders, passengers ... in the event of accidents and of loss or injury to third parties during the event and during practice.'

15 The Diikitiko Protodikio Athinon dismissed MOTOE's action on the ground, inter alia, first, that Article 49 of the Greek Road Traffic Code ensures that international rules for the safe running of motorcycling events are observed and, second, that MOTOE did not assert that that provision resulted in a dominant position within the common market, or that that provision might affect trade between Member States, or that ELPA abused such a position.

16 MOTOE lodged an appeal against that judgment with the Diikitiko Efetio Athinon, which states, first of all, that ELPA's activities are not limited to purely sporting matters, namely to the power conferred on ELPA in Article 49 of the Greek Road Traffic Code, given that it also engages in activities classified as 'economic' by the referring court, which consist in entering into sponsorship, advertising and insurance contracts. The Diikitiko Efetio Athinon, therefore, wonders whether ELPA can be classified as an undertaking for the purposes of Community competition law, in particular, for

the purposes of Articles 82 EC and 86 EC, so that it would be subject to the prohibition on the abuse of a dominant position. The referring court interprets Article 49 of the Greek Road Traffic Code as meaning that ELPA is the only legal person entitled to give consent to any application for authorisation to organise a motorcycling event. It draws attention to the fact that that association itself takes on, in parallel, the organising of events and the determination of prizes as well as the economic activities referred to above.

17 The Diikitiko Efetio Athinon next observes that the applicants, who have been refused authorisation to hold a motorcycling event since they have failed to obtain ELPA's consent, have no effective remedy under national law against such a decision. First, it is not provided that refusals by ELPA to give consent must contain a statement of reasons and, second, where a refusal of authorisation by the competent ministry is the subject of a legal action alleging failure to state reasons and that action is upheld, Greek law does not provide for authorisation to be granted to the applicant. Further, ELPA is not subject to control or to appraisal of any kind as regards the use that it makes of the power which is conferred on it by Article 49 of the Greek Road Traffic Code. Those circumstances present any person from another Member State of the European Union who wishes to organise motorcycling events in Greece with a *fait accompli*.

18 In these circumstances the Diikitiko Efetio Athinon decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can Articles 82 EC and 86 EC be interpreted so as also to include within their scope the activity of a legal person which has the status of national representative of the [FIM] and engages in economic activity as described above by entering into sponsorship, advertising and insurance contracts, in the context of the organisation of motor sport events by it?

(2) Should the answer [to the first question] be in the affirmative, is Article 49 of [the Greek Road Traffic Code], which, in relation to issue by the competent national public authority (in the present case, the Ministry for Public Order) of permission to organise a motor-vehicle competition, gives the foregoing legal person the power to provide a concurring opinion as to the holding of the competition without that power being made subject to restrictions, obligations and review, compatible with those provisions of the Treaty?'

Examination of the questions referred for a preliminary ruling

19 By its questions, which should be considered together, the referring court essentially asks, first, whether a legal person, which is a non-profit-making association such as ELPA, falls within the scope of Articles 82 EC and 86 EC, given that its activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts and, second, whether those Treaty provisions preclude a rule, such as that laid down in Article 49 of the Greek Road Traffic Code, in so far as it confers on such an association the power to give its consent to applications for authorisation to organise those events, without that power being made subject to restrictions, obligations or review.

20 In this respect, it must be borne in mind, first, that Community competition law refers to the activities of undertakings (Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31, and Case C-280/06 *ETI and Others* [2007] ECR I-0000, paragraph 38 and the case-law cited). More specifically, Article 82 EC applies to undertakings holding a dominant position.

21 Although the Treaty does not define the concept of an undertaking, the Court has consistently held that any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, must be categorised as an undertaking (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46).

22 It should be borne in mind in this regard that any activity consisting in offering goods or services on a given market is an economic activity (see, in particular, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75). Provided that that condition is satisfied, the fact that an activity has a connection with sport does not hinder the application of the rules of the Treaty (Case 36/74 *Walrave*

and Koch [1974] ECR 1405, paragraph 4, and Case C‑415/93 *Bosman* [1995] ECR I‑4921, paragraph 73) including those governing competition law (see, to that effect, Case C‑519/04 P *Meca‑Medina and Majcen* v *Commission* [2006] ECR I‑6991, paragraphs 22 and 28).

23 As stated in the order for reference, and as also confirmed at the hearing before the Court, ELPA organises, in cooperation with ETHEAM, motorcycling events in Greece and, enters, in that connection, into sponsorship, advertising and insurance contracts designed to exploit those events commercially. Those activities constitute a source of income for ELPA.

24 According to the case‑law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition (see, to that effect, Case C‑364/92 *SAT Fluggesellschaft* [1994] ECR I‑43, paragraphs 30 and 31).

25 As regards the possible effect of the exercise of public powers on the classification of a legal person such as ELPA as an undertaking for the purposes of Community competition law, it must be noted, as the Advocate General did at point 49 of her Opinion, that the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities (Case C‑82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I‑9297, paragraph 74). The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity.

26 In the present case, it is necessary to distinguish the participation of a legal person such as ELPA in the decision‑making process of the public authorities from the economic activities engaged in by that same legal person, such as the organisation and commercial exploitation of motorcycling events. It follows that the power of such a legal person to give its consent to applications for authorisation to organise those events does not prevent its being considered an undertaking for the purposes of Community competition law so far as concerns its economic activities referred to above.

27 As regards the effect that the fact that ELPA does not seek to make a profit may have on that classification, it should be noted that, in Case C‑222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I‑289, paragraphs 122 and 123), the Court stated that the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit.

28 That is the case of activities engaged in by a legal person such as ELPA. The fact that MOTOE, the applicant in the main proceedings, is itself a non‑profit‑making association has, from that point of view, no effect on the classification as an undertaking of a legal person such as ELPA. First, it is not inconceivable that, in Greece, there exist, in addition to the associations whose activities consist in organising and commercially exploiting motorcycling events without seeking to make a profit, associations which are engaged in that activity and do seek to make a profit and which are thus in competition with ELPA. Second, non‑profit‑making associations which offer goods or services on a given market may find themselves in competition with one another. The success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the other operators.

29 Consequently, a legal person such as ELPA must be considered an undertaking for the purposes of Community competition law. However, in order for it to fall within the scope of Article 82 EC, it must also occupy a dominant position within the common market or in a substantial part of it.

30 In that regard, it must be observed that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (Case C‑450/06 *Varec* [2008] ECR I‑0000, paragraph 23). However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary.

31 Before it is possible to assess whether a legal person such as ELPA has a dominant position within the meaning of Article 82 EC, it is necessary to define the relevant market, both from the point of

view of the goods or services concerned and from the geographic point of view (Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 10).

32 According to settled case-law, for the purposes of applying Article 82 EC, the relevant product or service market includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and the structure of supply and demand on the market in question (see, to that effect, Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 25; Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission* [1983] ECR 3461, paragraph 37; and Case C–62/86 *AKZO* v *Commission* [1991] ECR I–3359, paragraph 51).

33 In that regard, it is clear from the order for reference that the activities in which ELPA is engaged consist, first, in the organisation of motorcycling events and, second, in their commercial exploitation by means of sponsorship, advertising and insurance contracts. Those two types of activities are not interchangeable but are rather functionally complementary.

34 The definition of the relevant geographical market calls, just like the definition of the product or service market, for an economic assessment. The geographical market can thus be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns specifically the relevant products or services. From that point of view, it is not necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are similar or sufficiently homogeneous (see, to that effect, *United Brands and United Brands Continentaal* v *Commission*, cited above, paragraphs 44 and 53). Furthermore, the market may be confined to a single Member State (see, to that effect, *Nederlandsche Banden Industrie Michelin* v *Commission*, cited above, paragraph 28).

35 As stated in the order for reference, and as was also confirmed at the hearing before the Court, the activities in which ELPA engages are confined to the territory of Greece. However, the territory of a Member State may constitute a substantial part of the common market (see, to that effect, Case C–260/89 *ERT* [1991] ECR I-2925, paragraph 31). It is for the referring court, however, to determine whether the criterion relating to similar or sufficiently homogeneous conditions of competition is satisfied in the main proceedings.

36 It is with reference to the market thus defined that that court will have to assess whether ELPA has a dominant position.

37 It should be recalled in this respect that it is clear from the case–law that the concept of a 'dominant position' under Article 82 EC concerns a position of economic strength held by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (*United Brands and United Brands Continentaal* v *Commission*, cited above, paragraph 65; Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38; and *Nederlandsche Banden-Industrie-Michelin* v *Commission*, cited above, paragraph 30).

38 It should be added that an undertaking can be put in such a position when it is granted special or exclusive rights enabling it to determine whether and, as the case may be, in what conditions, other undertakings may have access to the relevant market and engage in their activities on that market.

39 It should further be observed that Article 82 EC cannot be infringed by a rule such as that laid down in Article 49 of the Greek Road Traffic Code unless trade between Member States is affected by it. As the Advocate General pointed out in points 63 and 64 of her Opinion, such an effect on trade between Member States can be assumed only if it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective legal and factual elements, that the behaviour in question may have an influence, direct or indirect, actual or potential, on trade between Member States in such a way as might hinder the attainment of a single market between Member States (Case C–475/99 *Ambulanz Glöckner* [2001] ECR I–8089, paragraph 48). Purely hypothetical or speculative effects that the conduct of an undertaking in a dominant position may have do not satisfy that criterion. Similarly, the impact on intra-community trade must not be insignificant (Joined Cases C–215/96 and C–216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 60, and *Ambulanz Glöckner*, cited above, paragraph 48).

40 Accordingly, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Case C‑250/92 *DLG* [1994] ECR I-5641, paragraph 54).

41 Furthermore, the assessment of whether the effect on trade between Member States is appreciable must take account of the conduct of the dominant undertaking in question, in so far as Article 82 EC precludes all conduct which is capable of affecting freedom of trade in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the single market (Case 22/78 *Hugin Kassaregister and Hugin Cash Registers* v *Commission* [1979] ECR 1869, paragraph 17).

42 The fact that the conduct of an undertaking in a dominant position relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected (see, to that effect, Joined Cases C‑94/04 and C‑202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 45). Such conduct may have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (see, by analogy, Joined Cases C‑295/04 to C‑298/04 *Manfredi and Others* [2006] ECR I‑6619, paragraphs 45 and 46).

43 So far as concerns, second, the scope of Article 86 EC, paragraph 1 thereof provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary, in particular, to the rules contained in the Treaty with regard to competition. In this respect, it should be noted that a legal person such as ELPA, to which the power to give consent to applications for authorisation to organise motorcycling events has been granted, must be considered an undertaking which has been granted by the Member State concerned special rights within the meaning of Article 86(1) EC.

44 Article 86(2) EC allows Member States to confer, on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings holding the exclusive rights (Case C‑320/91 *Corbeau* [1993] ECR I-2533, paragraph 14).

45 As regards the organisation and commercial exploitation of motorcycling events by a legal person such as ELPA, the Greek Government has not claimed that ELPA has been entrusted with the exercise of those activities through an act of public authority. It is not therefore necessary to examine further whether those activities may constitute a service of general economic interest (see, to that effect, Case 127/73 *BRT and Société belge des auteurs, compositeurs et éditeurs* [1974] ECR 313, paragraph 20, and Case 66/86 *Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 55).

46 As regards the power to give consent to applications for authorisation to organise motorcycling events, that does indeed stem from an act of public authority, namely Article 49 of the Greek Road Traffic Code, but it cannot be classified as an economic activity, as the Advocate General observed at point 110 of her Opinion.

47 A legal person such as ELPA cannot therefore be considered an undertaking entrusted with a service of general economic interest within the meaning of Article 86(2) EC.

48 As regards, third, the question whether Articles 82 EC and 86(1) EC preclude a national rule, such as Article 49 of the Greek Road Traffic Code, which confers on a legal person like ELPA, which can itself take on the organisation of motorcycling events and their commercial exploitation, the power to give consent to applications for authorisation to organise those events, without that power being made subject to restrictions, obligations and review, it should be recalled that the mere creation or reinforcement of a dominant position through the grant of special or exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC.

49 On the other hand, a Member State will be in breach of the prohibitions laid down by those two provisions if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (*Höfner and Elser*, cited above,

paragraph 29; *ERT*, cited above, paragraph 37; Case C–179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraphs 16 and 17; and Case C–323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 18). In this respect, it is not necessary that any abuse should actually occur (see, to that effect, Case C–55/96 *Job Centre* [1997] ECR I–7119, paragraph 36).

50 In any event, Articles 82 EC and 86(1) EC are infringed where a measure imputable to a Member State, and in particular a measure by which a Member State confers special or exclusive rights within the meaning of Article 86(1) EC, gives rise to a risk of an abuse of a dominant position (see, to that effect, *ERT*, cited above, paragraph 37; *Merci convenzionali porto di Genova*, cited above, paragraph 17; and Case C–380/05 *Centro Europa 7* [2008] ECR I–0000, paragraph 60).

51 A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount *de facto* to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors (see, by analogy, Case C–202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51, and Case C–18/88 *GB Inno BM* [1991] ECR I–5941, paragraph 25). Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted by the fact, confirmed at the hearing before the Court, that, when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grant it the required authorisation.

52 Furthermore, such a rule, which gives a legal person such as ELPA the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates.

53 In the light of the foregoing, the answer to the questions referred must be that a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

A legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling competitions and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

[Signatures]

* Language of the case: Greek.

Judgment of the Court (Fourth Chamber)
of 10 May 2007
SGL Carbon AG v Commission of the European Communities. Appeals - Competition - Agreements, decisions and concerted practices - Guidelines on the method of setting fines - Leniency Notice - Principle non bis in idem. Case C-328/05 P.

1. Competition - Fines - Community sanctions and sanctions imposed in a non-Member State for breach of national competition law

(Art. 3(1)(g) EC; Council Regulation No 17, Art. 15)

2. Appeals - Pleas in law - Mistaken assessment of the facts - Inadmissibility - Review by the Court of Justice of the assessment of the evidence - Possible only where the clear sense of the evidence has been distorted

(Art. 225(1) EC; Statute of the Court of Justice, Art. 58, first para.)

3. Competition - Administrative procedure - Statement of objections - Necessary content - Observance of the rights of the defence

(Council Regulation No 17, Art. 19(1))

4. Competition - Administrative procedure - Observance of the rights of the defence

5. Competition - Fines - Amount - Determination - Criteria

(Council Regulation No 17; Commission Notice 96/C 207/04)

6. Appeals - Jurisdiction of the Court

(Council Regulation No 17, Art. 15)

7. Competition - Fines - Amount - Determination - Criteria - Financial situation of the undertaking concerned

(Council Regulation No 17, Art. 15)

8. Competition - Fines - Discretion of the Commission

(Council Regulation No 17, Art. 15(2))

1. In the case of a cartel operating in an international context which is characterised, in particular, by the action of legal systems of non-member States on their respective territories, the exercise of powers by the authorities of those non-member States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements forming the basis of other States' legal systems in the sphere of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules.

It follows that, when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those by authorities of non-member States.

Accordingly, the principle non bis in idem laid down in Article 4 of Protocol No 7 to the European Convention on Human Rights does not apply to situations in which the legal systems and competition authorities of non-member States intervene within their own jurisdiction.

(see paras 24-30)

2. The Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. It follows that, save where the clear sense of the evidence has been distorted, the appraisal of the evidence submitted to the Court of First Instance does not constitute a point of law which is subject as such to review by the Court of Justice.

It follows that a plea, raised in the context of an appeal, which seeks to have the Court of Justice review the substance of the finding by the Court of First Instance, after a detailed examination of the factual circumstances and according to which an undertaking acted as the ringleader of the cartel, a role which constituted an aggravating circumstance, is inadmissible.

(see paras 41-42, 48)

3. Provided that the Commission sets out in the statement of objections the main elements of fact and of law capable of leading to the imposition of a fine, such as the gravity and the duration of the alleged infringement and also the circumstance that the infringement was committed deliberately or negligently, the Commission satisfies its obligation to observe the undertakings' right to be heard.

The rights of the defence are observed because the undertaking concerned was given the opportunity to comment on the duration, the gravity and the nature of the infringement. The Commission is not required to explain in the statement of objections the way in which it might make use of each of those elements in determining the amount of the fine.

Since the statement of objections indicates that the undertaking concerned has played the role of leader and instigator of the infringement, it is made aware that that fact may be taken into account when the fine is set. The fact that in the decision imposing a penalty the undertaking concerned is considered to be the sole ringleader of the cartel does not alter, vis-à-vis the Commission, that undertaking's position to the point of breaching the rights of the defence, since it is inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its subsequent assessment on the basis of the observations submitted to it by the parties and other findings of fact.

(see paras 56-58, 60, 62)

4. Observance of the rights of the defence requires, in particular, that the undertaking under investigation is put in a position during the administrative procedure to put forward its point of view on the reality and the relevance of the alleged facts and also on the documents used by the Commission. The language knowledge of a member of the team responsible for investigating a cartel cannot in itself be decisive for the purpose of determining whether there was any breach of the rights of the defence by the Commission.

(see paras 71, 73)

5. The Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. The cooperation which an undertaking provides to the Commission may justify a reduction in the fine under the Notice on the non-imposition or reduction of fines in cartel cases only if it actually allows the Commission to achieve its task of establishing the existence of an infringement and putting an end to it. The Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings.

(see paras 81, 83, 88)

6. It is not open to the Court of Justice, when ruling on points of law in 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 on undertakings for infringements of Community law. A plea seeking to dispute the proportionality of the fine imposed must be declared inadmissible, since it attempts to secure a reconsideration of findings of fact for which the Court of Justice does not have jurisdiction in an appeal.

(see paras 98-99)

7. The Commission is not required, when determining the amount of the fine, to take into account the financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions.

(see para. 100)

8. The Commission's powers under Article 15(2) of Regulation No 17 include the power to set the date by which the fines are payable and on which interest begins to accrue, and also the rate of that interest and the detailed arrangements for implementing its decision. Accordingly, the Commission is entitled to adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour in relation to payment of the fine.

(see paras 109-111)

In Case C-328/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 30 August 2005,

SGL Carbon AG, established in Wiesbaden (Germany), represented by M. Klusmann and F. Wiemer, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre, M. Schneider and W. Mölls, and also by H. Gading, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhasz, R. Silva de Lapuerta (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2006,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2007

gives the following

Judgment

On those grounds, the Court (Fourth Chamber) hereby

1. Dismisses the appeal;

2. Orders SGL Carbon AG to pay the costs.

1. By its appeal, SGL Carbon AG (SGL Carbon') seeks, primarily, to have set aside in part the judgment of the Court of First Instance of the European Communities of 15 June 2005 in Joined Cases T71/03, T74/03, T87/03 and T91/03 Tokai Carbon and Others v Commission , not published in the ECR (the judgment under appeal'), whereby the Court of First Instance dismissed its action against Commission Decision C(2002) 5083 final relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E2/37.667 - Specialty Graphites (the decision in issue') and, in the alternative, a reduction in the fine imposed on it by that decision.

Legal framework

Regulation No 17

2. Article 15 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, 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)...

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 [81](1) or Article [82] 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

3. The Commission Notice entitled 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') states in its introductory paragraphs:

The principles outlined... should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst 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.'

4. According to Section 1 of the Guidelines, [that] basic amount of the fine will be determined

according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'. Under Section 2 of the Guidelines, the basic amount will be increased where there are aggravating circumstances such as, for example, repeated infringement of the same type by the same undertaking or undertakings. According to Section 3 of the Guidelines, the basic amount will be reduced where there are specific attenuating circumstances.

The Leniency Notice

5. In its Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) (the Leniency Notice'), the Commission sets out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction in the fine which would otherwise have been imposed upon them.

6. According to Section A, point 5, of the Leniency Notice:

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

7. Section C of the Leniency Notice, entitled Substantial reduction in a fine', provides:

[Undertakings] 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.'

8. The conditions set out in Section B of the Leniency Notice, to which Section C refers, are that the undertaking in question:

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

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

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

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

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

9. Section D of the Leniency Notice, entitled Significant reduction in a fine', is worded as follows:

1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

- before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which contribute to establishing the infringement;

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

Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

10. Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, provides as follows:

Right not to be tried or punished twice

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

...'

The facts of the dispute and the decision in issue

11. In the judgment under appeal, the Court of First Instance summarised the facts of the action before it as follows:

1 By [the decision in issue] the Commission found that various undertakings had participated in a series of agreements and concerted practices within the meaning of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) in the specialty graphite sector in the period from July 1993 to February 1998.

2 For the purposes of [the decision in issue], specialty graphite describes a group of graphite products, namely isostatic graphite, extruded graphite and moulded graphite used in diverse applications. It does not include steel-making graphite electrodes.

3 The mechanical characteristics of isostatic graphite are superior to those of extruded and moulded graphite and the price of each graphite category varies according to its mechanical characteristics. Isostatic graphite is used, inter alia, in the manufacture, by electrical-discharge machining, of metal moulds for the automobile and electronics industries. It is also used to make dies for the continuous casting of non-ferrous metals such as copper and copper alloys.

4 The production cost differential between isostatic graphite and extruded or moulded graphite is at least 20%. In general, extruded graphite is the cheapest and is therefore chosen if it meets the user's requirements. Extruded products are used in a wide range of industrial applications, mainly in the iron and steel, aluminium and chemical industries and in metallurgy.

5 Moulded graphite is generally used only in large-scale applications, because it is typically inferior to extruded graphite.

6 In general, speciality graphite products are supplied to customers either directly from the manufacturing plants as finished machined products or through intermediary machine shops. These machine shops buy unmachined graphite (in blocks or rods), machine it (i.e. customise the product according to the customer's needs) and sell the machined products to the end-user.

7 The [decision in issue] concerns two separate cartels, one relating to the market for isostatic specialty graphite and the other to that for extruded specialty graphite. There was no evidence of an infringement in respect of moulded graphite. Those cartels covered very specific products, namely graphite in the form of standard and cut blocks, but not machined products, that are made to order for the customer.

8 The major producers of specialty graphite in the western world are multinational corporations.

Worldwide speciality graphite sales in 2000 were about EUR 900 million. Of this figure, isostatic graphite accounted for around EUR 500 million and extruded graphite for EUR 300 million. At Community/EEA level, sales in 2000 were EUR 100 to 120 million for isostatic graphite and EUR 60 to 70 million for extruded graphite. Unmachined products accounted for about EUR 35 to 50 million in the isostatic market and about EUR 30 million in the extruded market.

9 When the [decision in issue] was adopted, the largest producers of isostatic specialty graphite in the Community/EEA were [inter alia] the German company SGL Carbon...

...

12 In June 1997 the Commission commenced an investigation into the graphite electrodes market. The investigation led to the decision of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement - Case COMP/E-1/36.490 - Graphite electrodes (OJ 2002 L 100, p. 1)....

...

14 In the US, criminal proceedings were brought in March 2000 and in February 2001 against a subsidiary of [Le Carbone-Lorraine SA] and a subsidiary of [the Japanese company Toyo Tanso Co. Ltd]. The companies pleaded guilty and agreed to pay fines....

15 On 17 May 2002 the Commission sent a statement of objections to the addressees of [the decision in issue].... None of them substantially contested the facts.

...

17 The administrative procedure concluded on 17 December 2002 with the adoption of [the decision in issue]....

...

19 [The decision in issue] states that collusive agreements were implemented on the isostatic graphite market by regular multilateral meetings at four levels:

- top level meetings, attended by the top executives of the companies, at which the main principles of cooperation were established;

- international working level meetings concerning the classification of graphite blocks into different categories and the fixing of minimum prices for each category;

- regional (European) meetings;

- local (national) meetings concerning the Italian, German, French, British and Spanish markets.

...

22 On the basis of the findings of fact and legal assessment in [the decision in issue], the Commission imposed on the companies in question fines calculated in accordance with the method set out in the Guidelines ... and the Leniency Notice.

23 Under the first paragraph of Article 1 of the operative part of [the decision in issue], the following undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices affecting the Community and EEA markets for isostatic specialty graphite:

...

(b) SGL [Carbon], from July 1993 to February 1998;

...

24 Under the second paragraph of the same provision, the following undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating for the periods indicated in a complex of agreements and concerted practices affecting the Community and EEA markets for extruded specialty graphite:

- SGL [Carbon], from February 1993 to November 1996;

...

25 Article 3 of the operative part imposes the following fines:

...

(b) SGL [Carbon]:

- Isostatic specialty graphite: EUR 18 940 000,

- Extruded specialty graphite: EUR 8 810 000;

...

26 Article 3 further orders that the fines are to be paid within three months of the date of notification of [the decision in issue] with default interest at the rate of 6.75%.

27 [The decision in issue] was sent to the applicants with a covering letter of 20 December 2002. It stated that after expiry of the period for payment specified in [that decision] the Commission would take steps to recover the sums in question; however, if proceedings were commenced before the Court of First Instance the Commission would not take steps to enforce the judgment provided that interest at the rate of 4.75% was paid and a bank guarantee given.'

The procedure before the Court of First Instance and the judgment under appeal

12. By separate applications lodged at the Registry of the Court of First Instance in March 2003, SGL Carbon and the other addressees of the decision in issue brought actions for annulment of that decision.

13. In the operative part of the judgment under appeal, the Court of First Instance, in particular:

...

4. In Case T91/03 SGL Carbon v Commission :

- [set] the fine imposed on [SGL Carbon] by Article 3 of Decision COMP/E-2/37.667 at EUR 9 641 970 in respect of the infringement committed in the isostatic graphite sector;

- dismisse[d] the remainder of the application;

- order[ed] [SGL Carbon] to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission, and the Commission to bear one third of its own costs and to pay one third of the costs incurred by [SGL Carbon].'

Forms of order sought by the parties to the appeal

14. In its appeal, SGL Carbon claims that the Court should:

- primarily, set aside the judgment under appeal in so far as it dismisses its application;

- in the alternative, reduce the fine imposed on SGL Carbon and also the interest payable pending judgment and the default interest as fixed in the operative part of the judgment under appeal;

- order the Commission to pay the costs.

15. In its response, the Commission claims that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

16. In support of its appeal, SGL Carbon puts forward six pleas in law.

17. By its first plea, SGL Carbon maintains that the Court of First Instance infringed the principle non bis in idem by failing to take into account the fines previously imposed on it in the United States. The second plea is directed against the increase of 35% in the amount of the fine imposed on SGL Carbon for its role as the sole ringleader. By its third plea, the appellant claims that the Court of First Instance did not examine the plea alleging that the rights of the defence, in so far as they include a right to be heard, were infringed because the members of the Commission's team responsible for the investigation had insufficient knowledge of German. The fourth plea concerns the evaluation by the Court of First Instance of SGL Carbon's cooperation with the Commission. By its fifth plea, the appellant claims that the Court of First Instance failed to take into account its economic performance when assessing its financial capacity to pay the fine and that the amount of the fine is disproportionate. Last, by its sixth plea, the appellant claims that the Court of First Instance miscalculated the rate of interest.

First plea, alleging breach of the obligation to take into consideration the penalties imposed in a non-member State

Arguments of the parties

18. By its first plea, SGL Carbon claims that the Court of First Instance was wrong to question the applicability of the principle non bis in idem in the present case, since the penalties imposed on it in the United States ought to have been taken into consideration in determining the amount of the fine, at least for the purpose of reducing it.

19. At the hearing, SGL Carbon observed that although in Case C-289/04 P Showa Denko v Commission [2006] ECR I5859, paragraphs 50 to 63, and Case C308/04 P SGL Carbon v Commission [2006] ECR I5977, paragraphs 26 to 39, the Court rejected the argument that sanctions imposed in a non-member State in the sphere of competition law must be taken into consideration when setting the fine, the Commission erred in wholly ignoring such circumstances.

20. SGL Carbon maintains that, in view of the need to ensure that the penalties imposed are proportionate, the Commission may be under an obligation, in the exercise of its discretion, to take account of penalties imposed by the authorities of a non-member State.

21. The Commission contends that the appellant is wrong to rely on the principle non bis in idem in the present case. The administrative and judicial proceedings in the sphere of competition law in the United States and in the Community do not pursue the same objectives.

22. The Commission claims that it follows from Showa Denko v Commission and SGL Carbon v Commission that the obligation to take into consideration penalties imposed on a company in a non-member State has no legal basis in Community law.

23. The Commission further submits that the non-existence of any obligation to take such penalties into consideration is consistent with the general principles of law. Where a cartel operating throughout the world fixes prices on a global scale, the undertakings participating in the cartel do not commit a single infringement but a number of infringements corresponding to the number of sovereign legal orders which prohibit price-fixing having actual or potential effects on their respective territories.

Findings of the Court

24. It must be borne in mind, as a preliminary issue, that in Showa Denko v Commission and SGL

Carbon v Commission the Court has already considered whether the principle non bis in idem , which is enshrined in Article 4 of Protocol No 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, may be applied to situations in which the authorities of a non-member State have taken action under their power to impose penalties in the sphere of competition law applicable on the territory of that State.

25. On that question, the Court observed at paragraphs 28 and 52, respectively, of SGL Carbon v Commission and Showa Denko v Commission that a cartel operating in an international context is characterised, in particular, by the action of legal systems of non-member States on their respective territories.

26. In that regard, the Court held, at paragraphs 29 and 53 respectively of SGL Carbon v Commission and Showa Denko v Commission , that the exercise of powers by the authorities of those non-member States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements forming the basis of other States' legal systems in the sphere of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules.

27. The Court further held that it follows that, when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those by authorities of non-member States (see SGL Carbon v Commission , paragraph 312, and Showa Denko v Commission , paragraph 55).

28. Accordingly, the Court concluded that the principle non bis in idem does not apply to situations in which the legal systems and competition authorities of non-member States intervene within their own jurisdiction (see SGL Carbon v Commission , paragraph 32, and Showa Denko v Commission , paragraph 56).

29. As regards the present appeal, it must be observed that the Court of First Instance, essentially following the same reasoning, held at paragraphs 112 to 116 of the judgment under appeal that the principle non bis in idem does not apply where the Commission is called upon to exercise its powers under Community law, even though penalties have already been imposed on the undertaking concerned by the authorities of a non-member State for infringement of the competition rules applicable in that State.

30. In those circumstances, the argument put forward in its appeal alleging breach of the principle non bis in idem cannot be accepted.

31. As regards the argument put forward by the appellant at the hearing that the judgments in SGL Carbon v Commission and Showa Denko v Commission should be taken to mean that the Commission's discretion as to whether or not it is required to take into account the penalties imposed on the undertaking concerned by the authorities of a non-member State for infringement of the competition rules applicable in that State might in appropriate cases be reduced' in the sense that the Commission might none the less be required to take such penalties into consideration, it is sufficient to observe that such an interpretation of those judgments rests on a misreading of them and, in particular, paragraphs 36 and 60 respectively thereof.

32. In effect, at paragraphs 36 and 60 of those judgments, the Court did not make a determination as to the applicability of the principle non bis in idem but answered a subsidiary argument whereby

the appellants sought to establish that the Court of First Instance had failed to have regard to the principles of proportionality and fairness.

33. In that regard, the Court of Justice merely recalled that the determination of the fines imposed for infringements of Community competition law falls within the discretion which the Commission enjoys in such matters.

34. It follows that, in holding at paragraph 128 of the judgment under appeal that the Commission was not required to take the penalties which had been imposed on SGL Carbon by the authorities in the United States into consideration, the Court of First Instance did not err in law.

35. Accordingly, the first plea put forward by SGL Carbon in support of its appeal must be rejected.

Second plea, alleging that the increase in the amount of the fine imposed on the appellant because of its role as ringleader of the cartel is unlawful

36. This plea consists of two parts. In the first place, SGL Carbon claims that the increase in the basic amount of the fine is unlawful on the ground that the findings of fact made by the Court of First Instance do not establish any basis for such an increase. In the second place, in the appellant's submission, the Court of First Instance failed to have regard to the rights of the defence on that point, since before the decision in issue was adopted the appellant could not acquaint itself with a circumstance essential for its defence, namely that it would be considered by the Commission as the sole ringleader of the cartel.

First part of the second plea

- Arguments of the parties

37. SGL Carbon claims that the position of ringleader of the cartel attributed to it by the Court of First Instance does not correspond to the factual context of the case as set out in the judgment under appeal.

38. It also contends that neither the factual circumstances nor the findings of the Court of First Instance, which, moreover, are contradictory, can constitute factors capable of justifying an increase in the fine imposed on it.

39. The Commission asserts that, in so far as the appellant disputes the assessments of fact made by the Court of First Instance in respect of the appellant's role as ringleader of the cartel, this part of the plea is inadmissible.

40. It further submits that the appellant's argument that its characterisation as ringleader was reflected in the amount of the fine is also inadmissible, since it amounts to a repetition of arguments already raised before the Court of First Instance.

- Findings of the Court

41. It must be borne in mind, as a preliminary point, that it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the

value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see Case C551/03 P General Motors v Commission [2006] ECR I3173, paragraphs 51 and 52 and the case-law there cited).

42. As to the first part of the second plea, it must be observed that at paragraphs 316 to 331 of the judgment under appeal the Court of First Instance examined in detail the factual circumstances which led the Commission to regard SGL Carbon as the ringleader of the cartel and to take the view that such a role constituted an aggravating circumstance.

43. As regards such a circumstance, it must be observed that, in accordance with a consistent line of cases (see, in particular, Case C189/02 P Dansk Rørindustri and Others v Commission [2005] ECR I5425, paragraphs 240 to 242), the gravity of an infringement is assessed in the light of numerous factors, in respect of which the Commission has a margin of discretion. In taking into consideration, in accordance with the Guidelines referred to above, when determining the amount of the fine, the fact that there are aggravating circumstances, the Commission is merely carrying out its task of ensuring compliance with the Community competition rules.

44. For the purpose of determining the gravity of the infringement, it is necessary to take into consideration, in particular, the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel and the profit which they were able to derive from it (see, to that effect, Joined Cases 100/80 to 103/80 Musique Diffusion française and Others v Commission [1983] ECR 1825, paragraph 129).

45. In those circumstances, SGL Carbon's argument relating to the aggravating circumstance associated with its role as ringleader of the cartel seeks to have the Court re-examine all the factual evidence by reference to which the Court of First Instance has reached its decision.

46. In that regard, SGL Carbon refers to no other document or to any other factor of such a kind as to demonstrate that the Court of First Instance erred in law in its assessment relating to the appellant's role in both establishing and developing the cartel.

47. Nor is that assessment vitiated by contradictions in respect of the evaluation of SGL Carbon's conduct and that of the other undertakings that participated in the cartel.

48. It follows that the first part of the second plea must be rejected as inadmissible.

Second part of the second plea

- Arguments of the parties

49. SGL Carbon maintains that it was not given a proper hearing as regards the assessment of its infringement by the Commission and that the Court of First Instance misconstrued the legal import of such a circumstance. In the statement of objections, the Commission attributed to it and another undertaking the role of ringleaders of the cartel. At recitals 485 to 488 to the decision in issue, on the other hand, the Commission considered that the appellant alone was the leader and instigator of the infringement in the isostatic specialty market' and imposed on it the highest increase in the basic amount, namely 50%.

50. SGL Carbon therefore maintains that the Court of First Instance failed to observe its rights of defence. The statement of objections cannot merely mention that a fine will take account of the gravity and duration of the infringement but, in order to permit an effective defence, must set out the circumstances that may be taken into consideration when the Commission adopts its decision.

51. SGL Carbon emphasises that its alleged capacity as ringleader is an essential element for the purpose of fixing the amount of the fine. If the statement of objections had stated that the

Commission envisaged making such an assessment of the gravity of the infringement, SGL Carbon would have opposed it.

52. The Commission submits that the Court of First Instance was correct to hold that the rights of the defence, in particular the right to be heard, had been observed, since, in the statement of objections, the main elements of fact and of law concerning the infringements, such as their gravity and duration, had been stated. The right to be heard has no bearing on the way in which the Commission proposes to make use of the criteria of the gravity and the duration of the infringement for the purpose of determining the amount of the fines.

53. The Commission contends that the importance of the appellant's activity as leader of the cartel or the way in which the Court of First Instance assessed the circumstances relating to the appellant are questions of fact which can be reviewed at the appeal stage only where the evidence has been distorted.

54. It observes in that regard that the appellant has not questioned the lawfulness of the findings of fact made by the Court of First Instance. Nor has it put forward any arguments capable of showing that the evidence may have been distorted by the Court of First Instance.

- Findings of the Court

55. It must be borne in mind that it is the statement of objections, on the one hand, and access to the file, on the other, that allow the undertakings under investigation to acquaint themselves with the evidence which the Commission has at its disposal and to render the rights of the defence fully effective (see Joined Cases C 238/99 P, C244/99 P, C245/99 P, C247/99 P, C250/99 P to C252/99 P and C254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I8375, paragraphs 315 and 316, and also Joined Cases C204/00 P, C205/00 P, C211/00 P, C213/00 P, C217/00 P and C219/00 P Aalborg Portland and Others v Commission [2004] ECR I123, paragraphs 66 and 67).

56. It also follows from a consistent line of decisions that, provided that the Commission sets out in the statement of objections the main elements of fact and of law capable of leading to the imposition of a fine, such as the gravity and the duration of the alleged infringement and also the circumstance that the infringement was committed deliberately or negligently, the Commission satisfies its obligation to observe the undertakings' right to be heard (see, to that effect, Case 322/81 Michelin v Commission [1983] ECR 3461, paragraphs 19 and 20, and Dansk Rørindustri and Others v Commission , paragraph 428).

57. As regards the present appeal, it must be held that at paragraphs 138 to 142 of the judgment under appeal the Court of First Instance correctly determined the legal framework governing the statement of objections and the right of the undertakings to be heard.

58. Subsequently, the Court of First Instance correctly considered, at paragraphs 144 and 145 of the judgment under appeal, that the rights of the defence had been observed because SGL Carbon had been given the opportunity to comment on the duration, the gravity and the nature of the infringement. The Court of First Instance was also correct to state, at paragraph 146 of the judgment, that the Commission was not required to explain in the statement of objections the way in which it might make use of each of those elements in determining the amount of the fine (see, to that effect, Dansk Rørindustri and Others v Commission , paragraphs 434, 435 and 439).

59. It follows that the Court of First Instance did not err in law when it held that the statement of objections contained sufficiently precise indications of the way in which the Commission proposed to determine the amount of the fine, in particular as regards the gravity of the infringement.

60. It should be observed, in particular, that the Court of First Instance held, at paragraph

148 of the judgment under appeal, that the statement of objections indicated that SGL Carbon had played the role of leader and instigator of the infringement. The appellant was therefore made aware that that fact might be taken into account when the fine was set.

61. The Court of First Instance was also correct to hold, at paragraph 149 of the judgment under appeal, that there was nothing to suggest that SGL Carbon's liability as ringleader of the cartel was increased by the fact that the Commission, in the decision in issue, no longer attributed the same role to another undertaking which had participated in the cartel.

62. In those circumstances, as the Advocate General observed at point 59 of his Opinion, the fact that in the contested decision SGL Carbon was considered by the Commission to be the sole ringleader of the cartel did not alter, vis-à-vis the Commission, that undertaking's position to the point of breaching the rights of the defence, since it is inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its subsequent assessment on the basis of the observations submitted to it by the parties and other findings of fact.

63. The second part of the second plea is therefore unfounded.

64. It follows from the foregoing that the second plea put forward by SGL Carbon in support of its appeal must be rejected in its entirety.

Third plea, alleging breach of the rights of the defence in so far as they include the right to be heard

Arguments of the parties

65. SGL Carbon claims that the Court of First Instance was wrong to hold, at paragraph 154 of the judgment under appeal, that the allegation that the Commission officials responsible for the investigation had insufficient knowledge of German was not supported by any reliable evidence. The appellant submits that it demonstrated the extent to which and the factors on the basis of which it could only assume that none of those officials had sufficient command of that language.

66. According to SGL Carbon, the Commission's officials must be capable of understanding all the data relied on by the undertakings concerned, whether directly or by means of translations.

67. The Commission observes that the Court of First Instance considered that the appellant had adduced no reliable evidence capable of supporting that allegation.

68. The Commission emphasises that the individual language knowledge of a particular official cannot play the slightest role as regards respect for the rights of the defence. The administrative procedure is conducted by the Directorate-General for competition and is concluded by a decision adopted by the Commission acting in its capacity as an institution.

69. The Commission further submits that all the correspondence exchanged during the procedure was in German, with only one exception. Only the third request for information sent to the appellant was in English, but the appellant did not request a translation and merely replied in German.

Findings of the Court

70. It should be recalled by way of preliminary point that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (see, in particular, Case C194/99 P Thyssen Stahl v Commission [2003] ECR I10821, paragraph 30).

71. Observance of the rights of the defence requires, in particular, that the undertaking under

investigation is put in a position during the administrative procedure to put forward its point of view on the reality and the relevance of the alleged facts and also on the documents used by the Commission (see Case C310/93 P BPB Industries and British Gypsum v Commission [1995] ECR I865, paragraph 21).

72. As regards the third plea invoked in support of the appeal, it must be observed that, in so far as SGL Carbon challenges the rejection by the Court of First Instance, at paragraph 154 of the judgment under appeal, of its argument that the Commission had entrusted the case-file to officials who did not have sufficient knowledge of German, that conclusion is based on an assessment of fact and an evaluation of the evidence submitted to the Court of First Instance, which, as recalled at paragraph 41 of the present judgment, cannot be challenged in an appeal.

73. However, even on the assumption that certain officials of the Commission responsible for the case did not have the necessary language knowledge, it is sufficient to observe, in so far as SGL Carbon claims that the Commission breached its rights of defence, that the language knowledge of a member of the team responsible for investigating a cartel cannot in itself be decisive for the purpose of determining whether there was any breach of the rights of the defence by the Commission.

74. Consequently, the Court of First Instance did not err in law in considering that the rights of the defence had not been breached by the Commission.

75. The third plea in law put forward by SGL Carbon in support of its appeal cannot therefore be upheld.

Fourth plea in law, alleging failure to take SGL Carbon's cooperation with the Commission into account

Arguments of the parties

76. SGL Carbon claims that the Court of First Instance did not take into consideration the arguments that its cooperation with the Commission was undervalued by comparison with that of the other undertakings concerned. The Commission reduced the fine imposed on the appellant by only 35%, whereas a reduction of 50 to 75% would have been appropriate.

77. The appellant maintains that it cooperated at least to the same extent as the other undertakings and that it was the only one to provide information about the participation of other undertakings in the cartel.

78. SGL Carbon also claims that the question whether or not the Commission takes into account in its decision the infringements revealed by undertakings which cooperated is not the only relevant issue. Otherwise, undertakings wishing to cooperate would at any time have to fear that their cooperation, like the appellant's, would not be taken into consideration, or not be fully taken into consideration.

79. The Commission contends that the Court of First Instance did not err in law as regards its assessments relating to SGL Carbon's cooperation during the investigation. The Court of First Instance properly assessed the appellant's contributions and those of the other undertakings concerned. Since the appellant's cooperation did not contribute to the establishment of the infringement, there was no need to take it into consideration and to reduce the fine accordingly.

80. The Commission contends that the Court of First Instance properly examined the evidence concerning the respective contributions of the undertakings concerned during the investigation. The appellant has not explained to what extent that examination may have distorted the evidence, which is the only matter amenable to review in an appeal.

Findings of the Court

81. As observed at paragraph 43 of this judgment, the Commission has a wide discretion as regards

the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned.

82. As regards the present case, it must be observed that, at paragraphs 358 to 362 of the judgment under appeal, the Court of First Instance based its assessments in that regard, in reliance on the Leniency Notice, on the consideration that a single undertaking, namely the first one to provide evidence concerning the existence of a cartel, may receive a substantial reduction in the fine, to the exclusion of other undertakings which, at a subsequent stage in the administrative procedure, produce particular evidence relating to the same cartel.

83. With respect to the cooperation which an undertaking provides to the Commission, it is settled case-law that such a contribution may justify a reduction in the fine under the Leniency Notice only if it actually allows the Commission to achieve its task of establishing the existence of an infringement and putting an end to it (see, to that effect, Case C297/98 P SCA Holding v Commission [2000] ECR I10101, paragraph 36, and Dansk Rørindustri and Others v Commission , paragraph 399).

84. More specifically, while the Leniency Notice already provides, in Sections C and B, for a reduction in the fine for the first undertaking to adduce evidence of the existence of a cartel, the objective of promoting cooperation by undertakings in detecting secret cartels affecting the Community, in particular the undertakings which are the first to adduce evidence, was confirmed and reinforced by the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

85. In the present case, the Court of First Instance pointed out, at paragraph 360 of the judgment under appeal, that only a single undertaking, which was not SGL Carbon, had been the first to adduce such evidence.

86. Consequently, the Court of First Instance held, at paragraph 367 of the judgment under appeal, that SGL Carbon, as ringleader of the cartel, did not satisfy the conditions set out in the Leniency Notice and could not claim a significant reduction in the fine imposed on it. Such an assessment, based on fact, cannot be challenged in an appeal.

87. As regards SGL Carbon's argument concerning the taking into consideration of its cooperation with the Commission, independently of the fact that the appellant was characterised as ringleader of the cartel, it must be noted that the Court of First Instance was correct to hold, at paragraph 368 of the judgment under appeal, that the Commission was not required to reward such cooperation by a substantial reduction in the fine, since that cooperation had not effectively facilitated the establishment of the existence of that cartel and enabled the Commission to put an end to it.

88. As regards, finally, SGL Carbon's claim that the cooperation provided by it was undervalued by comparison with that of the other members of the cartel, it should be noted, as the Court of First Instance rightly pointed out at paragraph 371 of the judgment under appeal, that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings.

89. In fact, SGL Carbon has adduced no evidence capable of showing how the Court of First Instance erred in law in its analysis of the Commission's exercise of its discretion with respect to the way in which the undertakings cooperated with it during the investigation.

90. It follows from the foregoing that SGL Carbon is not correct to maintain that the findings of the Court of First Instance relating to its cooperation with the Commission during the investigation

are vitiated by an error of law.

91. The fourth plea in law put forward by SGL Carbon in support of its appeal must therefore be rejected.

Fifth plea in law, alleging that the fine is disproportionate

Arguments of the parties

92. SGL Carbon claims that the Court of First Instance was wrong to consider that the Commission is not required to evaluate the economic position of the undertaking concerned when setting the amount of the fine.

93. The appellant maintains that it is unacceptable that the Court of First Instance should approve an undertaking's becoming insolvent as a result of the imposition of a fine without taking the financial consequences of the fine into consideration. It submits that the principle of proportionality means that the impact of penalties by reference to the economic situation of the undertaking concerned must be taken into account.

94. The Commission contends that the fifth plea is inadmissible. In effect, SGL Carbon seeks to secure a reconsideration of the appropriateness of the determination of the amount of the fine by submitting a series of allegations which fall outside the findings made by the Court of First Instance in the judgment under appeal. However, such findings of fact cannot be reviewed by the Court of Justice in an appeal.

95. The Commission maintains that the fifth plea is unfounded in any event. In the exercise of its unlimited jurisdiction, the Court of First Instance approved the consistent case-law that the Commission is not required to take an undertaking's economic situation into account when determining the amount of a fine.

96. The Commission further submits that the Court of First Instance considerably reduced the amount of the fine imposed on the appellant, in excess of the reduction granted by the Commission.

Findings of the Court

97. It must be borne in mind at the outset that, as already stated at paragraph 41 of this judgment, review by the Court of Justice, in an appeal, does not extend to the findings of fact made by the Court of First Instance, save where the substantive inaccuracy of those findings is apparent from the documents in the file, where the evidence has been distorted by the Court of First Instance, where the legal characterisation of the facts by that Court is incorrect and where it is necessary to ascertain whether the rules relating to the burden of proof and the taking of evidence have been observed.

98. Nor is it open to the Court of Justice, when determining 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 on undertakings for infringements of Community law (see Case C219/95 P Ferriere Nord v Commission [1997] ECR I4411, paragraph 31, and Case C407/04 P Dalmine v Commission [2007] ECR I0000, paragraph 152).

99. In so far as SGL Carbon disputes the proportionality of the fine imposed on it, the plea must be declared inadmissible, since it attempts to secure a reconsideration of findings of fact for which the Court of Justice does not have jurisdiction in an appeal (see also Case C359/01 P British Sugar v Commission [2004] ECR I4933, paragraphs 47 and 48, and Dansk Rørindustri and Others v Commission , paragraphs 245 and 246).

100. As regards the argument that the Court of First Instance failed to take account of SGL Carbon's financial capacity, it must be observed that, according to settled caselaw which rightly

provides inspiration for paragraph 333 of the judgment under appeal, the Commission is not required, when determining the amount of the fine, to take into account the financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraphs 54 and 55, and SGL Carbon v Commission , paragraphs 105 and 106).

101. In those circumstances, the Court of First Instance did not err in law in rejecting, at paragraph 333 of the judgment under appeal, the plea based on the fact that the Commission failed to take the appellant's financial capacity into account.

102. The fifth plea put forward by SGL Carbon in support of its appeal cannot therefore be upheld.

Sixth plea, alleging that the interest rates fixed by the Commission are illegal

Arguments of the parties

103. SGL Carbon maintains that the Court of First Instance did not examine its arguments concerning the fixing of the interest rates and that the judgment under appeal is therefore vitiated by an error of law on that point.

104. It contends that the interest charged is too high. In the absence of a legal basis, the Commission cannot set interest at a rate considerably higher than the market rate. By fixing high interest rates, the Commission imposed a further penalty on the appellant.

105. SGL Carbon submits that the Court of First Instance cannot in any event properly reject the reference to the interest rate applied to the provisional payments made by undertakings in order to pay the fines imposed on them by asserting that the sole purpose of that rate is to prevent the unjust enrichment of the Communities. Even the rate of interest applicable to unpaid fines must have as its sole purpose to prevent the undertaking concerned from deriving a benefit from providing a guarantee.

106. The Commission contends that the sixth plea is inadmissible in so far as it seeks to have the setting of the interest reconsidered by the Court of Justice in the context of the appeal.

107. The Commission maintains that, in any event, the plea is unfounded. If undertakings were able to obtain economic advantages by delaying payment of the fines imposed on them, the penalty would be weakened and the undertakings delaying payment of the fines would have financial advantages by comparison with those paying promptly.

108. The Commission further submits that the Court of First Instance justified to the requisite legal standard the reasons why the Commission had not abused its discretion when fixing the interest and that the appellant has put forward no argument capable of showing that the default interest was fixed disproportionately.

Findings of the Court

109. It must be borne in mind that the Court of First Instance, in response to the plea raised before it, referred at paragraph 411 of the judgment under appeal to the consistent case-law according to which the Commission's powers under Article 15(2) of Regulation No 17 include the power to set the date by which the fines are payable and on which interest begins to accrue, and also the rate of that interest and the detailed arrangements for implementing its decision.

110. If the Commission did not have such a power, undertakings might be able to take advantage of late payments, thereby weakening the effect of penalties (SGL Carbon v Commission , paragraph 114).

111. Accordingly, the Court of First Instance was right to hold that the Commission was entitled to adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour in relation to payment of the fine (SGL Carbon v Commission , paragraph 115).

112. It is appropriate to add that SGL Carbon has not shown how the Court of First Instance erred in law in holding, at paragraph 412 of the judgment under appeal, that the Commission did not exceed its discretion in setting the rate of the default interest. The appellant has merely requested a re-examination of the findings of fact made by the Court of First Instance in that regard.

113. Such a line of argument falls outside the scope of the Court's power of review in an appeal (see Case C113/04 P Technische Unie v Commission [2006] ECR I8831, paragraphs 81 to 83). On that point, the plea must therefore be declared inadmissible.

114. As regards SGL Carbon's allegation that its argument that the Commission grants interest rates of 2% on provisional payments was wrongly rejected as being out of time, it must be observed that the Court of First Instance properly regarded that argument, which had not been raised in the originating application, as constituting a fresh plea, within the meaning of Article 48(2) of its Rules of Procedure. The Court of First Instance was therefore correct to reject it, as it did at paragraph 413 of the judgment under appeal, as inadmissible.

115. The sixth plea put forward by SGL Carbon in support of its appeal is therefore unfounded in part and inadmissible in part.

116. It follows from all of the foregoing considerations that none of the pleas on which SGL Carbon relies in support of its appeal can succeed and that the appeal must therefore be dismissed.

Costs

117. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, 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 against SGL Carbon and SGL Carbon has been unsuccessful, it must be ordered to pay the costs.

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31998Y0114(01) : N 3 43
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61980J0100 : N 44
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61982J0096 : N 100
61993J0310 : N 71
61995J0219 : N 98
61998J0297 : N 83
61999J0194 : N 70
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62001J0359 : N 99
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62004J0308 : N 24 - 28 31 32 100 110 111
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SUB	Competition ; Rules applying to undertakings ; Concerted practices
AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
NOTES	Baudisch, Ilja: Die Sanktionierung von grenzüberschreitenden Kartellsachverhalten - Die Rechtsprechung der Gemeinschaftsgerichte zum Grundsatz "ne bis in idem" im europäischen und internationalen Wettbewerbsverfahren, European Law Reporter 2007 p.216-223
PROCEDU	Action for annulment;Appeal against penalty;Appeal
ADVGEN	Mazak
JUDGRAP	Silva de Lapuerta
DATES	of document: 10/05/2007 of application: 30/08/2005

Judgment of the Court (Fourth Chamber)
of 7 June 2007
Britannia Alloys & Chemicals Ltd v Commission of the European Communities. Appeals - Competition - Agreements, decisions and concerted practices - Fines - Preceding business year' for determining the turnover on which the calculation of the fine is based. Case C-76/06 P.

1. Competition - Fines - Amount - Determination - Maximum amount

(Council Regulation No 17, Art. 15(2), first para.)

2. Competition - Fines - Amount - Determination - Maximum amount

(Council Regulation No 17, Art. 15(2), first para.)

3. Competition - Fines - Amount - Determination - Maximum amount

(Council Regulation No 17; Commission Notice 98/C 9/03)

1. The limit relating to turnover laid down in the first subparagraph of Article 15(2) of Regulation No 17 seeks to prevent fines imposed by the Commission from being disproportionate in relation to the size of the undertaking concerned. It follows that, in determining the preceding business year', the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 17, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed. Therefore, where the undertaking concerned has not achieved any turnover for the business year preceding the adoption of the Commission decision, the Commission is entitled to refer to another business year in order to be able to make a correct assessment of the financial resources of that undertaking and to ensure that the fine has a sufficient deterrent effect. Moreover, the determination of the upper limit of the fine is not a mere question of choosing between the two possibilities provided for in the first subparagraph of Article 15(2) of Regulation No 17, that is, between a maximum fine of EUR 1 million and an upper limit set by reference to the turnover of the undertaking concerned.

(see paras 24-25, 30-31)

2. When establishing the business year to be taken into account in order to ensure compliance with the upper limit of 10% of turnover applicable to fines imposed for breach of Community competition rules, the Commission does not infringe the principle of equal treatment by applying to one of the undertakings which participated in a cartel, but which had no turnover in the business year preceding the adoption of the penalising decision, different treatment from that applied to the other participants in the cartel which were still active when that decision was taken and had turnover for the previous business year giving a strong indication of their economic situation.

Moreover, in the context of calculating fines imposed under Article 15(2) of Regulation No 17, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers under that provision. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned in order to ensure that, in each case, the Community competition rules are fully effective.

Even if the Commission's previous practice had been different concerning an undertaking in breach which withdrew from the market concerned by the infringement before the penalising decision was taken, that change of practice cannot constitute an infringement of the principle of the protection of legitimate expectations, since a decision-making practice of the Commission cannot serve as a legal framework for the imposition of fines in competition matters.

(see paras 41-44, 60-62)

3. The provisions governing the implementation of the Community competition rules, and in particular Regulation No 17 and the Guidelines, enable undertakings to foresee with certainty the financial consequences likely to result from an infringement of those rules. Consequently, the principle of legal certainty can give an undertaking no guarantee that its cessation of commercial activities in the sector concerned will result in its escaping the imposition of a fine for the infringement committed in that sector.

Moreover, in the light of the Commission's discretion in this field, an undertaking participating in a cartel cannot acquire any certainty as to the amount of the fine likely to be imposed on it by the Commission under the provisions of Regulation No 17. In those circumstances, the fact that it was not able to ascertain in advance the relevant reference year for the purposes of determining the upper limit of the fine does not, by itself, constitute an infringement of the principle of legal certainty.

(see paras 80-81, 83-84)

In Case C-76/06 P,

APPEAL pursuant to Article 56 of the Statute of the Court of Justice, brought on 7 February 2006,

Britannia Alloys & Chemicals Ltd, established in Gravesend (United Kingdom), represented by S. Mobley and M. Commons, solicitors,

applicant,

the other party to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre, acting as Agent, with an address for service in Luxembourg

defendant at first instance,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhasz, R. Silva de Lapuerta (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: Y. Bot,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2007,

gives the following

Judgment

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

1. Dismisses the appeal;

2. Orders Britannia Alloys & Chemicals Ltd to pay the costs.

1. By its appeal, Britannia Alloys & Chemicals Ltd (Britannia') asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 29 November 2005 in

Case T-33/02 Britannia Alloys & Chemicals v Commission [2005] ECR II4973 (the judgment under appeal'), by which the Court dismissed its appeal against Commission Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 - Zinc phosphate) (OJ 2003 L 153, p. 1; the contested decision'), and to annul Article 3 of that decision in so far as it concerns the applicant.

Legal context

Regulation No 17

2. Article 15 of Council Regulation No 17: First Regulation implementing Articles [81] and [82] 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)...

...

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 [81](1) or Article [82] 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

3. The Commission Notice entitled 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') states in its introduction:

The principles outlined... by the Guidelines should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst 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.'

Background to the dispute

4. In paragraphs 1 to 10 of the judgment under appeal, the Court summarised the factual background to the dispute brought before it as follows:

1 Britannia..., a company incorporated under English law, is a subsidiary of M.I.M. Holdings Limited (MIM), an Australian company. In October 1993, Pasminco Europe (ISC Alloys) Limited

sold its zinc business to MIM, which transferred it to Britannia. That undertaking produced and sold zinc products, including zinc phosphate. In March 1997, Trident Alloys Limited (Trident), an independent company formed by Britannia's management, acquired Britannia's zinc business for GBP 14 359 072. Britannia is still in existence as a subsidiary of MIM, but is a non-trading company and therefore has no turnover.

2 Although they may have slightly differing chemical formulae, zinc orthophosphates form a homogeneous chemical product, generically referred to as zinc phosphate. Zinc phosphate, which is derived from zinc oxide and phosphoric acid, is widely used as an anti-corrosion mineral pigment in the paint industry. It is marketed either as standard zinc phosphate or as modified (or activated) zinc phosphate.

3 In 2001, virtually all of the world zinc production was controlled by the following five European producers: Dr Hans Heubach GmbH & Co. KG (Heubach), James M. Brown Limited (James Brown), Société Nouvelle des Couleurs Zinciques SA (SNCZ), Trident (formerly Britannia) and Union Pigments AS (formerly Waardals AS) (Union Pigments).

4 On 13 and 14 May 1998, the Commission carried out simultaneous and unannounced investigations under Article 14(2) of Regulation No 17 at the premises of Heubach, SNCZ and Trident....

5 On 11 December 2001, the Commission adopted the contested decision. The decision which is the subject of the present judgment is the one notified to the undertakings concerned, and which is annexed to the application....

6 In the contested decision, the Commission states that a cartel, consisting of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Union Pigments, existed between 24 March 1994 and 13 May 1998. The cartel was limited to standard zinc phosphate. The members of the cartel first adopted a market sharing agreement with sales quotas for the producers. Subsequently, they agreed on bottom or recommended prices at each meeting, which they generally followed. There was also a certain amount of customer allocation.

7 The operative part of the contested decision reads as follows:

Article 1

Britannia ... , Heubach... , James Brown, [SNCZ], Trident... and [Union Pigments] have infringed the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

...

(b) in the case of Britannia...: from 24 March 1994 until 15 March 1997

...

Article 3

For the infringement referred to in Article 1, the following fines are imposed:

(a) Britannia...: EUR 3.37 million;

(b) ... Heubach...: EUR 3.78 million;

(c) James ... Brown...: EUR 940 000;

(d) [SNCZ]: EUR 1.53 million;

(e) Trident...: EUR 1.98 million;

(f) [Union Pigments]...: EUR 350 000.

...

8 In calculating the fines, the Commission applied the method set out in the Guidelines... and the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, the Leniency Notice).

9 The Commission found first that the appropriate basic amount of fine for the applicant was EUR 3.75 million ([paragraph] 313 [of the grounds of] the contested decision). Next, it referred to the limit which, under Article 15(2) of Regulation No 17, the fine to be imposed on each of the undertakings concerned may not exceed. In fixing the upper limit of 10% of turnover achieved in the previous financial year laid down by that provision, the Commission, in the case of the applicant, took into account its global turnover for the business year ending 30 June 1996, which is the last available figure reflecting an entire year of normal economic activity ([paragraph] 345...). As that turnover was EUR 55.7 million ([paragraph] 50), the upper limit of the fine was set at about EUR 5.5 million. As the amount of the fine before application of the Leniency Notice was below that upper limit, the Commission did not reduce it on that basis.

10 Finally, the Commission granted the applicant a reduction of 10% under the Leniency Notice ([paragraph] 366). The final amount of the fine imposed on the applicant was thus EUR 3.37 million ([paragraph] 370).'

The procedure before the Court of First Instance and the judgment under appeal

5. By application lodged at the Registry of the Court of First Instance on 21 February 2002, Britannia brought an action for the partial annulment of the contested decision and, in the alternative, for reduction in the amount of the fine imposed by that decision.

6. By the judgment under appeal, the Court of First Instance dismissed the action.

Forms of order sought by the parties to the appeal

7. By its appeal, Britannia claims that the Court should:

- set aside the judgment under appeal in so far as it dismissed its action;

- annul Article 3 of the contested decision in so far as it concerns the applicant;

- in the alternative, amend Article 3 in so far as it concerns the applicant, so as to annul or substantially reduce the fine imposed on the applicant therein;

- further, in the alternative, refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice as to the law;

- in any event, order that the Commission bear its own costs and pay Britannia's costs relating to the proceedings before the Court of First Instance and the Court of Justice.

8. The Commission contends that the Court should:

- dismiss the appeal in part as inadmissible, or, in the alternative, dismiss it as unfounded;

- order the applicant to pay the costs.

The appeal

9. In support of its claims, Britannia relies, in essence, on three pleas alleging, respectively, breach of Article 15(2) of Regulation No 17, infringement of the principle of equal treatment and infringement of the principle of legal certainty.

The first plea, alleging breach of Article 15(2) of Regulation No 17

Arguments of the parties

10. By its first plea, Britannia submits that the Court of First Instance erred in law by holding that, in fixing the fine, the Commission had correctly applied the upper limit of 10% of turnover to Britannia's turnover for the business year ending 30 June 1996, rather than to the turnover for the business year preceding the adoption of the contested decision.

11. Britannia argues that, since it had not achieved any turnover for the business year immediately before the adoption of the contested decision, the Commission could only impose on it a fine of between EUR 1 000 and 1 000 000. Accordingly, the Court erred in law by holding that the Commission did not have to refer to the turnover for the business year ending on 30 June 2001.

12. Britannia submits that the adjective preceding', in the first subparagraph of Article 15(2) of Regulation No 17, refers to the last full 12-month financial year as at the date of adoption of the decision imposing the fine.

13. It maintains that the purpose of the upper limit on turnover, provided for in that provision of Regulation No 17, requires that that limit be applied to a business year which reflects the economic importance of the undertaking concerned on the date of the Commission decision. However, the Court of First Instance considered that, if an undertaking has not carried on any economic activity in the business year preceding such a decision, the turnover for that period will give no indication of its standing, and therefore cannot serve as a basis for setting the fine.

14. Britannia states that the figures, which appear in its audited accounts for the business year preceding the adoption of the contested decision, reflect its financial situation at the date on which the fine was imposed on it, that is, a turnover of zero. In order to determine the amount of that fine, the Commission could therefore not use a business year in which that company's economic activity was greater.

15. The Commission contends that, in accordance with the objective pursued by Article 15(2) of Regulation No 17, the premiss of the Court's reasoning is that the upper limit relating to turnover only applies if the undertaking has achieved that turnover in the business year preceding the decision closing the administrative procedure.

16. According to the Commission, the Court of First Instance correctly held that the upper limit was not applicable since there was no turnover for the last business year and, since the 10% upper limit seeks to reflect the financial capacity of the undertaking concerned, it applies where there is a turnover to which it can be linked.

17. The Commission states that the pre-condition for applying the 10% upper limit is the existence of a turnover. Where there is no turnover for the business year preceding the adoption of the final decision, other indicators have to be found in order to assess the amount of the fine to be imposed.

18. The Commission goes on to state that the Court's findings as to whether a zero turnover is a valid indication of Britannia's economic situation is a matter of fact which cannot be reviewed in the course of an appeal.

Findings of the Court

19. By its first plea, the applicant submits that the Court erred in law as regards the interpretation of the concept of preceding business year' contained in the first subparagraph of Article 15(2)

of Regulation No 17.

20. Thus, at issue between the parties before the Court of Justice is the question of how the Commission has to determine the concept of preceding business year' in those cases where substantial changes in the economic situation of the undertaking concerned have taken place between the period in which the infringement was committed and the date of adoption of the Commission decision imposing the fine.

21. As regards that concept, it should be pointed out that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also its context and the objectives pursued by the rules of which it is part (see Case C17/03 VEMW and Others [2005] ECR I4983, paragraph 41, and Case C391/05 Jan De Nul [2007] ECR I0000, paragraph 20).

22. In that regard, it should be recalled that the purpose of Article 15(2) of Regulation No 17 is to empower the Commission to impose fines with a view to enabling it to carry out the task of supervision conferred on it by Community law (see Joined Cases 100/80 to 103/80 Musique Diffusion française and Others v Commission [1983] ECR 1825, paragraph 105). That task includes in particular suppressing illegal activities and preventing their reoccurrence (see Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 173).

23. It should be added that, pursuant to the second subparagraph of Article 15(2) of Regulation No 17, the Commission is required to take into account the gravity and the duration of the infringement in question.

24. In the light of those factors, the Court has stated that the limit relating to turnover laid down in the first subparagraph of Article 15(2) of Regulation No 17 seeks to prevent fines imposed by the Commission from being disproportionate in relation to the size of the undertaking concerned (Musique Diffusion française and Others v Commission , paragraph 119).

25. It is clear from the above considerations that, in determining the preceding business year', the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 17, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed.

26. Having regard to that legal framework, the Court of First Instance held, in paragraphs 38 and 48 of the judgment under appeal, that the calculation of the upper limit of the fine presupposes not only that the Commission has at its disposal the turnover figures for the last business year preceding the date of adoption of its decision, but also that those figures represent a full year of normal economic activity over a period of 12 months.

27. Furthermore, in paragraphs 39 and 49 of the judgment under appeal, the Court referred to a number of specific situations in order to illustrate the fact that the Commission must be able to use turnover achieved in a complete year of normal business activity for the purposes of applying Article 15(2) of Regulation No 17.

28. Thus, if it had been accepted, the applicant's argument would have led to an interpretation of the first subparagraph of Article 15(2) of Regulation No 17 to the effect that, in cases in which no turnover has been achieved in the business year preceding the adoption of the Commission decision, the Commission would be required to apply only the first part of that subparagraph, since there is no turnover to which the upper limit set out in the second part of that subparagraph can be linked.

29. However, such an interpretation disregards not only the scope of the Commission's powers under

Article 15(2), but also the fact that, in certain situations, the turnover for the business year preceding the adoption of the Commission decision does not provide any useful indication as to the actual economic situation of the undertaking concerned and the appropriate level of fine to impose on that undertaking.

30. Accordingly, where, as in the present case, the undertaking concerned has not achieved any turnover for the business year preceding the adoption of the Commission decision, the Commission is entitled to refer to another business year in order to be able to make a correct assessment of the financial resources of that undertaking and to ensure that the fine has a sufficient deterrent effect.

31. It must be added that, as the Advocate General noted in point 74 of his Opinion and as the Court of First Instance correctly held in paragraph 40 of the judgment under appeal, the determination of the upper limit of the fine is not a mere question of choosing between the two possibilities provided for in the first subparagraph of Article 15(2) of Regulation No 17, that is, between a maximum fine of EUR 1 million and an upper limit set by reference to the turnover of the undertaking concerned.

32. The Court of First Instance therefore did not err in law by holding that the Commission could refer, pursuant to the first subparagraph of Article 15(2) of Regulation No 17, to the last complete business year preceding the adoption of the contested decision, namely the year ending 30 June 1996.

33. Accordingly, the first plea in law relied on by Britannia in support of its appeal must be rejected.

The second plea, alleging infringement of the principle of equal treatment

34. This plea is in two parts.

The first part of the second plea

- Arguments of the parties

35. By the first part of its second plea, Britannia submits that the Court of First Instance infringed the principle of equal treatment by dismissing the action, when, in the contested decision, the upper limit of 10% was applied to the last business year in which that company was considered by the Commission to have pursued normal economic activity', and, in the case of other undertakings participating in the cartel, the Commission took into account the business year preceding the adoption of that decision.

36. Britannia asserts that the application of the upper limit relating to turnover to a business year other than that preceding the contested decision fails to have regard to its financial situation on the date of adoption of that decision. In order to ensure compliance with the principle of equal treatment, the Commission should have applied the upper limit laid down in the first subparagraph of Article 15(2) of Regulation No 17 to the business year preceding the adoption of that decision in respect of all the undertakings concerned.

37. Britannia takes the view that, contrary to the Court's findings, its zero turnover for that business year accurately reflects its economic situation for the period in which the infringement was committed.

38. The Commission observes that the Court considered that the applicant was in a different situation from that of the other two undertakings which participated in the cartel, since the 10% upper limit laid down in the first subparagraph of Article 15(2) of Regulation No 17 was applicable to those undertakings. Those undertakings achieved a turnover for the business year preceding the adoption

of the contested decision, which was a reliable indication of their economic situation.

39. The Commission submits that the applicant claims not that it was in the same situation as those undertakings, but merely that its zero turnover for that business year precisely reflected its economic situation at the time. However, such an argument calls into question a finding of fact by the Court of First Instance.

- Findings of the Court

40. It is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (see Case C344/04 IATA and ELFAA [2006] ECR I-403, paragraph 95).

41. In relation to the present case, it should be recalled that the two undertakings which are the subject of Britannia's argument still carried on a commercial activity on the market which was the subject of the cartel when the Commission adopted the contested decision. Their turnover for the business year preceding the adoption of that decision thus enabled the Commission to assess the financial resources of those undertakings and to determine their economic situation.

42. In contrast, such an assessment was not possible in the case of Britannia. It is common ground that Britannia, on the date the contested decision was adopted, was in an entirely different situation from that of the other two undertakings which participated in the cartel.

43. In those circumstances, the Court of First Instance was correct to hold, in paragraphs 61 to 63 of the judgment under appeal, that the Commission was justified in treating the applicant differently from those undertakings, given that those undertakings were still active and that their turnover for the business year preceding the adoption of the contested decision was a strong indication of their economic situation.

44. It should be added that, in the context of calculating fines imposed under Article 15(2) of Regulation No 17, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers under that provision. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned in order to ensure that, in each case, the Community competition rules are fully effective (see, to that effect, Case C-308/04 P SGL Carbon v Commission [2006] ECR I5977, paragraph 46 and the case-law cited).

45. The first part of the second plea cannot therefore be upheld.

The second part of the second plea

- Arguments of the parties

46. By the second part of its second plea, Britannia submits that the Court of First Instance infringed the principle of equal treatment by dismissing the action, when the contested decision, in so far as it fixes the business year to which the 10% upper limit applies, does not accord with previous administrative practice in comparable cases.

47. Britannia states that, according to the Court, the Commission was entitled to depart from its previous practice in this area given that Britannia's situation was not comparable to that in other cases in which fines were imposed on the undertakings concerned.

48. In support of that second part of the second plea, Britannia refers to three types of situation.

49. First, it considers that its situation was comparable to cases in which an undertaking involved in a cartel had transferred its activities to another commercial entity while continuing to exist.

50. Secondly, Britannia takes the view that it was the subject of discrimination as compared with other undertakings whose turnover had decreased.

51. Thirdly, Britannia submits that it was not treated in the same way as an undertaking which was the subject of Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.466 - Greek Ferries) (OJ 1999 L 109, p. 24).

52. On that latter point, Britannia observes that that undertaking had withdrawn from the market before adoption of the Commission decision. As the turnover of that undertaking for the preceding business year was not available, the Commission relied on the first part of the first subparagraph of Article 15(2) of Regulation No 17 in order to impose on it a fine of EUR 1 million. Accordingly, Britannia should not be in a less favourable situation than that of the undertaking in that case.

53. The Commission takes the view that the question as to whether or not the applicant's situation was comparable to that of other undertakings which were the subject of previous decisions is a matter of fact which was ruled on by the Court of First Instance in the judgment under appeal and, therefore, cannot be reviewed by the Court of Justice in the context of the appeal.

54. As regards the first argument based on a transfer of activities, the Commission states that the Court held that the applicant was not in a comparable situation to that of other undertakings concerned by previous decisions, since, unlike those undertakings, Britannia had not achieved any turnover in the business year preceding the adoption of the contested decision.

55. In relation to the second argument, namely that Britannia was not treated in the same way as other undertakings whose turnover had decreased, the Commission submits that this argument was never raised by the applicant during the procedure before the Court of First Instance.

56. Finally, as regards the third argument, based on Decision 1999/271, the Commission observes that this was rejected by the Court. The Commission's previous practice cannot serve as a legal framework for setting fines in the field of competition, since the legal framework is laid down solely in Article 15(2) of Regulation No 17. Consequently, the interpretation of that provision in an earlier case that benefits a specific undertaking is not a matter of law such as to give rise to an obligation to treat another undertaking in a later case in the same way.

- Findings of the Court

57. It should be recalled that, as stated in paragraph 44 above, when calculating fines imposed on undertakings which participated in a cartel, differentiated treatment of those undertakings is inherent in the Commission's discretion in this area.

58. As regards the first two arguments relied on by Britannia, namely that the Commission departed from previous administrative practice, it should be borne in mind that the Court of First Instance, in paragraph 61 of the judgment under appeal, held that the applicant was not in a comparable situation to that of the undertakings referred to in previous Commission decisions since it had not achieved any turnover in the business year preceding the adoption of the contested decision.

59. In those circumstances, the Court correctly concluded, in paragraph 61, that the Commission was justified in treating Britannia differently from those undertakings.

60. In relation to the applicant's argument based on Decision 1999/271, it must also be pointed out that, while the situation of the undertaking referred to in that decision was similar to that of Britannia, it is clear from established case-law of the Court of Justice, set out in paragraphs 201 and 205 of Case C-167/04 P JCB Service v Commission [2006] ECR I8935, that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets,

products, the undertakings and periods concerned, are not likely to be the same.

61. It must be added that undertakings involved in an administrative procedure in which fines may be imposed for infringement of the Community competition rules cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or of a particular method of calculating the fines. The Court has stated in particular that 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 (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I-5425, paragraphs 228 and 229).

62. In the light of all the foregoing, the Court of First Instance did not err in law by holding that the Commission did not infringe the principle of equal treatment when establishing the business year to which the upper limit of 10% was applicable.

63. Accordingly, the second part of the second plea cannot succeed.

64. Consequently, the second plea relied on by Britannia in support of its appeal must be rejected in its entirety.

The third plea, alleging infringement of the principle of legal certainty

65. The third plea relied on by Britannia in support of its appeal is also in two parts.

The first part of the third plea

- Arguments of the parties

66. By the first part of its third plea, Britannia submits that the Court of First Instance infringed the principle of legal certainty by dismissing the appeal, when, in the contested decision, the Commission had taken into account a business year other than the one preceding the adoption of that decision when fixing the upper limit relating to turnover provided for in the first subparagraph of Article 15(2) of Regulation No 17.

67. More precisely, Britannia asserts that the Court erred in law by holding that the fact that the Commission departed from the wording of the first subparagraph of Article 15(2) of Regulation No 17 and used a business year other than the one preceding the adoption of the contested decision did not constitute an infringement of the principle of legal certainty.

68. Britannia submits that it could not be foreseen that the Commission intended to refer to a year other than that business year. In that regard, the Court's approach led to a significant lack of legal certainty given that it is impossible for undertakings concerned by a Commission investigation to determine the relevant reference year used for setting the upper limit of the fine.

69. Britannia adds that the only way to ensure that administrative practice is coherent and predictable is to apply the upper limit laid down in the first subparagraph of Article 15(2) of Regulation No 17 to the business year preceding the adoption of the Commission decision in all circumstances, even if such an interpretation would mean applying the upper limit laid down in that provision to a turnover which is zero.

70. The Commission takes the view that its interpretation of the first subparagraph of Article 15(2) of Regulation No 17 was predictable, since the upper limit set by that provision applies to turnover achieved in the business year preceding the decision closing the administrative phase and the applicant had no turnover during that year.

71. The Commission asserts that the concept of predictability of fines means that undertakings must be in a position to assess the consequences of their actions before carrying them out. In

the present case, when the applicant decided to commit the infringement, its turnover was not very different from that used in calculating the upper limit of 10%, that is, EUR 55.7 million for the year ending at the end of June 1996.

72. The Commission concludes that, when the infringement of which it is accused was committed, Britannia could assume that, if the infringement was discovered and penalised immediately, it would have to pay a fine of around EUR 5.5 million.

- Findings of the Court

73. It must be held that by its argument Britannia, in essence, seeks to reformulate all the arguments already set out in support of the first plea relied on to support this appeal, alleging infringement of Article 15(2) of Regulation No 17.

74. Accordingly, since it is clear from paragraph 32 of the present judgment that the first plea is unfounded, the arguments put forward by the applicant in support of the first part of its third plea are also unfounded.

75. The first part of the third plea cannot therefore be upheld.

The second part of the third plea

- Arguments of the parties

76. By the second part of its third plea, Britannia submits that the Court of First Instance erred in law in dismissing the action, even though the contested decision infringes fundamental rights. In fact, in the field of criminal penalties, legal certainty is a fundamental right enshrined in Article 7(1) of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 49(1) of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

77. The Commission contends that that part of the third plea is new since it was not raised before the Court of First Instance.

78. The Commission goes on to state that, as Britannia's turnover during the period in which the infringement was committed, that is, from 1994 to 1997, was approximately EUR 55 million, that undertaking could have expected a maximum fine of EUR 5.5 million if the cartel had been discovered. As Britannia was not in a position to ascertain its turnover for the business year preceding the adoption of the contested decision, it cannot claim that it expected a fine of a precise amount.

- Findings of the Court

79. It must be borne in mind that the principle of legal certainty requires that rules of Community law be clear and precise, so that interested parties can ascertain their position in situations and legal relationships governed by Community law (see Case C-63/93 Duff and Others [1996] ECR I-569, paragraph 20).

80. As regards the Community competition rules, the Court of First Instance pointed out in paragraph 70 of the judgment under appeal that the provisions governing the implementation of those rules, and in particular Regulation No 17 and the Guidelines, enable undertakings to foresee with certainty the financial consequences likely to result from an infringement of those rules.

81. The Court of First Instance was correct to hold in paragraph 73 of the judgment under appeal that the principle of legal certainty could give the applicant no guarantee that its cessation of commercial activities in the zinc sector would result in its escaping the imposition of a fine for the infringement committed. In fact, Britannia was perfectly able to foresee that a fine would be imposed on it, since it was clearly in breach of the competition rules and the fine would be

determined by reference not only to the gravity and duration of that infringement, but also to the circumstances specific to that undertaking.

82. Britannia does not put forward any argument or other evidence such as to show that the Court's finding in paragraph 73 of the judgment under appeal is vitiated by error of law.

83. Furthermore, in the light of the Commission's discretion in this field, an undertaking participating in a cartel cannot acquire any certainty as to the amount of the fine likely to be imposed on it by the Commission under the provisions of Regulation No 17.

84. In those circumstances, the fact that Britannia was not able to ascertain in advance the relevant reference year for the purposes of determining the upper limit of the fine does not, by itself, constitute an infringement of the principle of legal certainty.

85. The second part of the third plea cannot therefore be upheld.

86. Accordingly, the third plea relied on by Britannia in support of its appeal must be rejected.

87. It follows from the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

88. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, 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 against Britannia and Britannia has been unsuccessful, it must be ordered to pay the costs.

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FORM	Judgment
TREATY	European Economic Community
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61980J0100 : N 22 24
61993J0063 : N 79
62002A0033 : N 1 - 87
62002J0189 : N 61
62003J0017 : N 21
62004J0167 : N 60
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CONCERNS	Confirms 62002A0033 -
SUB	Competition ; Rules applying to undertakings ; Concerted practices
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APPLICA	Person
DEFENDA	Commission ; Institutions
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NOTES	Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (février-mars 2007), Petites affiches. La Loi / Le Quotidien juridique 2007 no 101 p.12-13 ; Idot, Laurence: Calcul du plafond de l'amende et chiffres d'affaires de références, Europe 2007 Août-Septembre Comm. no 219 p.26-27
PROCEDU	Action for annulment;Appeal against penalty;Appeal - unfounded
ADVGEN	Bot
JUDGRAP	Silva de Lapuerta
DATES	of document: 07/06/2007 of application: 07/02/2006

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

12 September 2007 (*)

(Competition – Cartels – European haberdashery market (needles) – Product market sharing – Geographic market sharing – Assessment of evidence – Participation in meetings – Tripartite agreement – Fine – Gravity and duration of the infringement – Attenuating circumstances)

In Case T‑36/05,

Coats Holdings Ltd, established in Uxbridge, Middlesex (United Kingdom),

J & P Coats Ltd, established in Uxbridge,

represented by W. Sibree and C. Jeffs, Solicitors,

applicants,

v

Commission of the European Communities, represented by F. Castillo de la Torre and K. Mojzesowicz, acting as Agents,

defendant,

APPLICATION, principally, for annulment of Commission Decision C (2004) 4221 final of 26 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/F‑1/38.338 – PO/Needles) and, in the alternative, for annulment or reduction of the fine imposed on the applicants,

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2006,

gives the following

Judgment

Subject-matter and facts

I – Subject-matter

1 By Decision C (2004) 4221 final of 26 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/F‑1/38.338 – PO/Needles; ‘the Decision’) the Commission found that, during the period from 10 September 1994 to 31 December 1999, Coats Holdings Ltd and J & P Coats Ltd (together ‘the applicants’ or ‘Coats’) participated in a series of agreements – within the meaning of Article 81 (1) EC – in the needles sector in conjunction with two other undertakings and their respective subsidiaries, namely, first, William Prym GmbH & Co. KG (‘Prym’) and Prym Consumer GmbH & Co. KG and, second, Entaco Group Ltd and Entaco Ltd.

2 On the basis of the findings of fact and legal assessments in the Decision, the Commission imposed

a fine of EUR 30 million on the applicants.

II – Applicants and other undertakings concerned

A – Coats Holdings and J & P Coats

3 Until February 1991, Coats Viyella plc (currently known as 'Coats Holdings') was a needle manufacturer through its wholly-owned subsidiary, Needles Industries Ltd ('NIL'). In April 1991, Coats Viyella sold NIL in a buy-out by former employees of NIL (first management buy-out) to a new company, Entaco. Entaco acquired NIL's manufacturing assets and packaging materials, while Coats Viyella retained NIL's needle finishing and packaging business. Coats Viyella remained active in that sector until its finishing and packaging business was also acquired by Entaco, on 10 September 1994, in a second management buy-out.

4 Coats Holdings has been a distributor of needles in the wholesale and retail business sectors since 1994. In 2002, the last year of published accounts available to the Commission, Coats Holdings' turnover amounted to GBP 1 156 million.

5 J & P Coats is a wholly-owned subsidiary of Coats Holdings, which operates in the United Kingdom market and handles all of Coats Holdings' activities in the metal and plastic haberdashery products market ('hard haberdashery products') in the European Economic Area (EEA).

B – Prym and Prym Consumer

6 Prym is a German company which claims to be one of Europe's leading brands of hard haberdashery and sewing products. It has three main divisions, namely Prym Tec GmbH & Co. KG, Prym Fashion GmbH & Co. KG and Prym Consumer. In 2003, Prym had a turnover of EUR 337 million. In 2002, Prym Consumer's share of the turnover amounted to approximately EUR 126 million.

7 In January 1977, Coats Patons Ltd (Coats Holdings' predecessor in title) acquired a 24.9% holding in William Prym-Werke KG (Prym's predecessor in title). Coats Holdings retained that stake until 1994.

8 Prym Consumer markets a range of hand sewing needles, knitting pins, safety pins and consumer haberdashery. Prym Consumer is the parent company of Newey Group plc, its wholly-owned English subsidiary. Between September 1994 and March 1997, Prym Consumer held 10.1% of the share capital of Entaco via that subsidiary.

C – Entaco and Entaco Group

9 Entaco's main business activities are the manufacture of hand sewing needles, medical devices, commercial fishing systems and associated wire products.

10 Entaco Group became the parent company of Entaco as of March 1997 and owns 100% of the share capital of Entaco.

III – Administrative procedure

11 On 7 and 8 November 2001, the Commission carried out investigations pursuant to Article 14(3) of Council Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty of 6 February 1962 (OJ, English Special Edition (I) (1959-1962), p. 87) at the premises of several Community producers and distributors of haberdashery products (including Entaco, Coats and Prym). Those investigations followed the provision of information by Mr E, Entaco's Director of Marketing and Sales at the material time, between 23 August 2000 and 6 August 2001. The Commission regarded the provision of that information as a leniency application by Entaco.

12 On 14 April and 15 May 2003, the Commission sent requests for information under Article 11 of Regulation No 17 to the undertakings concerned. On 15 March 2004, the Commission sent a statement of objections to Prym, Entaco and Coats, whose replies to that statement of objections were lodged within the prescribed time-limit. The Commission gave them access to the file in electronic form. A hearing took place on 18 June 2004.

13 On 26 October 2004, the Commission adopted the Decision.

IV – The Decision

14 According to the Decision, between 10 September 1994 and 31 December 1999, the three undertakings in question and their respective subsidiaries entered into a series of written agreements that were formally bilateral but amounted in practice to tripartite agreements, under which those undertakings shared or contributed to sharing product markets (by segmenting the European market for hard haberdashery products) and geographic markets (by segmenting the European market for needles).

A – Relevant markets

15 The industry concerned is the manufacturing and packaging of needles and other hard haberdashery products.

16 According to the Decision, Prym, Entaco and Coats are the main suppliers of needles in Europe. Prym Consumer and Entaco dominate the needle manufacturing sector in the European Union and in the world-wide market. Furthermore, the distribution of needles and pins in Europe is dominated by Coats, and comprehensive agreements exist between Coats and Prym concerning the distribution of hard haberdashery products throughout the European Union.

1. Relevant product markets

17 The Commission takes the view that hand sewing needles and craft needles form part of the same market, and that machine needles can be distinguished. In conclusion, for the purposes of the Decision, the Commission identified three relevant product markets:

– the European market for hand sewing needles and craft needles (including, in particular, special needles);

– the European market for 'other sewing and knitting products, including pins and knitting pins/knitting needles';

– the European market for other hard haberdashery products, including zips and other fasteners.

In the first of those markets, the Commission found that the product and geographic market sharing took place between 10 September 1994 and 31 December 1999, whereas the last two were the subject of product market sharing between 10 September 1994 and 13 March 1997.

2. Relevant geographic market

18 The Commission explains that, unlike fasteners, needles and pins have very low transport costs. However, needles and pins sold in Europe are mainly produced in the European Union by European manufacturers. The Commission concludes that the market for needles is at least Europe-wide.

3. Size of the relevant markets in economic terms

19 According to the Commission's findings, in 2002 the turnover of the market for needles in the European Union amounted to approximately EUR 30 million. It takes the view that, as far as the wholesale business is concerned, the market for needles must be regarded as being worth close to EUR 30 million. As for the retail business, the value of the market for hand sewing needles alone must also be estimated as approximately EUR 30 million. However, in the present case, according to the Commission, it is necessary to take into consideration a larger market than the hand sewing needle market. It therefore took into consideration the markets for accessories, fasteners other than zips, and for other sewing and knitting products, including pins and knitting pins/knitting needles. The European Union turnover in the latter market amounts also to EUR 30 million. In the Commission's opinion, a conservative estimate of the total market for other fasteners in the European Union must be between EUR 1 billion and EUR 1.5 billion.

B – Description of events

20 The Commission notes that, as early as 1975, the predecessors of Prym and of Coats Holdings had entered into Principles of Agreement which contained market-sharing clauses. Those Principles are not, however, the subject-matter of the Decision.

1. Meetings and agreements between 1993 and 1994

21 The events at issue in the present action occurred mainly in 1993 and 1994.

(a) Meetings and correspondence

22 In the Decision, the Commission identifies five tripartite meetings between Prym, Coats (or NIL) and Entaco, four of which took place in 1993 and one in 1995. The minutes of the first meeting, held on 11 February 1993, which Prym sent to Entaco by fax of 18 February 1993, state:

'background of the Coats/Prym relationship – Prym seem to be responsible for hard haberdashery. [Prym] believed that there was a moral obligation on Coats to tidy up the present [NIL] situation, so that the original intention of Coats controlling the manufacture of soft haberdashery and Prym being the supplier of hard haberdashery could finally be achieved'.

23 In a letter of 10 May 1993 addressed to Prym, Entaco explained why the three undertakings had an interest in sharing the European market and set out the following initial proposals:

'The main objective of Prym really is to remove or neutralise Entaco's entry into the haberdashery market. We would propose the following which we consider takes this objective into account: …'

24 In a letter of 30 June 1993 addressed to Coats, Prym stated why Entaco, Prym and Coats had an interest in a common involvement:

'A further competitor in the hard haberdashery market in Europe is the last thing we need! It would seem sensible therefore for the three parties involved – Coats/NIL, Entaco and Prym – to cooperate to ensure that the European needle market does not suffer from further self-inflicted wounds!'

25 At a meeting between Coats, Prym and Entaco on 6 October 1993, concerning the possible acquisition of the NIL packaging business, Prym informed Coats that the initial plan for a Prym/Entaco joint venture had been abandoned and that Entaco would prefer Prym to make a direct investment in Entaco, as it was of the view that it would be more acceptable to the market if Entaco could present a 'face of independence'. Coats' representative then stated that 'he had no problem with the new approach, subject to two points: (i) That Entaco did not sell competitive products to competition at lower prices than they gave Coats. (ii) That Mr F [Coats' Chief Executive] was in agreement'.

(b) Overview of agreements concluded in 1994

26 On 10 September 1994, the agreements listed below, which, according to the Commission, are unlawful, were entered into by the following undertakings.

27 The agreements concluded between Prym (or Prym Consumer) and Entaco are as follows:

– Heads of Agreement (signed on 15 or 16 June 1994 but entering into force on 10 September 1994);

– Agreement for the sale and purchase of 10.1% of the entire issued share capital of Entaco and on certain future shareholder relationships ('the 10.1% Agreement');

– Purchasing agreement;

– Distribution agreement.

28 The agreements concluded between Coats and Entaco are as follows:

– Agreement for the sale and purchase of a business;

– Supply and purchase agreement.

(c) Agreements between Prym (or Prym Consumer) and Entaco

Heads of Agreement

29 In June 1994, Entaco and Prym signed Heads of Agreement which entered into force on 10 September 1994. That agreement was drawn up by the parties for the purchase of the packaging and finishing activities of NIL (formerly owned by Coats Holdings) and took effect from the date of such purchase. The agreement, as stated in its preamble, was to remain in effect as long as Prym held at least 10.1% of the ordinary shares of Entaco.

30 According to that agreement, Prym committed itself to assisting in developing Entaco as a specialist needle producer. It therefore instructed its US subsidiary, Prym-Dritz Inc., to purchase all the sewing needles it required from Entaco. In return, Entaco agreed 'during the period of [the] Agreement to restrict its manufacturing and distribution activities in the haberdashery sector to needles only, and not to widen its activities to embrace pins, safety pins, four-piece fasteners, knitting pins, or any other haberdashery product without the prior agreement of Prym', and 'to appoint Prym as its exclusive distributor for all packaged hand sewing needles, other than Coats brands in Europe with the exception of the UK and Republic of Ireland'.

10.1% Agreement

31 This agreement provided for Prym Consumer to buy 10.1% of the issued share capital of Entaco from the 3i Group plc, a shareholding which was held by Prym Consumer's subsidiary, Newey Group, between September 1994 and March 1997.

Purchasing and distribution agreements

32 According to the purchasing agreement, Prym Consumer was not to compete with Entaco and agreed to purchase all of its requirements for products specified in schedule 1 to the agreement exclusively from Entaco (clauses 2.2 and 2.3 of the purchasing agreement).

33 Under the distribution agreement, Entaco committed itself to selling products in 'the Territory' (Europe, excluding the United Kingdom and the Republic of Ireland) only to clients known as 'Label Accounts', to 'the Distributor' (Prym Consumer) and to Coats (clause 2.2 of that agreement). The relevant products were supposed to be specified in schedule 1 to the agreement, which is, however, a blank document.

(d) Agreements between Coats and Entaco

Agreement for the sale and purchase of a business

34 By an agreement entitled 'Agreement for the sale and purchase of a business' (business sale agreement), Coats sold the remainder of its needle manufacturing and packaging business to Entaco on 10 September 1994 (second management buy-out). Under clause 17.1 of that agreement, the sale was 'conditional upon the execution of the Prym agreements' (the distribution and purchasing agreements and the 10.1% Agreement entered into by Entaco and Prym Consumer described above). Clause 17.2 provided that if that obligation was not fulfilled, the agreement would lapse.

Supply and purchase agreement

35 On the same date, J & P Coats and Entaco entered into a three-year agreement entitled 'Supply and Purchase Agreement' for the exclusive purchase by Coats of Milward branded needles and accessories from Entaco. Clause 2.2 provides that Entaco 'shall … not supply Products to a customer of [Coats UK] other than those customers to whom [Entaco] [supplied] Products prior to the date hereof at existing business levels' (subparagraph (a)) and 'shall fulfil its obligations of cognate nature pursuant to an agreement between [Entaco] and Prym dated 8 September 1994' (subparagraph (b)). Clause 2.2.4 provides that 'in continental Europe [Coats] shall purchase all of its requirements for Products from [Entaco] and Prym [Consumer]'.

36 According to the Decision, Entaco was obliged, by virtue of that supply and purchase agreement, on

the one hand to enter into the purchasing agreement with Prym in order to buy the remaining packaging and finishing needles business from Coats (which was a prerequisite to becoming a competitor to Prym at the wholesale level and to Coats and Prym at the retail level) and, on the other hand, to respect the obligations contained in the agreements signed with Prym (which were effectively keeping Entaco from competing with Prym at the wholesale level and with Prym and Coats at the retail level). Finally, Entaco had to confine itself to being a supplier of Prym and Coats, but with the security of an outlet for its production.

(e) Inter-conditional clauses contained in the agreements

37 In the Decision, the Commission takes the view that all the agreements listed in the above section were inextricably linked through a series of reference or inter-conditional clauses.

38 The Commission regards the complex system of inter-conditional clauses as having had a twofold effect. First, it made those formally bilateral agreements an overarching tripartite agreement. Second, the system compelled Entaco (i) to sign the distribution and purchasing agreements with Prym Consumer, thereby giving effect to the principles set out in the Heads of Agreement, since the sale of NIL and the exclusive supply contract with Coats were conditional upon those signatures, and (ii) to respect the geographic and product market sharing with Prym Consumer even after its acquisition of NIL (which would have enabled Entaco to become an effective competitor to Prym at the wholesale and retail levels and to Coats at the retail level). That effect was produced by clause 2.2 of the supply and purchase agreement with Coats.

39 The Commission relies in that regard upon a written statement by Mr E dated 7 October 2003 in which he provides the following information on the objectives of the market sharing agreements:

‘In 1994 Entaco’s then Managing Director, Victor [B], signed up to Agreements with ... Coats and Prym, in return for which Coats at the same time sold the assets of [NIL] to [Entaco]. The Distribution Agreements which were signed up to in 1994 with both Coats and Prym, although separate Agreements, were in reality effectively one Tripartite Agreement. In return for the secure supply of needles to Coats and Prym, Entaco agreed not to enter into the market for other haberdashery items such as pins and fasteners.’

2. Events after 1994

40 On 13 March 1997, Prym sold its 10.1% shareholding in the capital of Entaco to Entaco Group by an agreement relating to the sale of 11 222 ordinary shares in the capital of Entaco. The agreement was conditional upon the purchasing and distribution agreements between Entaco and Prym Consumer being extended for five years commencing 1 April 1997.

41 A second distribution agreement between Prym Consumer and Entaco was signed on 1 April 1997, thereby extending the previous distribution agreement relating to hand sewing needles. The market concerned was Europe, excluding the United Kingdom and the Republic of Ireland. The purchasing agreement too was extended by another agreement signed on 1 April 1997, which provided that Prym should not manufacture or distribute hand sewing needles or craft needles. The clauses cited above thus maintained the principle of a market sharing agreement between Entaco and Prym, although its scope was limited only to needles.

42 The supply and purchase agreement between Entaco Group and J & P Coats was renewed on 10 September 1997 for a three-year period, expiring in September 2000.

3. Termination of the various agreements and concerted practices

43 Prym’s sale in March 1997 of the 10.1% stake in Entaco terminated the Heads of Agreement. The Commission believes that that did not, however, mean the end of the product market sharing agreement, since clause 7 of the agreement of 13 March 1997 (relating to the sale of 11 222 shares) maintained the principle of the same kind of collusion between Prym and Entaco as that contained in the 1994 Heads of Agreement.

44 Prym Consumer terminated the purchasing agreement by letter of 14 December 1998, giving 12 months’ notice. That agreement was thus terminated on 31 December 1999. The Commission says it is unaware as to whether the distribution agreement was also terminated on 31 December 1999 but, according to the Commission, the fact that Prym referred to the purchasing and distribution

agreements as being 'one' agreement suggests that the distribution agreement would have terminated as a result of the termination of the purchasing agreement.

45 Prym states that the parties to the agreements ceased to abide by the two agreements at the latest by the end of April 1999. However, in the Commission's view, in reality, the purchasing agreement remained legally in force until 31 December 1999, and the distribution agreement remained in force at least until that date. The Commission concludes that those two agreements ended on 31 December 1999. By contrast, the 1997 supply and purchase agreement remained in force until September 2000.

C – Legal assessment

1. Application of Article 81 EC

46 According to the Decision, Entaco, Coats and Prym participated in numerous meetings, either together or in a bipartite manner, and also signed a series of, formally bilateral, agreements aimed at restricting competition and which amounted to a tripartite agreement.

47 According to the Commission, that conduct led to a change in the conditions of competition, which ceased to be as they should have been, and prevented the participating competitors from determining their policy on the market independently as required by Article 81(1) EC. The Commission concludes that, in the present case, the tripartite agreement and the preliminary meetings between Prym, Entaco and Coats, and also the bilateral meetings between Prym and Entaco, may be characterised as agreements and/or concerted practices.

48 The Commission finds that the anti-competitive behaviour in question had the object and effect of restricting competition in the Community. It notes that in all of the agreements and concerted practices considered in this case, the following elements can be regarded as relevant for the purposes of establishing an infringement of Article 81(1) EC:

– product and geographic market sharing;

– participating in preliminary and/or regular meetings and having other contacts in order to agree on those restrictions and to implement and/or modify them as required.

49 The Commission takes the view that the continuing agreement between the manufacturers had an appreciable effect on trade between the Member States of the European Union, as the agreements entered into by the members of the cartel extended to virtually all trade throughout the European Union in the needle industrial sector, and also affected trade in the more important industrial sectors of other hard haberdashery products by preventing Entaco from entering those markets.

2. Fines

50 In the Decision, the Commission set the fine to take into account the gravity and duration of the infringement, which are the two criteria expressly referred to in Article 23(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

51 In assessing the gravity of the infringement, the Commission notes that it must take account of its nature, its actual impact on the market (where this can be measured) and the size of the relevant geographic market. In the present case, the Commission is of the opinion that the undertakings concerned by the Decision committed a 'very serious' infringement, leading it to fix the starting amount of the fine imposed on Coats at EUR 20 million.

52 As regards the duration of the cartel, the Commission takes the view that the product and geographic market sharing agreements between Prym, Entaco and Coats lasted from the entry into force of the Heads of Agreement and the signature on 10 September 1994 of the bilateral agreements, which in practice amounted to a tripartite agreement, until at least 31 December 1999, the date of termination of the distribution and purchasing agreements between Prym Consumer and Entaco. The duration of the infringement is therefore at least five years and three months. As a result, it increased the starting amount by 50% to take account of the duration of the infringement. It thus set the basic amount of the fine imposed on Coats at EUR 30 million.

53 As to the attenuating circumstances, the Commission takes the view that the fact that another undertaking may have acted as ringleader – which was not the position in the present case – has no bearing on the assessment of Coats' involvement. Furthermore, Coats gained, in particular, an economic advantage from the infringing practices concerned: the protection of its Milward brand and a certain stability in the needles and pins markets and other hard haberdashery markets. The Commission explains that, for the purposes of assessing the gravity of the present case, it is required to take account of the size of the relevant markets and the effective economic capacity of the offenders to cause significant damage to other operators.

54 As regards the application of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), the Commission takes the view that Entaco was the only undertaking to have informed it of the existence of the market sharing agreements and to have supplied decisive evidence without which those agreements might not have been disclosed. As a result, the Commission considers that Entaco alone satisfies the conditions set out in Section B of that Notice.

D – Operative part

55 In conclusion, the Commission adopted the operative part of the Decision, Article 2 of which, applying the criteria referred to above, imposes the following fines:

– EUR 30 million on Prym and Prym Consumer, which are jointly and severally liable;

– EUR 30 million on Coats Holdings and J & P Coats, which are jointly and severally liable.

56 The applicants were notified of the operative part of the Decision on 26 October 2004, whereas the full text of the Decision, including the summary of grounds, was not communicated to the applicants until 22 November 2004.

Procedure and forms of order sought by the parties

57 By application lodged at the Registry of the Court of First Instance on 31 January 2005, the applicants brought the present action.

58 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and to put certain questions to the parties. The parties replied within the time-limit allowed.

59 The parties presented their arguments and their replies to the Court's questions at the hearing on 22 November 2006.

60 The applicants claim that the Court should:

– annul the Decision in its entirety;

– in the alternative, annul such parts of the Decision as the Court finds that the Commission has failed to prove or are vitiated by manifest error or inadequate reasoning;

– annul or reduce the fine imposed on Coats;

– order the Commission to pay the costs.

61 The Commission contends that the Court should:

– dismiss the application;

– order the applicants to pay the costs.

Law

62 In the light of the pleas in law put forward, the form of order sought by the applicants must be regarded as seeking, principally, the annulment of the Decision and, in the alternative, the annulment or reduction of the associated fine. In fact, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Community judicature relates only to those aspects of the decision which concern that addressee (Case C‑310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I‑5363, paragraph 53).

63 As to the merits, Coats advances two pleas in law, one of which, concerning the erroneous assessment of the evidence, is advanced in support of the application for annulment of the Decision, while the other supports the claim for annulment or reduction of the fine.

I – Plea in law seeking annulment of the Decision

64 By the first plea, comprising several parts, the applicants submit that the Commission's assessment of the evidence as a whole is vitiated by manifest errors such that it has failed to demonstrate to the requisite legal standard that Coats was a party to an unlawful agreement between 1994 and 1999. It is appropriate first of all, therefore, to establish the relevant rules relating to the burden of proof and the assessment of the evidence.

A – Burden of proof and assessment of the evidence

1. Applicants' arguments

65 According to the applicants, the Court of Justice and the Court of First Instance have repeatedly confirmed that the Commission must produce 'sufficiently precise and consistent evidence' to support the 'firm conviction' that the alleged infringement took place. That standard of proof is not satisfied if a 'plausible explanation' could be given which rules out an infringement. The applicants rely in that respect on Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzink* v *Commission* [1984] ECR 1679 ('*CRAM and Rheinzink*'), paragraph 20; Joined Cases T‑185/96, T‑189/96 and T‑190/96 *Riviera auto service établissements Dalmasso and Others* v *Commission* [1999] ECR II‑93 ('*Riviera auto service*'), paragraph 47; and Case T‑62/98 *Volkswagen* v *Commission* [2000] ECR II‑2707, paragraphs 43 and 72.

66 The Commission disputes the applicants' assertion that it must produce evidence to support the 'firm conviction' that the alleged infringement was committed. Contrary to the applicants' contention, *CRAM and Rheinzink* (cited in paragraph 65 above) does not refer to the concept of 'firm conviction'.

67 Furthermore, the existence of an alternative plausible explanation of the facts is relevant only if the Commission has failed to establish the existence of the infringement on the basis of the documentary evidence adduced by it.

2. Findings of the Court

68 The Court recalls that, as regards establishing an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement (Case C‑185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I‑8417, paragraph 58, and Case C‑49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I‑4125, paragraph 86).

69 Any doubt in the mind of the Court must operate to the advantage of the addressee of the decision finding an infringement. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, particularly in proceedings for annulment of a decision imposing a fine.

70 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, one of the fundamental rights which, according to the case-law of the Court of Justice and as reaffirmed in Article 6(2) EU, are general principles of Community law. Given the nature of the infringements in question and the nature and severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the

procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C–199/92 P *Hüls* v *Commission* [1999] ECR I–4287, paragraphs 149 and 150, and Case C–235/92 P *Montecatini* v *Commission* [1999] ECR I–4539, paragraphs 175 and 176).

71 Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement (Joined Cases T–44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II–0000, paragraph 62) and to support the firm conviction that the alleged infringements constitute appreciable restrictions of competition within the meaning of Article 81(1) EC (*Riviera auto service*, cited in paragraph 65 above, paragraph 47). That requirement is not satisfied, in particular, where a plausible explanation can be given for those alleged infringements which rules out an infringement of Community rules on competition (*CRAM and Rheinzink*, cited in paragraph 65 above, paragraph 16 et seq., and *Riviera auto service*, cited in paragraph 65 above, paragraph 47).

72 However, the Commission rightly observes that the case-law, according to which it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another ‘plausible explanation’ of the facts to be substituted for the one adopted by the Commission, is applicable only where the Commission’s reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings. It is not, therefore, applicable where the Commission’s findings are based on documentary evidence (see, to that effect, Joined Cases T–305/94 to T–307/94, T–313/94 to T–316/94, T–318/94, T–325/94, T–328/94, T–329/94 and T–335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II–931 (‘*PVC II*’), paragraphs 725 to 727, and Joined Cases T–67/00, T–68/00, T–71/00 and T–78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II–2501 (‘*JFE Engineering*’), paragraphs 186 and 187).

73 The question in the present case is therefore whether there is documentary evidence to support the Commission’s complaints. In that regard, the Commission claims that the Decision is based on an ample case-file of direct evidence disclosing the inter-conditional clauses and the nature of the negotiations that resulted in them being agreed.

74 However, as regards the inter-conditional obligations contained in the agreements, the direct evidence adduced implicates only Prym and Entaco. As to Coats, that evidence is ambiguous. Since the evidence calls for interpretation, the Commission’s argument is unconvincing. According to the Commission, as there is documentary evidence, it is not sufficient for the applicants to provide a plausible explanation. However, that evidence is ‘documentary evidence’ only if the Commission’s, rather than the applicants’, explanation is accepted. It follows that, in the present case, there is no documentary evidence within the meaning of the case-law. As far as the inter-conditional obligations are concerned, the applicants are thus free to put forward a ‘plausible explanation’ of the facts as an alternative to the one adopted by the Commission.

B – Areas of dispute

75 Most of the facts set out in the Decision are not at issue in the present dispute between the Commission and Coats. The following are the key areas of dispute:

– the Commission relies on Coats’ participation in two trilateral meetings held on 11 February and 11 August 1993 involving Coats, Prym and Entaco, at which a cartel was allegedly discussed;

– the Commission claims that Coats influenced the terms of the Heads of Agreement and enabled anti-competitive agreements to come into force;

– according to the Commission, the combination of, first, the inter-conditional obligations contained in the 1994 Entaco/Prym agreements and the 1994 Coats/Entaco agreements and, second, Coats’ alleged ability to require Entaco to comply with certain obligations owed to Prym, made Coats the ‘cornerstone’ of a tripartite cartel arrangement;

– the Commission maintains that, by deciding in April 1997 to renew the 1994 Coats/Entaco supply and purchase agreement on virtually the same terms, Coats continued the alleged tripartite cartel agreement;

– the Commission claims that a payment made by Coats to Entaco in October 2000 in settlement of a dispute relating to a breach of the 1997 Coats/Entaco supply and purchase agreement in reality compensated Entaco for Prym's non-compliance with their cartel and demonstrated that Coats was enforcing a tripartite arrangement.

76 In the Decision, the Commission relied on the above points to demonstrate that Coats had committed an infringement of Article 81 EC. It is appropriate, therefore, for the assessment of the first plea in law to be structured by reference to those points. In addition, since the 1994 agreements ended in March 1997, a distinction will need to be made between the period from 10 September 1994 to 13 March 1997 and the period from 1 April 1997 to 31 December 1999.

C – Coats' liability for the period from September 1994 to March 1997

1. Coats' participation in the trilateral meetings

(a) Arguments of the parties

77 The applicants claim that the trilateral meetings in which Coats took part, namely the meetings held on 11 February and 11 August 1993, did not involve an infringement by Coats of Article 81 (1) EC. Next, they challenge the Commission's assertion that the mechanism of inter-conditional clauses did not require Coats to attend, after 10 September 1994, meetings concerning the day-to-day business of the market sharing agreements concluded by Prym and Entaco. Thus, the fact that Coats did not participate in any of the meetings held after 1994 demonstrates that it was not a party to the cartel formed by Entaco and Prym.

78 As regards the first trilateral meeting, which was held on 11 February 1993, the applicants dispute its characterisation, in recital 78 of the Decision, as a '[meeting] where infringements were very clearly expressed and detailed'. According to the applicants, a proper examination of the minutes of the meeting permits no such conclusion and demonstrates that it was an entirely legitimate meeting in the context of the sale of a business, as a result of which Coats believes that it created a new competitor in the needles sector.

79 Coats claims that it did not concur with Prym's view (see paragraph 22 above) that 'there was a moral obligation on Coats to tidy up' the NIL situation; that the letter from Entaco to Prym dated 10 May 1993 (see paragraph 23 above) was not sent to it, and thus that it did not at any point agree with the views expressed in that letter; and that the Commission drew a similar, unjustified conclusion in relying on the letter from Prym to Coats of 30 June 1993 (see paragraph 24 above), in which Prym suggests 'cooperat[ing] to ensure that the European needle market does not suffer from further self-inflicted wounds'.

80 Finally, as regards the trilateral meeting on 11 August 1993, Coats claims that it was obviously not an anti-competitive meeting.

81 According to the Commission, the minutes of the meeting held on 11 February 1993 and the letter of 10 May 1993 must be assessed in the context of the longstanding cooperation between Prym and Coats. Those documents illustrate the direct development of events leading to the letter of 30 June 1993, which was sent directly to Coats, and finally to the signing of the agreements in September 1994. The letters and faxes are interconnected and, taken together, give a very coherent picture of events and of the nature of those events.

82 The Commission states that, according to settled case-law, where the participation of an undertaking in cartel meetings has been established, it is for that undertaking to put forward evidence to establish that its participation 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. In that regard, there is no evidence that Coats expressed the slightest opposition or objection to what was being discussed at those meetings, although Coats was fully informed of the anti-competitive nature of the negotiations and meetings and did not distance itself from what was being discussed.

(b) Findings of the Court

83 According to case-law, participation in meetings between undertakings of a manifestly anti-competitive nature (*Hüls* v *Commission*, cited in paragraph 70 above, paragraph 155), or with an anti-competitive object (*JFE Engineering*, cited in paragraph 72 above, paragraph 327), or at which anti-competitive agreements were concluded (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) may establish the existence of a cartel.

84 It should be noted that the Commission counted five trilateral meetings, four of which took place between February and October 1993, that is, one year before the agreements at issue were concluded. Two meetings (those of 11 February and 11 August 1993) were categorised by the Commission as anti-competitive meetings.

85 As regards the trilateral meeting held on 11 August 1993, Coats correctly observes that, in the text of the Decision, the Commission omits any reference to that meeting, although it categorises it as a market sharing meeting in Table 2.

86 In fact, a reading of the agreed note of that meeting (annexed to the reply to the statement of objections) demonstrates that the only subject of discussion was the sale of NIL, in particular the assets to be sold. That meeting cannot, therefore, be categorised as a market sharing meeting.

87 As regards the meeting held between Coats, Entaco and Prym on 11 February 1993, in categorising it as a market sharing meeting, the Commission relies on a fax of 18 February 1993 from Prym to Entaco containing minutes of the meeting drawn up by Prym. Paragraph 11 of the minutes records that Mr G of Prym believed that 'there was a moral obligation on Coats to tidy up the present [NIL] situation' (see paragraph 22 above).

88 First of all, it should be noted that that is only the opinion of Mr G of Prym. Similarly, the two letters of 10 May and 30 June 1993 which, according to the Commission, show why the three undertakings have an interest in sharing the European market, are not from Coats. There is, therefore, no evidence that Coats concurred with those statements.

89 Coats nevertheless concedes that its representatives did not contest those statements. In those circumstances, it remains to be considered whether Coats could simply not endorse those statements or whether it was under an obligation publicly to distance itself from such a step if it is to be regarded as not having participated in the cartel in question.

90 It is settled case-law that where participation in cartel 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 (*Aalborg Portland* v *Commission*, cited in paragraph 83 above, paragraph 81, and *Hüls* v *Commission*, cited in paragraph 70 above, paragraph 155). As the Court of Justice explained in paragraph 82 of *Aalborg Portland* v *Commission*, the reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it. The Court of First Instance has applied that case-law also to meetings in which not only competing manufacturers took part but also customers, which is what Coats was in the present case (Joined Cases T‑202/98, T‑204/98 and T‑207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II‑2035, paragraphs 62 to 66).

91 However, the case-law concerning tacit approval is based on the premiss that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded (*Aalborg Portland* v *Commission*, cited in paragraph 83 above, paragraph 81) or which were of a manifestly anti-competitive nature (*Hüls* v *Commission*, cited in paragraph 70 above, paragraph 155). However, the anti-competitive nature of the meeting on 11 February 1993 has not been established beyond doubt. The words 'there was a moral obligation on Coats to tidy up the present [NIL] situation' are relatively ambiguous in the context of the sale of a business and are not necessarily a reference to market sharing. They could equally mean that Coats should accept Prym's earlier offer instead of selling NIL to Entaco. The rest of the minutes have no relevance. Furthermore, the Commission cannot rely on the letter of 30 June 1993 – which makes no reference to the meeting of 11 February 1993 and which was not from Coats – to assess the nature of a meeting held more than four months earlier.

92 As regards the letter of 10 May 1993 from Entaco to Prym, it is clear from its wording (for example, '[u]nder an agreement between Prym Consumer and Entaco both companies would be anxious to maintain the status quo') that the discussions between Entaco and Prym were bilateral in nature. The letter was written neither by nor to Coats. Thus, the letter is not capable of proving that Coats was implicated in the cartel.

93 Furthermore, even if the Commission's assertion were correct, Coats took part in only one anti-competitive meeting, since, contrary to the Commission's claim, the meeting of 11 August 1993 cannot be regarded as a cartel meeting (see paragraph 86 above). The only meeting which could possibly be characterised as a cartel meeting took place on 11 February 1993, 19 months before the conclusion on 10 September 1994 of the agreements to which the Decision relates.

94 Moreover, the only trilateral meeting after 1993, which took place on 6 October 1995, was not characterised by the Commission as an anti-competitive meeting. It follows that Coats did not attend any of the meetings concerning the day-to-day implementation of the market sharing agreements between Prym and Entaco. According to the Commission, the mechanism of inter-conditional clauses did not require Coats to attend meetings after 10 September 1994, but that is not a convincing argument. Clearly, Entaco's obligation to sell only to existing customers in continental Europe was not self-enforcing. The existence of an obligation, whether inter-conditional or not, cannot guarantee its observance. If Coats had intended to require Entaco to comply with its obligation to sell only to existing customers in continental Europe, it would, in any event, have needed to attend those meetings in order to check Entaco's compliance with its obligation.

95 Finally, the Commission submits in its rejoinder that, in the present case, the case-law relating to participation in cartel meetings is important not for the purpose of establishing the existence of an agreement, but because the meetings help to explain the objectives of the written agreements, the Commission proceeding on the premiss that, in the present case, 'the agreements were written agreements and there is no need to deduce Coats' consent from its presence in the meetings'. In other words, the Commission itself is not seeking to establish Coats' liability on the basis of its participation in the meetings, but refers to those meetings simply in order to interpret the written agreements, as Coats' presence in those meetings demonstrates its underlying intentions.

96 In those circumstances, mere participation in the meeting on 11 February 1993 – the anti-competitive nature of which has not been established to the requisite legal standard – cannot render Coats liable for a cartel which was formed by Prym and Entaco more than a year and a half later and which lasted until the end of 1999. Nevertheless, it remains to be considered whether the Commission's other objections are sufficient to justify the operative part of the Decision. In examining that point, the correspondence analysed above will be taken into account in order to interpret Coats' conduct.

2. Coats' influence on the drafting and entry into force of the Heads of Agreement

(a) Arguments of the parties

97 It is common ground that Coats was never formally involved in the Heads of Agreement or in the other anti-competitive written agreements between Prym and Entaco. Although the Commission claims that a complex system of inter-conditional clauses made those formally bilateral agreements an overarching tripartite agreement (see paragraph 37 et seq. above), it acknowledges that there is no agreement signed by all three parties, since the tripartite signing which Coats suggested in its letter of 11 August 1994 did not take place.

98 By contrast, Coats and the Commission disagree as to whether Coats was actively involved in the drafting and entry into force of the Heads of Agreement. The applicants dispute the Commission's assertion that they were in a position to influence the drafting of the Heads of Agreement. They say that the final form of the Heads of Agreement was signed on 15 June 1994, without Coats having any involvement either in its negotiation or drafting. Moreover, Coats claims that it did nothing with the intention of 'enabling' the Heads of Agreement to come into force, as it would have sold its business in any event. Furthermore, Entaco and Prym explicitly discussed the continuation of their cartel agreement even if the transaction with Coats did not proceed.

99 To substantiate its claims, Coats cites the testimony of Mr G of Prym at the hearing before the Commission, according to which 'there was never at any time any Coats input regarding the Heads of Agreement which were signed in June 1994'. Furthermore, the applicants observe that the two faxes, dated 11 and 30 August 1994, relied upon by the Commission as evidence that Coats

intervened in the drafting of the Heads of Agreement, were sent two months after the Heads of Agreement were finalised and signed.

100 As regards the tripartite signing which had been suggested in its letter of 11 August 1994, Coats emphasises that the only reason for such a signing was to ensure that the sale took place within a reasonable period of time, following earlier delays as a result of ongoing discussions between Entaco and Prym. Furthermore, no tripartite signing took place.

101 The Commission explains that since Coats did not directly sign the Heads of Agreement and the distribution and purchasing agreements, it was not a party to the bilateral agreements between Entaco and Prym, but that it adhered to the common plan, the implementation of which was ensured by a network of interconnected bilateral agreements.

102 In the Decision, the Commission found that Coats was informed about the existence of that agreement and its precise content, and therefore about the fact that the entry into force of an agreement containing collusive clauses by two of its suppliers depended on Coats' own actions. By deciding to sign the sale agreement, Coats, according to the Commission, helped to enforce the anti-competitive agreements reached in the Heads of Agreement.

103 The Commission states in that regard that Coats was informed about the content of the Heads of Agreement at the latest on 16 June 1994 and that, knowing of the content of the agreement, it could, and indeed did, try to influence the final shape of the agreement reached. Furthermore, the two faxes of 11 and 30 August 1994 show that Coats tried to change the text of the Heads of Agreement which had already been signed but which had not yet entered into force.

104 The Commission takes the view that the fact that the entry into force of the Heads of Agreement was conditional upon the execution of the sale agreement, which was conditional upon Entaco meeting its obligations under the 1994 distribution and purchasing agreements, supports the Commission's interpretation of the word 'tripartite'.

(b) Findings of the Court

105 It should be noted that Coats was informed at least of the existence of the Heads of Agreement at the latest on 16 June 1994. A letter of 16 June 1994 from Mr G (Prym) to Mr B (Entaco) stated that he had 'spoken to Martin Flower [Coats' CEO] and advised him of the situation'. That letter, together with the faxes of 11 and 30 August 1994 (see paragraphs 106 and 116 above), prove that Coats knew of the cartel before it came into force. Nevertheless, the mere fact of being informed about an anti-competitive agreement cannot give rise to liability for the infringement. The Commission acknowledges that implicitly when it states, in recital 137 of the Decision, that '[b]eing informed about a market sharing agreement may not constitute an approval, however, actively participating in its drafting and enabling it to come into force certainly constitutes such an approval'.

Coats' involvement in drafting the Heads of Agreement

106 As regards Coats' involvement in drafting the Heads of Agreement, it must be noted that the Commission has not produced any evidence that Coats was informed of that agreement before it was signed. According to the case-file, the final form of that agreement was signed on 15 June 1994 without Coats' prior intervention. Admittedly, after it had been signed, Coats tried to persuade Prym and Entaco to change the terms of the Heads of Agreement. In a fax of 11 August 1994, Coats said:

'Thank you for sending me a copy of the Heads of Agreement between Prym and Entaco under cover of your fax dated 25 July 1994. Overall we have no objection, excepting … . I do not believe we can accept such a clause and ask that it be removed as a condition of the sale proceeding as planned.'

107 Nevertheless, that fax indicates that Coats was not involved in drafting the agreement and that a signed copy was sent to it subsequently. Furthermore, the provision which Coats was contesting was not in fact amended, even though Coats signed the 1994 agreements with Entaco. Moreover, Mr G of Prym confirmed at the hearing before the Commission that '[t]he discussions between Entaco and Prym [had taken] place exclusively between Entaco and Prym and to the best of [his] recollection there [had] never at any time [been] any input from the Coats side regarding those discussions or about the detailed content of the two agreements which were signed and … there [had] never at any time [been] any Coats input regarding the Heads of Agreement which were signed in June 1994'. Although he contradicts the statement by Mr E referred to in paragraph 39 above, the Commission

made no reference to that testimony in its Decision.

108 Furthermore, in the defence the Commission does not repeat its assertion in the Decision that 'Coats could influence the drafting of the Heads of Agreement'. Rather, it claims that '[t]he Decision simply [found] that Coats was informed … about the existence of this agreement and its precise content'. In those circumstances, the Commission has not established that Coats did in fact influence the drafting of the Heads of Agreement.

Entry into force of the Heads of Agreement

109 As regards the complaint that Coats enabled the Heads of Agreement to come into force, the Commission's reasoning seems to imply that, since Coats knew of the Heads of Agreement, it could no longer sell its business without becoming liable for the cartel, since its entry into force was conditional upon the sale. Coats' decision to proceed with the sale of its business is not, however, capable by itself of proving that its purpose was to contribute to the objectives of the Prym/Entaco cartel. The fact that Prym and Entaco decided to make that event the date on which their cartel would come into force cannot therefore, at first sight, be attributed to Coats.

110 However, in the circumstances of the present case, the fact that Coats triggered the mechanism of the Prym/Entaco cartel could implicate Coats in that cartel, if that act was part of a common plan.

111 In that respect, it must be recalled that the various points at issue in the present case cannot be examined in isolation. As the Court has acknowledged, the evidence must be assessed in its entirety, taking into account all relevant factual circumstances (Case T–141/94 *Thyssen Stahl* v *Commission* [1999] ECR II–347, paragraph 175).

112 In the present case, Coats' conduct must therefore be examined in the light of the ongoing collaboration between Coats and Prym, which started in the 1970s. That collaboration intensified in the meetings and exchanges of correspondence referred to in paragraph 87 et seq. above. As a result of them, Coats was fully informed of Prym's and Entaco's intentions. In particular, the statement about 'cooperat[ing]' in the letter of 30 June 1993 clearly demonstrates that Entaco and Prym regarded Coats as a partner.

113 As for Coats' anti-competitive intentions, these are demonstrated first of all by the fact that the Heads of Agreement were disclosed to it. In that regard, the Commission rightly observes that suppliers do not generally inform their customers about the cartels of which they are members. In fact, such conduct is highly unusual and shows that, contrary to Coats' claim, it was not the 'victim' of a cartel. The very fact that Entaco and Prym discussed confidential issues (such as the creation of a cartel) shows that Coats' intentions must have been of an anti-competitive nature. According to the settled case-law of the Court, the fact that an exchange of information involves information which an independent operator scrupulously preserves as business secrets is sufficient to demonstrate the existence of an anti-competitive intention (*Tate & Lyle* v *Commission*, cited in paragraph 90 above, paragraph 66).

114 The Heads of Agreement clearly state that Entaco and Prym would share product markets and the geographic market. It is clear from the first sentence that the Heads of Agreement were to take effect from the date of Entaco's purchase of NIL's finishing and packaging business. Coats was thus informed of the existence of that agreement and of its content, just as it was informed of the fact that the entry into force of an agreement containing collusive clauses between two of its suppliers was dependent on its own actions. By deciding to sign the sale agreement, Coats knowingly contributed by its own conduct to the achievement of an objective that was common to Prym and to Entaco, namely the entry into force of the anti-competitive measures agreed in the Heads of Agreement.

115 Furthermore, Entaco would not have entered into any agreement with Prym without being able to enter into agreements with Coats. Entaco expressed that view in a fax of 24 November 1993 addressed to Prym ('we [Entaco] would not seek to have "handcuffs on our wrists" in Europe if we were not cushioned by a supply agreement with Coats'). Coats was aware of that, since, under clauses 7.1.4 and 17.1, the 1994 business sale agreement between Coats and Entaco was conditional upon agreements between Entaco and Prym and the supply and purchase agreement. It follows that the cartel would not have been established if Coats had not participated in it.

116 Moreover, evidence of Coats' intention is contained in a fax addressed to Entaco of 30 August 1994

and copied to Prym, in which Coats mentions a meeting organised with Prym in order to 'clarify some issues regarding the sale of NIL', and emphasises that 'Coats is, at the end of the day, a shareholder of Prym and must therefore ensure that Prym is happy about what we [Entaco and Coats] are about to conclude'. In that fax, Coats summarises its discussion with Prym concerning the draft supply and purchase agreement. It also makes precise comments as to how, according to Coats and Prym, the distribution and purchasing agreements interact with the supply and purchase agreement, and the improvements required.

117 Finally, it should be noted that Coats itself suggested a tripartite signing. Furthermore, although the agreements were not signed at a trilateral meeting, they were all signed bilaterally on the same day. In those circumstances, knowingly contributing to the entry into force of the Heads of Agreement cannot be regarded as a purely factual and innocuous act, but shows at the very least a concerted practice.

118 The fact remains that Coats' contribution was limited to facilitating the entry into force of the Heads of Agreement. The question of the extent of Coats' liability therefore arises.

The extent of Coats' liability

119 As the Court stated in paragraph 370 of *JFE Engineering* (cited in paragraph 72 above), an undertaking may be held responsible for an overall cartel, even though it is shown to have participated directly only in one or some of its constituent elements, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel. Similarly, the fact that different undertakings have played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, therefore, of infringement, provided that each undertaking has contributed, at its own level, to the pursuit of the common objective.

120 In the present case, Coats was aware of the market sharing provided for in the Heads of Agreement and of the fact that the entry into force of the cartel depended on its conduct. It therefore shares responsibility for the overall Prym/Entaco cartel.

121 In terms of the time-frame, however, the effects of Coats' conduct in enabling the Heads of Agreement to come into force were limited to the period during which that agreement remained in force. Liability for participation in a cartel cannot extend beyond its existence. Upon the sale of its 10.1% share in Entaco (on 13 March 1997), Prym brought the Heads of Agreement (see paragraph 43 above), and thus the cartel, to an end. Admittedly, some aspects of the cartel were maintained by Prym and Entaco in the 1997 agreements. However, the entry into force of the 1997 agreements did not depend on Coats' collaboration. The 1997 agreements between Prym and Entaco were not conditional upon the conclusion of the 1997 supply and purchase agreement. In fact, that agreement was signed more than five months later and contained different provisions concerning its duration and termination. In those circumstances, the termination of the Heads of Agreement represents a break which brought Coats' liability to an end. For Coats to be liable beyond that date, it would have had to perform a new anti-competitive act (see paragraph 175 et seq. below) or been in a position to require Entaco to comply with certain obligations towards Prym pursuant to the inter-conditional clauses contained in the 1997 agreements as well as in the 1994 agreements (see paragraph 123 et seq. below).

122 It follows from all of the foregoing that by facilitating the entry into force of the Heads of Agreement between Prym and Entaco, Coats became liable until that agreement came to an end on 13 March 1997.

3. The inter-conditional clauses and implementation of the various agreements concerned

123 It should be noted that, according to the Decision, the 1994 agreements between Coats and Entaco and between Entaco and Prym were interlinked through a series of reference or inter-conditional clauses which created a chain of interconnections from which it can be seen that those formally bilateral contracts amounted, in practice, to a tripartite agreement (see paragraph 37 et seq. above). Under clause 2.2(b) of the 1994 supply and purchase agreements, in particular, Coats obliged Entaco to comply with the 1994 distribution and purchasing agreements. Coats thus participated in the implementation of the various cartels established by Prym and Entaco and, consequently, is itself implicated in those agreements and/or concerted practices.

(a) Arguments of the parties

124 The applicants dispute those assertions by the Commission. First of all, they say that the Commission failed to take account of the extensive evidence in the Commission's file suggesting that the Entaco/Prym cartel was freestanding and would have proceeded regardless of the sale of the Coats needle finishing and packaging business to Entaco. The freestanding nature of the cartel is reflected in the Heads of Agreement, since the latter provides for its own continuation in the event of the supply and purchase agreement coming to an end.

125 Second, according to the applicants, the Commission demonstrates an ignorance of the commercial realities in its analysis of the inter-conditional obligations of the 1994 agreements, as the various conditions precedent were obviously all commercially logical and necessary.

126 In that regard, Coats claims that clause 2.2 of the 1994 supply and purchase agreement between Coats and Entaco (see paragraph 35 above) was intended purely to give Coats legitimate protection in its principal sales areas from competition from Entaco in return for Coats agreeing to an exclusive purchasing obligation. Such wording is standard in exclusive purchasing agreements and permitted by Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) [EC] to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended.

127 In Coats' view, the interpretation of its insertion of the 'cognate nature' wording as showing an intention to enable the Entaco/Prym geographic market sharing agreement to be implemented is implausible, given that the wording was introduced at the last minute and that, at that point, the 1994 agreements between Entaco and Prym had already been signed. Furthermore, the existing evidence clearly shows that the 'cognate nature' wording was suggested by Entaco rather than by Coats. It is a manuscript amendment to the agreement, which replaces an earlier longer and more complex draft.

128 Coats states that there was also a commercial rationale from Entaco's point of view as to why, according to clause 17.1 of the 1994 Coats/Entaco business sale agreement, that agreement was conditional upon the 1994 Entaco/Prym purchasing agreement: Entaco could not risk buying the packaging business, which included a large stock of unfinished Chinese needles (around 300 million), without secure outlets for packaged needles.

129 As regards the implementation of the agreements, the applicants claim that it was impossible for Coats to influence Entaco's and Prym's respective market shares by varying the amounts, without being in clear breach of contract.

130 The Commission claims that the reference to 'obligations of cognate nature' in clause 2.2(b) of the supply and purchase agreement forced Entaco to comply with a geographic market sharing agreement concluded with Prym. As a result, that clause enabled Coats to implement the market sharing and made Coats a party to the tripartite agreement.

131 In the Commission's view, it is irrelevant whether the anti-competitive clauses were introduced by Entaco or by Coats, by hand and at the last minute, or by other means and well in advance. Moreover, it claims that Regulation No 1984/83 cannot be applied to the supply and purchase agreements.

132 In conclusion, the Commission claims that the supply and purchase agreement was the 'cornerstone' of a tripartite agreement.

(b) Findings of the Court

133 In order to assess the Commission's findings concerning the inter-conditional obligations and the tripartite nature of the cartel, it is necessary, first, to analyse the clauses upon which the Commission relied in reaching its conclusions. The agreements to which Coats was a party include only two clauses that refer to other agreements: clause 2.2 of the supply and purchase agreement and clause 17.1 of the business sale agreement.

Enforcement of the various agreements as a result of clause 2.2 of the supply and purchase agreement

134 Clause 2.2 of the 1994 supply and purchase agreement provides that Entaco shall:

‘(a) not supply Products to a customer of [Coats, established in the United Kingdom] other than those customers to whom [Entaco] supplies Products prior to the date hereof at existing business levels; …

(b) fulfil its obligations of cognate nature pursuant to an agreement between [Entaco] and Prym dated 8 September 1994.’

135 Essentially, the Commission claims that the reference in clause 2.2(b) to ‘obligations of cognate nature’ forced Entaco to comply with a geographic market sharing agreement concluded with Prym. Therefore, that clause enabled Coats to enforce the market sharing and thus made it a party to the tripartite agreement. That interpretation is unconvincing, however, for a number of reasons.

– Wording of the clause

136 First, that interpretation contradicts the wording of clause 2.2(b). That clause refers to ‘an agreement between [Entaco] and Prym dated 8 September 1994’. However, it must be noted that there is no agreement dated 8 September 1994. It is nevertheless apparent from Coats’ response to the statement of objections that the final version of the Entaco/Prym agreements was drawn up on 8 September 1994 and left in abeyance until the agreements with Coats were signed on 10 September 1994.

137 It is necessary therefore to identify the agreement to which the above wording refers, given that three agreements between Entaco and Prym were drawn up on that date (namely, the 10.1% Agreement and the purchasing and distribution agreements). According to the Commission, the reference is to the 1994 distribution agreement and the 1994 purchasing agreement. Therefore, Entaco was obliged to fulfil its obligations under those agreements and thus to comply with the geographic market sharing agreement with Prym.

138 However, clause 2.2(b) mentions only ‘an agreement’ in the singular. If the Commission’s interpretation of clause 2.2(b) were correct and that clause was to force Entaco to comply with its obligations under the contracts concluded with Prym, ‘agreement’ would be in the plural.

– Structure and context of the clause

139 Second, the Commission’s interpretation does not take account of the structure or context of the clause. Clause 2.2(a) contains an obligation on Entaco not to compete, which covers the territory of the United Kingdom. Therefore, given that the manuscript amendments to clause 2.2(a) and (b) replaced a much longer and more complex draft which included not only the United Kingdom but also other territories, clause 2.2(b) can readily be interpreted as covering the other territories in which Entaco was prohibited by Coats from competing. Thus, ‘obligations of cognate nature’ refers, in fact, to clause 2.2 of the 1994 Entaco/Prym distribution agreement, which provides that ‘[Entaco] will not sell Products to any person in the Territory [Europe, excluding the United Kingdom and the Republic of Ireland] other than the Label Accounts [Entaco’s existing clients] and/or the Distributor [Prym] and/or the Coats Group’.

140 Indeed, if it were the case that clause 2.2(b) did not contain a non-compete obligation in favour of Coats, but required Entaco to fulfil its obligations towards Prym, the protection from competition from Entaco sought by Coats in its principal sales areas would be guaranteed only in the territory of the United Kingdom.

141 That interpretation is unconvincing, since it conflicts with Coats’ intentions. In the context of the non-compete obligation specified in clause 2.2(a), it appears more probable that the phrase ‘obligations of cognate nature’ also refers to a non-compete obligation. If clause 2.2(b) had been intended to apply to the cartel comprised in the agreements between Entaco and Prym, the words ‘of cognate nature’ would have no relevance and the clause should instead read ‘[Entaco shall] fulfil its obligations pursuant to the agreements …’.

142 Furthermore, it should be noted that the clause which was replaced by clause 2.2(b) did not include a reference to the Entaco/Prym agreements. If that reference had effectively been the ‘cornerstone’ of the cartel, it is unlikely that it would have been inserted at the last minute and that it would not have been contained in the initial draft of the agreement.

143 Therefore, the structure and the context of the clause support Coats’ interpretation that clause 2.2

(a) related to the United Kingdom, whereas clause 2.2(b), in referring to another agreement, was intended to achieve the same aim in continental Europe where Coats also carried on its business.

– Intended objective of the clause

144 Third, on the Commission's interpretation, clause 2.2(b) could not, in practice, have achieved its aim. According to the Commission, 'to enforce the market sharing agreements, all Coats (as the overwhelming buyer in UK) had to do was to buy from Entaco rather than Prym'. That argument is based on the premiss that Coats was in a position to discipline the two undertakings by means of its product orders. However, according to the 1994 supply and purchase agreement between Entaco and Coats, the latter was under a contractual obligation to purchase exclusively from Entaco in the United Kingdom. Therefore, Coats did not have the flexibility to be able to discipline Entaco or Prym by varying the amounts, without being in breach of contract.

145 A dispute between Entaco and Coats arose precisely because Coats was not entitled to substitute orders from Prym for those from Entaco. In Italy, Coats was required to purchase exclusively from Entaco (except for purchases from third parties at the levels existing when their 1994 supply and purchase agreement was signed). When Coats started to purchase larger quantities of needles from Prym than the quantity it bought at the date of signature of the 1994 supply and purchase agreement, Entaco claimed damages.

– History of the clause

146 Finally, account should be taken of the circumstances in which the manuscript amendment was inserted. Coats states that Prym never intervened in the negotiations between Coats and Entaco. That assertion was confirmed by Prym at the hearing before the Commission. However, if, as the Commission claims, Prym had needed the support of Coats to prevent Entaco from entering the continental European market, it would have taken steps to intervene in those negotiations.

147 In addition, Coats submits that the wording of clause 2.2(b) was introduced at the last minute, and that, at that point, the 1994 Entaco/Prym agreements had already been signed (on 8 September 1994). Furthermore, during the hearing before the Commission, Coats produced the testimony of its in-house lawyer, who attended the signing meeting on Coats' behalf, according to which that wording was introduced at the request of Entaco's lawyers in order to simplify the text and to make it dovetail with the 1994 distribution agreement between Entaco and Prym, which had been signed shortly before.

148 The Commission took the view that it was extremely unlikely that Entaco's lawyers would have insisted on imposing an obligation on their own client at the last minute, thus obliging Entaco to comply with another contract. Nevertheless, that objection would be relevant only if the Commission's interpretation of the meaning of 'obligations of cognate nature' were accepted. If it is accepted that that wording was intended to have the same effect as the original provision (which was more complex and which was deleted), it follows that it did not impose any additional obligation on Entaco.

149 On the contrary, in response to a written question from the Court, the applicants confirmed that the geographic coverage of the non-compete obligation in the Entaco/Prym distribution agreement did not include the United States or the 'World Territory' beyond continental Europe. It was therefore in Entaco's own interest to refer to that non-compete clause in the supply and purchase agreement with Coats in order to restrict its obligations to the United Kingdom and continental Europe, and in order to have only one commitment to honour.

150 In those circumstances, Coats' explanation – that the words of the manuscript amendment are intended to have the same effect as the non-compete obligation which they replaced – is plausible and convincing. It follows that clause 2.2(b) was not intended to implement the market sharing agreed between Entaco and Prym, but to give Coats protection from competition from Entaco in its principal sales areas in return for Coats agreeing to an exclusive purchasing obligation.

The role of the supply and purchase agreement as the 'cornerstone' of a tripartite agreement

151 According to the Commission, the Coats/Entaco supply and purchase agreement was the 'cornerstone' of a tripartite agreement. However, it must be noted that the Heads of Agreement provide that, '[s]hould the supply arrangement between Coats and Entaco be discontinued for any

reason then Prym and Entaco will discuss sales policy in order to restrict the loss of production volume at Entaco'. Thus, the Heads of Agreement envisaged that the supply and purchase agreement might end, notwithstanding the continuation of the Heads of Agreement themselves.

152 Clause 2.4 of the Entaco/Prym distribution agreement similarly specifies that '[i]f the Coats Viyella Supply Agreement terminates or expires for any reason whatsoever, the Distributor [Prym] agrees to liase with the Company [Entaco] with a view to restricting the loss of sales by Entaco which may result therefrom'.

153 Thus, if the cartel could have subsisted without any involvement by Coats, no credence can be given to the Commission's interpretation that the supply and purchase agreement was the 'cornerstone' of a tripartite agreement: if a 'cornerstone' is removed, the whole building collapses. However, in the present case, the Heads of Agreement and the distribution agreement specifically provided that the termination of the supply and purchase agreement would not preclude their continuation.

Clause 17.1 of the business sale agreement

154 Under clause 17.1 of the business sale agreement, the sale of the business to Entaco was 'conditional upon the execution of the Prym Agreements'. Those were defined as follows in the 'Interpretation' section of the agreement: 'the agreement for the sale and purchase of 10.1%', 'the purchasing agreement' and 'the distribution agreement to be entered into between … [Entaco] and … Prym Consumer'.

155 According to Coats, there is an obvious commercial rationale as to why the business sale agreement between Coats and Entaco was conditional upon the 'Prym Agreements' (see paragraph 128 above). Thus, the condition was not for the benefit of Coats, but commercially essential for Entaco. The Commission does not dispute the commercial logic of clause 17.1, but simply claims that Coats was the 'cornerstone' of the market sharing agreements.

156 While it is true that Coats' participation was important for Prym and Entaco, that does not conflict with Coats' assertion that the reason for the inter-conditional obligation was Entaco's commercial interest. Since it is the Commission's interpretation that Coats sought to impose such conditions in order to be in a position to implement the Entaco/Prym cartel, it should be noted, first, that, when the business sale agreement was signed, the 'Prym Agreements' had already been signed (on 8 September 1994). Thus, the cartel had already been established. Second, since the business sale agreement achieved its objective with the sale of NIL, it could not ensure future compliance with the cartel.

157 It follows from all of the foregoing that the Commission has not demonstrated to the requisite legal standard that clause 2.2(b) of the supply and purchase agreement was intended to implement the market sharing agreed between Entaco and Prym. Nor has the Commission produced evidence that the formally bilateral 1994 agreements between Coats and Entaco, and between Entaco and Prym, amounted in practice to a tripartite agreement. By contrast, Coats has proved – within the meaning of *JFE Engineering*, cited in paragraph 72 above – circumstances which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in the Decision.

158 Accordingly, the Commission cannot rely on the purportedly tripartite nature of the agreements in order to prove Coats' liability in relation to the Prym/Entaco cartel.

4. Other parts of the plea in law

(a) The economic size of the markets concerned

Arguments of the parties

159 Coats disputes the assertion in recital 19 of the Decision that 'the distribution of needles and pins in Europe is dominated by Coats'. On that point, the applicants observe that, in recital 45 of the Decision, the Commission estimated the size of the wholesale market in question (hand sewing needles) as approximately EUR 30 million and considerably larger at the retail level. Sales of Coats' needles to retailers and wholesalers in the European Union amounted to EUR 2.98 million in 2002. Its share of the market in the European Union is therefore less than 10% at wholesale level and

even less at retail level.

160 The Commission submits that that plea is ineffective, since it is not capable (in the event that it is well founded) of leading to the annulment of the Decision.

Findings of the Court

161 It is settled case-law that, for the purpose of applying Article 81(1) EC, there is no need to demonstrate the actual anti-competitive effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, p. 342, and Case T–143/89 *Ferriere Nord* v *Commission* [1995] ECR II–917, paragraph 30). The cartel's aim was to share the geographic and also the product markets, and was, therefore, an obvious restriction of competition.

162 It follows that, for the purpose of establishing an infringement of Article 81(1) EC, the economic size of the markets in question is irrelevant in the present case.

(b) Mr E's testimony

Arguments of the parties

163 According to the applicants, the Commission seeks to interpret the objectives of the agreements almost exclusively in the light of the statements made by Mr E, the former managing director of Entaco, and, in particular, the statement concerning the tripartite nature of the agreements (see paragraph 39 above). However, in the applicants' view, a number of points need to be made about the quality and credibility of Mr E as a witness.

164 The Commission claims that the interpretation of the objectives of the agreements was made on the basis of the evidence gathered during the administrative procedure, and only corroborated by Mr E's statements.

Findings of the Court

165 The applicants correctly point out that Mr E was not involved in the negotiation of the 1994 agreements and that the judge rejected his evidence as unreliable in the litigation between Entaco and Prym in the High Court of Justice in September 1999. In addition, the Commission itself concedes that it treated Mr E's statements with caution and that it did not use them where it did not find sufficient evidence, for example concerning the allegations on price-fixing.

166 As regards the compensation scheme, Mr E's statements are contradictory (see paragraph 188 et seq. below). Thus, it cannot be ruled out that the complaint initially filed at the Commission by Mr E in August 2000 was motivated by resentment for the fact that Prym had terminated the 1997 purchasing agreement and that Coats had refused to renew the 1997 supply and purchase agreement.

167 In those circumstances, Mr E's testimony is unreliable and incapable of corroborating the Commission's case. However, since the Commission has relied on other evidence which is sufficient to establish Coats' liability, the complaint relating to the credibility of Mr E's testimony is not capable of leading to the annulment of the Decision.

5. Conclusion

168 It follows from the foregoing that, although the Commission made some errors in its assessment of the evidence, the fact that Coats facilitated the entry into force of the Heads of Agreement between Prym and Entaco rendered it liable until the termination of that agreement on 13 March 1997 (see paragraphs 109 to 122 above). Accordingly, the applicants' plea in relation to the annulment of the Decision must be dismissed in so far as it concerns the period from 10 September 1994 to 13 March 1997.

D – Coats' liability between April 1997 and December 1999

1. The 1997 agreements

(a) Arguments of the parties

169 As regards the 1997 agreements, the applicants observe that neither the 1997 Entaco/Prym distribution agreement nor the 1997 Entaco/Prym purchasing agreement was conditional in any way upon the 1994 Coats/Entaco supply and purchase agreement or upon its renewal in 1997.

170 The Commission claims, first, that the 1997 agreements perpetuated a tripartite cartel, since the effects of the agreements (apart from the reduction in scope of the product market sharing agreement) were the same as they were before that date. In particular, Coats obliged Entaco to comply with the 1997 distribution and purchasing agreements by means of clause 2.2(b) of the 1997 supply and purchase agreement. Nevertheless, unlike the situation in September 1994, the parties were merely continuing the cartel which they had already established. Consequently, the different dates on which various contracts were extended had no bearing on the cartel's existence and functioning.

171 Next, according to the Commission, the fact that the 1997 distribution and purchasing agreements were not conditional upon the 1994 supply and purchase agreement or its renewal is irrelevant, since the 1994 and 1997 supply and purchase agreements were conditional upon the 1994 and 1997 distribution and purchasing agreements. Further, clause 2.4 of the 1997 distribution agreement refers to the 1997 supply and purchase agreement.

(b) Findings of the Court

172 The applicants correctly assert that neither the 1997 Entaco/Prym distribution agreement nor the 1997 Entaco/Prym purchasing agreement was conditional upon the 1994 Coats/Entaco supply and purchase agreement or upon its renewal. Nor was the agreement relating to the sale of 11 222 ordinary shares in the capital of Entaco conditional upon the extension of the Coats/Entaco supply and purchase agreement.

173 The only reference in the 1997 Entaco/Prym agreements to the Coats/Entaco supply and purchase agreement is in clause 2.4 of the 1997 distribution agreement. It reproduces the provision under which the 1997 Entaco/Prym distribution agreement would continue to apply even if the Coats/Entaco supply and purchase agreement were terminated, which demonstrates the independence of each of the two sets of agreements from the other. In addition, Coats' explanation that that wording was reproduced merely for ease and simplicity is convincing, since that paragraph corresponds word for word with that of the 1994 agreement.

174 Conversely, contrary to the Commission's assertion, the 1997 supply and purchase agreement was not conditional upon the 1997 Entaco/Prym distribution and purchasing agreements. It was signed more than five months later and contained different provisions concerning its duration and termination.

175 Furthermore, it has already been found that the Commission has not demonstrated to the requisite legal standard that clause 2.2(b) of the 1994 supply and purchase agreement – which is identical to that contained in the 1997 agreement – was intended to implement the market sharing agreed between Entaco and Prym (see paragraph 134 et seq. above).

176 Accordingly, the Commission has not proved that the 1997 agreements were a continuation of a tripartite agreement.

2. Attendance at meetings

(a) Arguments of the parties

177 Coats claims that, after April 1997, it did not take part in any trilateral meeting and that it took no steps to implement the Entaco/Prym cartel or to have it implemented.

178 The Commission submits that, according to case-law, the fact that an undertaking did not attend meetings is of minor significance where it contributed by its own conduct to the common objectives pursued by all the participants. In addition, the Commission takes the view that, after the

agreements entered into force, the mechanism of inter-conditional clauses did not require Coats to participate in the meetings, as it knew that both Entaco and Prym depended on the Entaco/Coats supply and purchase agreement.

(b) Findings of the Court

179 It is common ground that Coats did not participate in any trilateral meeting, and thus in any meeting to implement the Entaco/Prym cartel, after April 1997. On the contrary, the dispute between Entaco and Coats indicates that Coats ignored its obligations towards Entaco (see paragraph 145 above and paragraph 182 et seq. below).

180 The Commission's argument – that the mechanism of inter-conditional clauses obviated the need for Coats to attend meetings after 10 September 1994 concerning the implementation of the cartel – is unconvincing. Entaco's obligation to sell only to existing customers in continental Europe was not self-enforcing (see paragraph 94 above). Thus, the fact that Coats did not participate in any of the meetings after 1994 is, instead, evidence that it ceased to be a party to the Entaco/Prym cartel after the termination of the Heads of Agreement in 1997.

181 In any event, it is clear that, as regards the period between April 1997 and December 1999, Coats cannot incur liability as a result of presence at an anti-competitive meeting.

3. The compensation scheme

182 In the Decision, the Commission claims that, as regards the dispute mentioned in paragraph 145 above (arising from the fact that Coats was not entitled to substitute orders from Prym for those from Entaco), Coats did not settle its own dispute with Entaco but effectively settled a dispute between Entaco and Prym concerning Prym's non-compliance with their cartel.

(a) Arguments of the parties

183 Coats disputes that assertion, which the Commission made in order to prove that Coats was implementing the cartel in question. According to the applicants, the correspondence as a whole shows that Entaco's action related to Coats' non-compliance with their 1997 supply and purchasing agreement, rather than to the breach of the 1997 Entaco/Prym agreements.

184 The Commission states that, for Coats, the compensation scheme represented another means of implementing the tripartite agreement, and recalls that the evidence must be assessed in its entirety, taking into account all relevant factual circumstances. It takes the view that its interpretation is corroborated by Mr E's remarks.

(b) Findings of the Court

185 According to recital 214 of the Decision:

'Coats was perfectly aware of the content and the implication of the Entaco/Prym agreements as the Supply and Purchase agreement was conditional upon these agreements and since it had communication of these agreements. Therefore it knew that all orders placed by Coats to Prym have to be supplied by Entaco. As a consequence, compensating Entaco for a switch of business from Entaco to Prym by Coats makes sense only if Coats accepts that Prym does not respect its agreement with Entaco and ultimately could be interpreted as compensation on behalf of Prym made by Coats.'

186 That line of argument suggests that the Commission meant that Entaco would suffer no loss if Coats changed supplier, because if Prym replaced Entaco as supplier, Prym would still have to procure needles from Entaco pursuant to the 1997 Prym/Entaco purchasing agreement, so that a claim would make sense only if Prym was not purchasing all of its supplies from Entaco and was breaching the 1997 purchasing agreement between those two undertakings.

187 However, it should be noted that, depending on the prices agreed under the 1997 Entaco/Prym purchasing agreement and the 1997 Coats/Entaco supply agreement respectively, it could have been much more profitable for Entaco to supply Coats direct rather than via Prym. In any event, the breach by Coats of its exclusive purchasing obligation can still be invoked. The argument would simply be about the quantum of damages. It seems pointless, therefore, to resort to as complex a

construction as that of the Commission in order to make sense of Entaco's damages claim.

188 The Commission takes the view that its interpretation is corroborated by Mr E's statement:

'Since the reference to maintaining the status quo was actually in the Entaco/Coats Agreement and since Prym had not compensated Entaco for its loss of business, Entaco chose to go after Coats for the loss of profit and the matter was settled between the two companies, on a confidential basis, by the payment of a [GBP] 60 000 cash settlement from Coats to Entaco.'

189 However, the Commission's version is not corroborated by the correspondence annexed to the reply to the statement of objections. Indeed, as far as that dispute is concerned, Mr B of Entaco stated in a letter of 9 June 1999 adressed to Coats that he 'enclose[s] faxes … in which Coats admits breaching the Agreement'. In fact, Mr E himself said in a letter of 25 September 2000 to Coats:

'I am writing to you … to confirm Entaco's understanding of the current position with regard to our request for compensation following alleged breaches of the September 1997 Agreement between our two companies.'

190 Finally, the Commission concedes in the Decision itself that compensation 'could be interpreted', rather than 'must be interpreted', in that way. Accordingly, the Commission has failed to establish that the compensation scheme was intended to settle a dispute between Entaco and Prym about the latter's non-compliance with their cartel, rather than a dispute between Coats and Entaco.

E – Conclusion

191 In so far as the Commission seeks to establish Coats' liability in respect of the period after the termination of the Heads of Agreement, the Decision is vitiated by a manifest error of assessment. It follows that the plea relating to the annulment of the Decision must be upheld as regards the period after 13 March 1997. The remainder of the plea must be dismissed. The legal consequences for the calculation of the fine will be addressed in paragraph 204 et seq. below.

II – Plea in law seeking annulment or reduction of the fine

192 The plea for annulment or reduction of the fine consists of several complaints relating, inter alia, to erroneous assessment of the gravity of the infringement, lack of differential treatment and breach of the principle of proportionality.

A – Arguments of the parties

193 The applicants observe that, in assessing the appropriate amount of the fine, the Commission reached the conclusion that '[t]he three parties were equally active since the infringing agreements could only succeed as a result of the tripartite agreement between the three undertakings and their subsidiaries'. According to Coats, that assessment is manifestly erroneous. On the Commission's own case, Coats participated in only two preliminary meetings at which intended infringements were allegedly discussed. That cannot be described as being 'equally active'.

194 As regards the statements in recital 325 of the Decision that Coats was a leading distributor of haberdashery products in Europe and that Coats and Prym were the main competitors at the retail level with their respective brands of hand sewing needles, namely Milward and Newey, Coats claims that the Commission produces no evidence of Coats' share of the distribution of haberdashery products, yet Coats supplied evidence showing that its share was between 8% and 25%. Furthermore, the claim that Coats was one of the main hand sewing needles distributors is contradicted by the figures put forward in the Decision itself. Coats' share at retail level by value was, according to the figures in recital 45 of the Decision, much less than 10%.

195 Furthermore, the applicants complain that the Commission does not distinguish between the legitimate protection sought by Coats and unlawful protection from competition. Coats concludes that the Commission has made serious errors of assessment concerning the gravity of the alleged infringement. Furthermore, the fine imposed on Coats is grossly disproportionate to its turnover in the relevant market.

196 According to the Commission, the fact that Coats did not participate in the meetings between Entaco and Prym after 1993 is irrelevant for the purpose of assessing the gravity of its own

participation in the cartel. As far as Coats' arguments regarding its 'weight' are concerned, the Commission notes that the relative weight, that is to say, the effective economic capacity to cause significant damage, is not determined only by the market share for the products which are the subject-matter of the infringement concerned.

197 The Commission submits that Coats' market share at retail level was higher than it now claims. The fact that Entaco and Prym, who are practically the only manufacturers of needles and, more particularly, of hand sewing needles, supplied their needles to Coats should be sufficient evidence of Coats' size and strength at the distribution level.

198 In the Commission's view, Coats was the leading distributor, in the same way as Prym was the leading manufacturer. Taking into account the different weight at each economic level, it saw no reason to impose fines with different starting amounts for the two major undertakings. Furthermore, Coats' conduct cannot, according to the Commission, be described as passive. Coats participated in the crucial meetings which led to the infringement and concluded the agreements which constitute the subject-matter of the infringements. The bilateral meetings between Entaco and Prym were of ancillary importance.

B – Findings of the Court

199 It is settled case-law that, in fixing the amount of a fine, the Commission must have regard to all relevant circumstances (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 106; Joined Cases C‑189/02 P, C‑202/02 P, C‑205/02 P to C‑208/02 P and C‑213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I‑5425, paragraph 241; Joined Cases T‑236/01, T‑239/01, T‑244/01 to T‑246/01, T‑251/01 and T‑252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II‑1181, paragraph 331) and particularly to the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 23 (3) of Regulation No 1/2003. That basic amount will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.

1. Assessment of the gravity of the infringement

200 According to 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'), the gravity of the infringement is calculated by reference to a large number of factors, some of which the Commission must take into account (Case T‑224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II‑2597, paragraph 183, upheld on appeal in Case C‑397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I‑4429, paragraph 91).

201 It should be noted in that regard that the Guidelines are not explicitly referred to in the Decision. However, the methodology used in calculating the fine shows unequivocally that the fine was calculated on the basis of the Guidelines. Furthermore, in its pleadings, the Commission explains and justifies the imposition of the fine on the basis of the Guidelines.

202 As to the assessment of the gravity of the infringement, the applicants complain that the Commission considered only the nature of the infringement and failed to take the circumstances of the present case into account. The Commission, in particular, overestimated Coats' size and strength in the relevant market and also its role in the operation of the cartel.

203 However, in the circumstances of the present case, the Court finds that in any event it is not necessary to alter that amount, since the description of the infringement as 'very serious' is well founded and the Commission chose the minimum starting amount laid down by the Guidelines in respect of such an infringement, namely EUR 20 million.

2. Assessment of the duration of the infringement

204 As regards the increase in the fine to take account of the duration of the infringement, the second indent of Section 1 B of the Guidelines provides that, for 'infringements of medium duration (in general, one to five years)', there may be an 'increase of up to 50% in the amount determined for gravity'. The third indent of Section 1 B provides that, for 'infringements of long duration (in

general, more than five years)', there may be an increase 'of up to 10% per year in the amount determined for gravity'. As stated in paragraph 52 above, the Commission took the view that the infringement lasted for five years and three months. Consequently, the Commission applied the third indent of that provision and increased the starting amount by 50% (EUR 10 million) to take account of the duration of the infringement.

205 In view of the fact that the Decision is to be annulled in so far as the applicants were found to have infringed Article 81(1) EC after 13 March 1997 (see paragraph 191 above), the Commission's findings on the duration of the infringement cannot be taken into account in the present case. In light of the Commission's evidence in the Decision, Coats' liability has been established for the period from 10 September 1994 to 13 March 1997, that is, for a period of two years and six months. Therefore, it is appropriate for the second indent of Section 1 B of the Guidelines to be applied, and it is for the Court to fix an appropriate rate of increase pursuant to Article 31 of Regulation No 1/2003.

206 In application of its unlimited jurisdiction and in order to take account of the proven duration of the infringement, which is equivalent to approximately half of the period determined by the Commission, the rate of increase is reduced to 25%, resulting in an additional amount of EUR 5 million and a total fine of EUR 25 million.

3. Consideration of attenuating circumstances

207 It has already been noted that, in fixing the amount of a fine, the Commission must have regard to all relevant circumstances. According to Section 3 of the Guidelines, that may lead to a reduction in the basic amount of the fine, depending on the attenuating circumstances. In the present case, there are a number of unusual circumstances. However, clearly the Commission did not assess all those circumstances correctly.

208 First of all, Coats attended only two of the allegedly unlawful meetings, neither of which can be described as determinative (see paragraph 96 above). In fact, in recital 77 of the Decision, the Commission itself describes them as 'preliminary' meetings. The Commission dismisses the fact that Coats did not participate in 13 other unlawful meetings on the unsubstantiated grounds that those bilateral meetings between Prym and Entaco were of 'ancillary importance'. That assessment is incorrect, particularly in the light of recital 258 of the Decision, where the Commission claims that '[t]he regularity of those meetings ensured the continuing implementation of the signed agreements'.

209 The Commission is mistaken in taking the view that the fact that Coats did not participate in the meetings between Entaco and Prym after 1993 is irrelevant to the assessment of the gravity of Coats' own participation in the cartel. According to the Court of Justice, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and when determining any fine (*Commission* v *Anic Partecipazioni*, cited in paragraph 68 above, paragraph 90).

210 Equally, the Court of First Instance has held in *Cheil Jedang* v *Commission* that it is clear from case-law that one circumstance that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the ordinary members of the cartel (Case T‑220/00 *Cheil Jedang* v *Commission* [2003] ECR II‑2473, paragraph 168).

211 Accordingly, in fixing the fine, the Commission cannot disregard Coats' absence from all of the meetings held after 1993, since that absence can be indicative of a 'passive … role' within the meaning of the first indent of Section 3 of the Guidelines.

212 Furthermore, it is apparent from the case-law that such a role can be inferred where the undertaking does not actively participate in the creation of any anti-competitive agreements (see, to that effect, *Cheil Jedang* v *Commission*, cited in paragraph 210 above, paragraph 167). It is clear in the present case that, contrary to the Commission's assertion, Coats did not play any role in drawing up the Heads of Agreement, the crucial part of the cartel (see paragraph 106 et seq. above), or in drawing up the other anti-competitive agreements concluded by Prym and Entaco.

213 Finally, it should be acknowledged that, as regards protection from competition, the Commission

cannot base its assessment of the fine on protection which does not infringe the competition rules. As far as Entaco is concerned, Coats was entitled, under Regulation No 1984/83, to protect itself from competition from that company in its principal sales areas by entering into an exclusive purchasing agreement with it. That is what the 1994 and 1997 supply and purchasing agreements between the two companies were intended to achieve. As regards competition from Prym, Coats did not obtain any protection from that company, which continued to compete with Coats through its Whitecroft and Newey brands.

214 It follows that Coats' role was essentially limited to facilitating the entry into force of the Heads of Agreement. Its role is therefore more akin to that of a mediator than that of a full member of the cartel.

215 Therefore, in the exercise of its unlimited jurisdiction, the Court considers it appropriate to reduce the amount of the fine by 20% to take account of those attenuating circumstances. Since the amount of the fine has already been reduced to EUR 25 million (see paragraph 206 above), that further reduction results in a total fine of EUR 20 million.

4. The other parts of the plea

216 Finally, the applicants rely on two complaints relating to the alleged disproportionality of the fine and the lack of differential treatment.

217 As regards differential treatment, the sixth paragraph of Section 1 A of the Guidelines provides for the possibility in some cases to apply weightings to the amounts determined within each of the categories of gravity 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.

218 However, it is apparent from the use of the expression 'in some cases' and the word 'particularly' in the Guidelines that weighting according to the individual size of the individual undertakings is not a systematic step in the calculation which the Commission has imposed on itself, but an opportunity for flexibility which it has conferred on itself in cases where that is required (Case T–44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II–2223, paragraph 246).

219 Furthermore, Coats' minor and passive role in the operation of the cartel has already been assessed above (see paragraph 207 et seq. above) and has resulted in a reduction of the fine. In those circumstances, a further reduction would mean that that attenuating circumstance would be taken into account twice.

220 The same line of argument applies to the proportionality of the fine. In any event, Coats' argument that the fine is disproportionate is not adequately substantiated in its application. In fact, Coats has simply mentioned the word 'disproportionate' in the application. However, under Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, the application must state, inter alia, the subject-matter of the proceedings, the form of order sought by the applicant and a summary of the pleas in law on which the application is based. Those elements must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court of First Instance to rule on the application, should this be necessary, without further supporting information. That requirement is not satisfied here.

C – Conclusion

221 It follows from the aforementioned considerations that the applicants' plea in relation to a reduction of the fine is partly justified. Accordingly, the amount of the fine is set at EUR 20 million (see paragraph 215 above).

Costs

222 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(3), the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

223 As the applicants have been successful in part of their pleadings, the Court will make an equitable assessment of the case in holding that they are to bear two thirds of their own costs and pay two thirds of the costs incurred by the Commission, and that the Commission is to bear one third of its own costs and pay one third of the costs incurred by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby

1. Annuls Commission Decision C (2004) 4221 final of 26 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/F–1/38.338 – PO/Needles) in so far as the Decision finds that the applicants infringed Article 81(1) EC after 13 March 1997;

2. Sets the amount of the fine imposed on the applicants under Article 2 of the Decision at EUR 20 million;

3. Dismisses the remainder of the application;

4. Orders the applicants to bear two thirds of their own costs and to pay two thirds of the costs incurred by the Commission, and the Commission to bear one third of its own costs and to pay one third of the costs incurred by the applicants.

Pirrung	Forwood	Papasavvas

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon	J. Pirrung
Registrar	President

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* Language of the case: English.

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APPLICA Person

DEFENDA Commission ; Institutions

NATIONA United Kingdom

NOTES Sarrazin, Cyril: Le Tribunal annule partiellement la décision de la Commission et réduit le montant de l'amende infligée, Concurrences : revue des droits de la concurrence 2007 no 4 p.66-67 ; Arhel, Pierre ; : Petites affiches. La Loi / Le Quotidien juridique ; 2007 no 256 p.6-7 ; : Activité des juridictions communautaires en droit de la concurrence (septembre 2007) ; Idot, Laurence: Preuve d'une entente horizontale, Europe 2007 Novembre Comm. no 313 p.31-32

PROCEDU Action for annulment

DATES of document: 12/09/2007
of application: 31/01/2005

Joined Cases T-101/05 and T-111/05

BASF AG and UCB SA

v

Commission of the European Communities

(Competition – Agreements, decisions and concerted practices in the vitamin products sector – Choline chloride (vitamin B4) – Decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area – Fines – Deterrence – Repeated infringement – Cooperation during the administrative procedure – Single and continuous infringement)

Summary of the Judgment

1. *Competition – Fines – Amount – Determination – Deterrent effect – Account taken of the size of the fined undertaking – Relevance – Obligation to take account of the likelihood of repeat infringement by the fined undertaking and fines already imposed for other anti-competitive activities or in a non-member State – None*

   (Council Regulations Nos 17, Art. 15, and 1/2003, Art. 23; Commission Notice 98/C 9/03, point 1 A)

2. *Competition – Fines – Amount – Determination – Criteria – Gravity of the infringement – Aggravating circumstances – Repeated infringement – Meaning – No time-limit – Infringement of the principle of legal certainty – None – Judicial review – Unlimited jurisdiction*

   (Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2); Commission Notice 98/C 9/03)

3. *Competition – Fines – Amount – Determination – Method of calculation laid down by the guidelines drawn up by the Commission*

   (Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2); Commission Notice 98/C 9/03)

4. *Competition – Fines – Amount – Determination – Commission notice on the non-imposition or reduction of fines in cartel cases in return for the cooperation of the fined undertakings – Binding upon the Commission*

   (Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2); Commission Notice 96/C 207/04)

5. *Competition – Fines – Amount – Determination – Criteria – Reduction of the fine for cooperation of the fined undertaking – Conditions*

   (Council Regulations Nos 17, Arts. 11 and 15(2), and 1/2003, Art. 23(2); Commission Notice 96/C 207/04, title D)

6. *Competition – Administrative procedure – Hearings – No minutes or audio recording of a meeting held with an undertaking in the context of the notice on cooperation – Formalities not requested by the undertaking – Infringement of the priniciple of sound administration – None*

   (Rules of Procedure of the Court of First Instance, Art. 65(c); Council Regulations Nos 17, Arts 11 and 15(2), and 1/2003, Art. 23(2); Commission Notice 96/C 207/04)

7. *Competition – Fines – Amount – Determination – Criteria – Mitigating circumstances – Termination of the infringement before the Commission's intervention*

(Council Regulations Nos 17, Arts 11 and 15(2), and 1/2003, Art. 23(2); Commission Notice 98/C 9/03)

8. *Competition – Agreements, decisions and concerted practices – Not allowed – Infringements – Agreements and concerted practices capable of being treated as constituting a single infringement – Meaning*

   (Art. 81(1) EC; Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2))

9. *Competition – Fines – Amount – Discretion of the Commission – Judicial review – Unlimited jurisdiction*

   (Art. 229 EC; Council Regulation No 1/2003, Art. 31; Commission Notice 98/C 9/03)

10. *Competition – Fines – Amount – Determination – Guidelines on the method of setting fines for infringements of the competition rules – Duty to apply the 'lex mitior' – None*

    (Council Regulation No 1/2003, Art. 23(2))

1. The Commission does not infringe Regulation No 17 and Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty where, for the purpose of increasing the starting amount the fine in order to give it sufficient deterrent effect, it does not evaluate the likelihood of any repeat infringement by the fined undertaking, but merely takes account of its size, that latter factor being capable of being used as an indication of the influence that it was able to exert on the market.

   Thus, the reality of the infringement committed cannot be affected by measures adopted by the undertaking concerned in order to prevent recurrence, since adoption of a compliance programme does not oblige the Commission to grant a reduction in the fine. That being so, the assertion that, following fines imposed on the undertaking concerned in another market by another Commission decision, that undertaking has no further need of deterrence must be rejected. Nor does the imposition of a fine for other anti-competitive activities affect the reality of the infringement committed or, therefore, require the Commission to grant a reduction under that head.

   The same applies to adverse findings against the undertaking in non-member countries. The objective of deterrence, which the Commission is entitled to pursue when setting fines, is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the European Economic Area. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be determined solely by reference to the individual situation of the undertaking sanctioned or by reference to the question whether it has complied with the competition rules in non-member countries outside the European Economic Area.

   (see paras 46-47, 50, 52-53)

2. Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty are the relevant legal bases on which the Commission may impose fines on undertakings and associations of undertakings for infringements of Articles 81 EC and 82 EC. Under those provisions, in order to determine the amount of the fine, the duration and gravity of the infringement must be taken into consideration. The gravity of the infringement is determined by reference to numerous factors, for which the Commission has a margin of discretion. The fact that aggravating circumstances are taken into account in setting the fine is consistent with the Commission's task of ensuring compliance with the competition rules. Furthermore, the analysis of the gravity of the infringement must take any repeated infringement into account, and such repeated infringement may justify a significant increase in the basic amount of the fine.

   For a case of repeated infringement to be recognised, it is sufficient that the Commission is dealing with infringements falling under the same provision of the EC Treaty, without it being necessary for them to concern the same product market.

   The fact that Regulation No 17, Regulation No 1/2003 and the Commission's 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 lay down no maximum period for making a finding of repeated infringement does not breach the principle of legal certainty. The finding and the appraisal of the specific features of a repeated infringement come within the Commission's discretion in relation to the choice of factors to be taken into consideration for the purpose of determining the amount of fines. In that connection, the Commission cannot be bound by any limitation period for such a finding. In that regard, repeated infringement is an important factor which the Commission is required to appraise, since taking repeated infringement into account is intended to provide undertakings which have shown a propensity to breach the competition rules with an incentive to change their conduct. The Commission may therefore, in each case, take into consideration the indicia which tend to confirm such a propensity, including, for example, the time which has elapsed between the infringements at issue.

Where the Community judicature has to rule on the Commission's assessment of repeated infringement, the exercise of its unlimited jurisdiction may justify the production and taking into consideration of additional information which did not have to be referred to as such under the obligation to state reasons laid down in Article 253 EC. It may, therefore, take account of the fact that the undertaking concerned took part in an infringement even if the fact was omitted in the Commission's decision.

(see paras 64-67, 70-71)

3. Under 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, the percentages corresponding to the increases or reductions applied for aggravating or attenuating circumstances must be applied to the basic amount of the fine, which is determined by reference to the gravity and duration of the infringement.

(see para. 73)

4. In view of the legitimate expectation which undertakings intending to cooperate with the Commission have been able to derive from its notice on the non-imposition or reduction of fines in cartel cases, the Commission must adhere to it when, for the purposes of determining the fine to be imposed on the undertaking concerned, it assesses its cooperation.

(see para. 89)

5. In order for an undertaking to be able to benefit from a reduction in its fine on account of its cooperation during the administrative procedure, its conduct must facilitate the Commission's task of establishing and punishing infringements of the competition rules. It does not therefore constitute cooperation falling within the scope of Section D of the notice on the non-imposition or reduction of fines in cartel cases, which concerns for example the sending of information, documents or other evidence which contribute to establishing the existence of the infringement, for an undertaking to supply the Commission, in the context of its investigation of a cartel, with information concerning a proceeding for the infringement of competition rules brought in a non-member State which is not part of the European Economic Area and which was not used by the Commission either directly or indirectly in order to establish the existence of an infringement in that area.

Furthermore, a reduction based on that 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. It is clear from the very concept of cooperation, as described in the wording of the notice, and in particular in the introduction and at Section D, point 1, that it is only where the conduct of the undertaking concerned shows such a spirit of cooperation that a reduction may be granted on the basis of that notice. The conduct of an undertaking which, even though it was not required to respond to a question put by the Commission, responded in an incomplete and misleading way cannot therefore be considered to reflect such a spirit of cooperation. Nor is that spirit reflected in the conduct of an undertaking which supplies the Commission with documents in response to a request for information pursuant to Article 11 of Regulation No 17, since in that case the undertaking acts by virtue of a legal obligation, even if that information serves to establish, as against the undertaking which supplies it or as against a different undertaking, the existence of anti-competitive conduct.

(see paras 90-92, 108, 111)

6. The Commission cannot be accused of infringing the principle of sound administration through omitting to take minutes or make an audio recording of a meeting held with an undertaking with a view to cooperation capable of being rewarded in accordance with the notice on the non-imposition

or reduction of fines in cartel cases, where that undertaking did not in fact ask the institution to carry out those formalities.

As regards the appraisal as evidence of what was discussed at a meeting of a written statement by a person who took part in it, the Rules of Procedure of the Court of First Instance do not preclude the parties from producing such statements; however, their appraisal is a matter for the Court, which, if the facts described therein are crucial to the outcome of the case, may order, by way of a measure of inquiry, that the author of such a document be heard as a witness.

(see paras 96-97)

7. Termination of the infringements of the competition rules as soon as the Commission intervened, referred to in the third indent of point 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive activities by the interventions in question, whereas a case where the infringement has already come to an end before the date on which the Commission first intervenes is not covered by that provision. That latter hypothesis is sufficiently taken into account by the calculation of the duration of the infringement period found.

Nor can the dismissal of the employees who played a decisive role in the infringement constitute action that justifies a reduction in the fine. It represents a measure designed to ensure that the undertaking's employees comply with the competition rules, which in any event is an obligation borne by the latter and cannot therefore be regarded as an attenuating circumstance.

(see paras 128-129)

8. The characterisation of certain unlawful actions as constituting one and the same infringement affects the penalty that may be imposed, since a finding that a number of infringements exist may entail the imposition of several distinct fines, each time within the limits defined in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. However, a finding of a number of infringements may be advantageous to those responsible when some of the infringements are time-barred.

In that regard, the concept of single infringement can be applied to the legal characterisation of anti-competitive conduct consisting of agreements, of concerted practices and of decisions of associations of undertakings. The concept of single infringement can also be applied to the personal nature of liability for the infringements of the competition rules. An undertaking which has participated in an infringement by virtue of its own conduct, which met the definition of an agreement or a concerted practice within the meaning of Article 81(1) EC and which was intended to help to bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or that it could reasonably have foreseen that conduct, and that it was prepared to accept the risk. That conclusion has its origin in a widespread conception in the legal orders of the Member States concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole. It is not therefore contrary to the principle that responsibility for such infringements is personal in nature, it does not ignore the individual analysis of the incriminating evidence and it does not breach the rights of defence of the undertakings involved. Thus, a case of infringement of Article 81(1) EC may result from a series of acts or from continuous conduct which forms part of an 'overall plan' because they have the same object of distorting competition within the common market. In such a case, the Commission is entitled to attribute liability for those actions on the basis of participation in the infringement considered as a whole, even if it is established that the undertaking concerned directly participated in only one or some of the constituent elements of the infringement. Likewise, the fact that different undertakings played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, accordingly, of infringement, provided that each undertaking contributed, at its own level, to the pursuit of the common objective.

The concept of single objective cannot be determined by a general reference to the distortion of competition in the market concerned by the infringement, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a consubstantial element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement. Thus, for the purposes of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they display a link of complementarity inasmuch as each of them is intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contributes to the realisation of the set of anti-competitive effects intended by those responsible, within the framework of a global plan having a single objective, the various instances of anti-competitive conduct thus being 'closely linked'. In that regard, it will be necessary to take into account any circumstance capable of establishing or casting doubt on that link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various agreements and concerted practices in question.

Therefore, a worldwide agreement to allocate world markets by the withdrawal of North American producers from the European market in return for the withdrawal of European producers from North American markets, on the one hand, and, on the other hand, a cartel established by European producers after the definitive cessation of the worldwide agreement, concerning the sharing of the market and customers and the fixing of prices throughout the European Economic Area, must be regarded as two separate infringements of Article 81(1) EC and not a single and continuous infringement, given the absence of any temporal overlap in their implementation, the fact that they pursue different objectives and were implemented by dissimilar methods, and in the absence of evidence that the European producers intended to adhere to the global arrangements in order subsequently to divide the EEA market.

(see paras 157-161, 179-181, 199-201, 209)

9. As regards determination of the amount of fines imposed for breach of the competition rules, by virtue of the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the Community judicature is empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed where the question of the amount of the fine is before it. In that context, the Commission's 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 are without prejudice to the assessment of the fine by the Community judicature when it exercises that unlimited jurisdiction.

(see para. 213)

10. The principle of non-retroactivity does not preclude the application of guidelines which, *ex hypothesi*, have the effect of increasing the level of the fines imposed for infringements committed before they were adopted, on condition that the policy which they implement was reasonably foreseeable at the time when the infringements concerned were committed. Consequently, the fact that the Commission is entitled, albeit conditionally, to apply retroactively, to the detriment of those concerned, rules of conduct designed to produce external effects, such as the Guidelines, means that it is under no obligation to apply the *lex mitior*.

(see paras 233-234)

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

12 June 2007 (*)

(Community trade mark – Opposition proceedings – Application for the figurative Community mark WATERFORD STELLENBOSCH – Earlier Community word mark WATERFORD – Relative ground for refusal – No likelihood of confusion – Absence of similarity between the goods – Absence of complementarity – Article 8(1)(b) of Regulation (EC) No 40/94)

In Case T-105/05,

Assembled Investments (Proprietary) Ltd, established in Stellenbosch (South Africa), represented by P. Hagman and S. Ziegler, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the Court of First Instance, being

Waterford Wedgwood plc, established in Waterford (Ireland), represented by K. Manhaeve, lawyer,

ACTION brought against the decision of the First Board of Appeal of OHIM of 15 December 2004 (Case R 240/2004-1), relating to opposition proceedings between Waterford Wedgwood plc and Assembled Investments (Proprietary) Ltd,

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

composed of J. Pirrung, President, A.W.H. Meij and I. Pelikánová, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the application lodged at the Registry of the Court of First Instance on 28 February 2005,

having regard to the response of the intervener lodged at the Registry of the Court on 11 August 2005,

having regard to the response of OHIM lodged at the Registry on 18 August 2005,

further to the hearing on 5 December 2006,

gives the following

Judgment

Background to the dispute

1 On 23 December 1999, the applicant filed an application for a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The mark sought to be registered is the figurative sign represented below:

3 The goods for which registration of the mark was sought are within Class 33 of the Nice Agreement concerning the international classification of goods and services for the purposes of the registration of marks of 15 June 1957, as revised and amended and, following a restriction made by the applicant before OHIM, correspond to the following description: ‘Alcoholic beverages, namely wines produced in the Stellenbosch district, South Africa.’

4 That application was published in the *Community Trade Marks Bulletin* No 55/2000 of 10 July 2000.

5 On 6 October 2000, Waterford Wedgwood plc (‘the intervener’) filed a notice of opposition against the Community trade mark application based on, inter alia, the existence of the Community word mark Registration No 397 521, WATERFORD, registered in respect of, among other things, products falling within Class 21 of the Nice Agreement and corresponding to the following description: ‘Articles of glassware, earthenware, chinaware and porcelain’.

6 In support of its opposition, the intervener relied on the relative grounds for refusal set out in Article 8(1)(a) and (b) and Article 8(5) of Regulation No 40/94.

7 By decision of 2 February 2004, OHIM’s Opposition Division rejected the opposition in its entirety on the grounds, first, that the trade marks were not identical, since the trade mark applied for included elements other than the term ‘waterford’, secondly, that there was no likelihood of confusion in so far as the goods concerned were not similar, the fact that wine is generally drunk in a glass being insufficient in this respect and, thirdly, that the evidence provided by the intervener was insufficient to establish the repute of the trade marks on which the opposition was based.

8 On 1 April 2004, the intervener appealed against the Opposition Division’s decision.

9 By decision of 15 December 2004 (‘the contested decision’), the First Board of Appeal annulled the Opposition Division’s decision and dismissed the Community trade mark application. It found, first, that the trade mark applied for and the earlier mark were highly similar on the visual, phonetic and conceptual levels for the relevant consumers in the United Kingdom and Ireland and, secondly, that the goods covered by the trade mark applied for and the ‘articles of glassware’ covered by the earlier mark were similar on account of the high degree to which wine and wine glasses complement each other. The Board of Appeal also found that the evidence submitted by the intervener on 12 April 2002 could be taken into account. The examination of that evidence led it to hold that one of the documents, namely a study based on a survey carried out among consumers in the United Kingdom, established the strong distinctive character of the earlier mark in the United Kingdom and in Ireland. Basing its decision on that information, the Board of Appeal concluded that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. As a result, it held that there was no need to rule on the ground for refusal laid down in Article 8(5) of Regulation No 40/94, relied upon in the alternative by the intervener.

Forms of order sought

10 The applicant claims that the Court should:

– annul the contested decision;

– determine that there is no similarity giving rise to confusion between the trade mark applied for and the earlier mark;

– remit the case to OHIM for purposes of registration of the trade mark applied for;

– order OHIM and the intervener to pay the costs.

11 OHIM contends that the Court should:

– dismiss the action if it finds the application not to be well founded;

– annul the contested decision if it finds that the goods are not similar;

– annul the contested decision if it finds that the goods are similar but that the intervener has not substantiated that the earlier mark has acquired a high degree of distinctiveness as a result of the use made of it in the European Community or at least in the United Kingdom;

– order the applicant to pay the costs if the action is dismissed;

– order each party to the proceedings before the Court to bear its own costs if the contested decision is annulled.

12 The intervener contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

Admissibility of the applicant's second and third heads of claim

13 It should be observed that, by its second head of claim, the applicant is seeking a declaratory judgment on the existence of a similarity giving rise to confusion between the trade mark sought and the earlier mark. However, the Court of First Instance has jurisdiction, under Article 63(3) of Regulation No 40/94, only to annul or to alter decisions of the Boards of Appeal. As a result, it is not competent to deliver declaratory judgments and such a head of claim is therefore inadmissible.

14 As regards the applicant's third head of claim, it seeks essentially that the Court of First Instance order OHIM to register the trade mark applied for. However, under Article 63(6) of Regulation No 40/94, OHIM is required to take the necessary measures to comply with the judgment of the Court of Justice. Accordingly, the Court of First Instance is not entitled to issue directions to OHIM and such a head of claim is therefore inadmissible (Case T‑163/98 *Procter & Gamble* v *OHIM(BABY-DRY)* [1999] ECR II‑2383, paragraph 53).

15 It follows that the applicant's second and third heads of claim are inadmissible.

Merits

16 The applicant advances three pleas in law in support of the forms of order which it seeks: these concern, first, infringement of Article 74(2), secondly, infringement of Article 8(1)(b) and, thirdly, infringement of Article 8(5) of Regulation No 40/94.

17 The Court is of the opinion that it is first necessary to consider the second plea.

18 Under the second plea, the applicant claims that no likelihood of confusion exists in the present case inasmuch as, on the one hand, neither the goods nor the trade marks are similar and, on the

other hand, the intervener has not established that the earlier mark had acquired a high degree of distinctiveness.

19 The Court considers that it is first of all necessary to examine the arguments of the parties on the similarity between the goods.

Arguments of the parties

20 The applicant submits that the Board of Appeal erred, firstly, by taking into account the distinctive character of the earlier mark for the purpose of assessing the similarity of the goods and, secondly, by holding that the goods are similar on the ground that articles of glassware and wine are complementary goods.

21 In this respect, the applicant states that the fact that wine is drunk from a wine glass does not create any complementary connection between those two products, since consumers do not view them as produced by the same operators. It claims that, first, wine producers do not produce or distribute any goods other than wine, in particular articles of glassware, and that producers of glassware are not involved in wine production. Secondly, wine and wine glasses are not normally sold together. Lastly, wine is a particular and unique product constituting a market which is completely distinct from other markets.

22 The applicant maintains that the other factors generally taken into account for the purpose of establishing the similarity of goods are not present in this instance. It is of the view that wine and articles of glassware are distinct in their nature and intended purpose, that they are not substitutable, that they do not have the same distribution channels and that they are not produced in the same areas. The applicant infers that the goods are not similar and that any likelihood of confusion between the trade mark applied for and the earlier mark is therefore precluded.

23 OHIM shares the analysis of the Board of Appeal, which limited the examination of the similarity of the goods, so far as the earlier mark is concerned, to ‘articles of glassware’ since the other goods covered by the earlier mark clearly did not bear any similarity to those covered by the trade mark applied for. It also accepts that wine glasses, as a sub–category of articles of glassware, are to a certain extent complementary to wine, in so far as wine is generally drunk out of wine glasses. However, since wine can be drunk from other glasses and wine glasses can be used to drink beverages other than wine, OHIM considers that that complementary connection is tenuous. It is therefore inclined to concur with the applicant’s view in observing that complementarity is not sufficient for a finding that the goods at issue are similar, since, in the present case, apart from that complementarity, none of the criteria required by case-law to establish similarity between the goods is met.

24 However, OHIM states that it is prepared to accept the reasoning of the Board of Appeal on the basis that the public may actually believe, because of that complementarity, that the wine glasses and wine marketed under the same trade mark are sold under the responsibility of the same undertaking or of economically-linked undertakings.

25 The intervener maintains that the Board of Appeal was right to find that the goods in question are similar. It considers that wine and wine glasses are complementary in so far as wine is consistently drunk from wine glasses and those glasses are consistently used for the drinking of wine, so that there is an indispensable or, at least, very significant connection between those products. It adds that, on special occasions or celebrations, wine is served in crystal glasses of a high quality. Likewise, for the consumption of a fine wine the type of glass used is of primordial importance.

26 As regards means of distribution, the intervener submits that both types of goods are sometimes distributed by the same commercial channels such as restaurants or specialised wine shops. Likewise, certain wine producers, including the applicant, sometimes sell their wine with a glass, whereby the wine and the glass bear the same trade mark.

Findings of the Court

27 Article 8(1)(b) of Regulation No 40/94 states clearly that, in order for there to be a likelihood of confusion within the meaning of that provision, the goods or services designated must be identical or similar. Thus, even where the mark applied for is identical to a mark which is distinctive to a particularly high level, it must be established that the goods or services designated by the opposing

marks are similar (see, by way of analogy, Case C‑39/97 *Canon* [1998] ECR I‑5507, paragraph 22, and Case T‑169/03 *Sergio Rossi* v *OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II‑685, paragraph 53).

28 It should also be borne in mind that, in order to assess the similarity of the goods in question, account must be taken of all the relevant factors which characterise the relationship between those goods, those factors including, in particular, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (see *Canon*, paragraph 23, and *SISSI ROSSI*, paragraph 54).

29 Before assessing the facts of the present case in the light of what has just been stated, it is necessary to dismiss the applicant's contention that OHIM took into account the distinctive character of the earlier mark in order to assess the similarity of the goods. In paragraph 42 of the contested decision, the Board of Appeal states that 'the distinctive character of the earlier trade mark must be taken into account when determining whether the similarity between the goods or services covered by the two trade marks is sufficient to give rise to the likelihood of confusion'. Therefore, contrary to the applicant's contention, the Board of Appeal took into account the distinctive character of the earlier mark not in order to assess the similarity of the goods but, at a later stage of its examination, in order to assess whether there was a likelihood of confusion.

30 Next, the assessment of the similarity of the goods should be restricted, as regards the earlier mark, to 'articles of glassware', since the other goods covered by the earlier mark have no connection with wine. As is apparent from the contested decision, that category includes carafes, decanters and stemware or wine glasses, articles which are specifically intended to be used for the consumption of wine.

31 The parties do not dispute that the goods at issue, namely the articles of glassware, on the one hand, and, on the other hand, the wine, are distinct by nature and by their use, that they are neither in competition with one another nor substitutable and that they are not produced in the same areas.

32 As regards distribution channels, it is true that wine and certain articles of glassware are sometimes sold in the same places, such as specialist wine retailers, as the intervener has pointed out. However, in the absence of information proving the contrary, it appears that such sales represent no more than a negligible proportion of the overall sales of the articles of glassware concerned.

33 Likewise, wine glasses and wine, although normally marketed separately, are occasionally distributed together for promotional purposes. Thus, the intervener produced before both the Board of Appeal and the Court a copy of a photograph representing a gift package marketed by the applicant and consisting of a bottle of wine and two wine glasses which bear the trade mark sought without the word 'stellenbosch'. However, it has not been shown that that practice by wine producers is of any significant commercial importance. In addition, as the applicant and OHIM submitted at the hearing, the distribution of wine glasses with wine is normally perceived by the consumers concerned as a promotional attempt to increase sales of the wine rather than as an indication that the producer concerned devotes part of his activity to the distribution of articles of glassware.

34 Lastly, it should be stated that there is a degree of complementarity between some articles of glassware, in particular wine glasses, carafes and decanters, on the one hand, and wine, on the other, in so far as the first group of products is intended to be used for drinking wine. However, in so far as wine may be drunk from other vessels and the articles of glassware mentioned above can be used for other purposes, that complementarity is not sufficiently pronounced for it to be accepted that, from the consumer's point of view, the goods in question are similar within the terms of Article 8(1)(b) of Regulation No 40/94.

35 Having regard to all of the foregoing, it must be held that articles of glassware and wine are not similar goods. Consequently, there can be no likelihood of confusion between the conflicting marks and the applicant's second plea must therefore be accepted.

36 Accordingly, the contested decision falls to be annulled, without it being necessary to examine the other grounds put forward by the applicant in connection with the second plea, the first plea on the alleged infringement of Article 74(2) of Regulation No 40/94 or the third plea on the application of the ground for refusal laid down in Article 8(5) of that regulation.

37 In any event, it is clear from paragraph 53 of the contested decision that the latter ground was not considered by the Board of Appeal. It must therefore be considered in the re-examination of the intervener's opposition.

Costs

38 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since OHIM and the intervener have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls the decision of the First Board of Appeal of OHIM of 15 December 2004 (Case R 240/2004-1);

2. Orders the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and Waterford Wedgwood plc to pay, in addition to their own costs, the costs incurred by the applicant.

Pirrung	Meij	Pelikánová

Delivered in open court in Luxembourg on 12 June 2007.

Registrar	President
E. Coulon	J. Pirrung

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* Language of the case: English.

Case T-410/03

Hoechst GmbH

v

Commission of the European Communities

(Competition – Agreements, decisions and concerted practices – Market in sorbates – Decision finding an infringement of Article 81 EC – Calculation of the amount of the fines – Obligation to state the reasons on which the decision is based – Gravity and duration of the infringement – Aggravating circumstances – Principle non bis in idem – Cooperation during the administrative procedure – Access to the file – Duration of the procedure)

Summary of the Judgment

1. *Competition – Administrative procedure – Breach resulting from the obligation placed on the Commission – Respect for the principles of sound administration and equal treatment*

(Council Regulation No 17, Arts 15(2) and 17; Commission Notice 96/C 207/04)

2. *Competition – Administrative procedure – Respect for the rights of the defence – Access to the file*

(Art. 81(1) EC; Council Regulation No 17, Arts 19(1) and 20)

3. *Competition – Administrative procedure – Bringing infringements to an end – Commission's powers – Injunctions addressed to undertakings*

(Council Regulation No 17, Art. 3(1))

4. *Competition – Administrative procedure – Limitation period for fines – Exclusive application of Regulation No 2988/74*

(Council Regulation No 2988/74, Art. 2(1) and (3))

5. *Competition – Fines – Decision imposing fines – Obligation to state the reasons on which the decision is based – Scope*

(Art. 253 EC; Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

6. *Competition – Fines – Amount – Determination – Criteria – Discretion of the Commission*

(Council Regulation No 17, Art. 15(2))

7. *Competition – Fines – Amount – Determination – Criteria – Gravity of the infringement*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1A)

8. *Competition – Fines – Amount – Determination – Criteria – Division of undertakings concerned into categories having the same starting point*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1A)

9. *Competition – Fines – Amount – Determination – Criteria – Deterrent effect of the fine*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1A, fourth and fifth paras)

10. *Competition – Fines – Amount – Determination – Criteria – Duration of the infringement*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1B, first and third paras)

11. *Competition – Fines – Amount – Determination – Criteria – Gravity and duration of the infringement*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1A and B)

12. *Competition – Administrative procedure – Statement of objections – Necessary content – Respect for the rights of the defence*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 2)

13. *Competition – Fines – Amount – Determination – Criteria – Gravity of the infringement – Aggravating circumstances – Repeated infringement*

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

14. *Competition – Fines – Amount – Determination – Non-imposition or reduction of the fine for cooperation of the undertaking concerned with the Commission*

(Council Regulation No 17, Art. 15(2); Commission Notices 96/C 207/04 and 2002/C 45/03)

15. *Competition – Fines – Amount – Determination – Criteria – Taking into account of the cooperation of the undertaking concerned with the Commission*

(Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04, title B)

16. *Competition – Fines – Community sanctions and sanctions imposed in a non-member State for breach of national competition law*

(Art. 3(1)(g) EC; Council Regulation No 17, Art. 15)

1. Within the framework of the application of the Notice on the non-imposition or reduction of fines in cartel cases, the Commission fails to have regard to the principles of sound administration and equal treatment when it provides one of the cooperating undertakings with an assurance that it will be warned if other undertakings attempt to overtake it in relation to cooperation, even if that assurance is not in fact subsequently implemented.

Where that procedural irregularity cannot lead to the annulment of the Commission's final decision, the importance of the observance of those principles by the Commission may justify, in favour of an undertaking which has been the victim of that irregularity, a reduction in the fine by the Community judicature, in the exercise of its unlimited jurisdiction.

(see paras 136-137, 581-582)

2. The right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means in competition cases that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information.

The Commission cannot, however, make a general reference to confidentiality to justify a total refusal to disclose documents in its file. The right of undertakings and associations of undertakings to protect their business secrets must be balanced against the safeguarding of the right to have access to the whole of the file.

In that regard, the fact that access is given to the non-confidential version of a document forming part of the Commission's file, virtually all of the pages of which are blank and marked 'Business secrets', without a more comprehensible non-confidential version, or even a summary of the content of those documents, being provided, may bear a close relationship to failure to disclose that document.

(see paras 145, 152-153)

3. The application of Article 3(1) of Regulation No 17 may include a prohibition on pursuing certain activities or practices or on allowing situations which have been found to be unlawful to continue, but also a prohibition on adopting similar future conduct. Such obligations on undertakings must not however exceed the limits of what is appropriate and necessary to achieve the aim pursued. Furthermore, the Commission's power to issue injunctions is to be applied according to the nature of the infringement found.

The fact that an undertaking which took part in anti-competitive practices is no longer involved in the market concerned on the date of adoption of the Commission decision imposing sanctions in regard to those practices, or that those practices ceased before the adoption of the decision, does not mean that the Commission exceeds the powers conferred on it by Article 3(1) of Regulation No 17 by enjoining that undertaking to refrain from any anti-competitive act or conduct, as such an injunction is by nature preventive and does not depend on the situation of the undertaking concerned at the time of adoption of the decision.

(see paras 198-200)

4. While the fact that a reasonable period is exceeded may, in certain circumstances, justify annulment of a decision finding an infringement of the competition rules, that does not apply where what is being disputed is the amount of the fines imposed by that decision, since the Commission's power to impose fines is governed by Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules relating to competition, which established a limitation period for that purpose. That regulation established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules. Article 2(3) of that regulation provides that, subject to any suspension, the limitation period expires in any event after 10 years where it is interrupted pursuant to Article 2(1) of that regulation, so that the Commission cannot put off a decision about fines indefinitely without incurring the risk of the limitation period expiring. In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period.

(see paras 220, 223-224)

5. A Commission decision imposing fines on a number of undertakings for an infringement of the Community competition rules contains, with respect to the classification of the undertakings concerned in different categories for the purposes of determining the starting amount of the fine, a sufficient statement of reasons when the Commission states that it took as a basis the worldwide market shares obtained on the basis of the worldwide turnover for the relevant product, even if, on grounds of confidentiality, it does not specify those turnovers but merely indicates brackets of market shares, as those factors are sufficiently comprehensible.

(see paras 258-259, 261, 263-265)

6. When determining the amount of a fine imposed for infringement of the Community competition rules, the Commission has a discretion. Under Article 15(2) of Regulation No 17, the amount of the fine is to be determined on the basis of the gravity of the infringement and its duration. In addition, that amount is the result of a series of arithmetical calculations performed by the Commission in accordance with the Guidelines. That amount is set, inter alia, on the basis of various factors linked to the individual conduct of the undertaking in question, such as the existence of aggravating or attenuating circumstances.

It cannot be inferred from that legal framework that the Commission must ensure a proportion between the amount of the fine, as thus calculated, and the overall volume of the relevant product market in the European Economic Area, for a given year of the infringement.

(see para. 342)

7. The three aspects to be taken into consideration in the assessment of the gravity of the infringement, which, according to 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, are the very nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market, do not have the same weight in the context of the global examination. The nature of the infringement plays a preponderant role, in particular, in characterising 'very serious' infringements. In that regard, it follows from the description of very serious infringements in those guidelines that agreements or concerted practices aimed, in particular, at setting prices or the allocation of sales quotas may entail, solely on the basis of their very nature, the characterisation as 'very serious', without there being any need to characterise such conduct by a particular impact.

(see paras 343, 345)

8. Although a Commission decision imposing sanctions which is addressed to different undertakings which have participated in an unlawful cartel is drafted in the form of a single decision, it must be analysed as a bundle of individual decisions finding in respect of each of the undertakings to which it is addressed the infringement or infringements alleged and imposing fines on them. The Commission may therefore examine separately the situation of the different undertakings concerned and divide them into categories in order to determine the individual contribution of each undertaking to the success of the cartel even where, within the cartel, a set of undertakings has always engaged in concerted conduct.

(see paras 308, 360, 365)

9. When determining the amount of a fine to be imposed for infringement of the competition rules in accordance with 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, the Commission may apply an increase to the starting amount to take account of the undertaking's size and global resources.

First, the need to ensure that the fine has a sufficient deterrent effect requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality. The Commission may take account of the fact that, owing to its worldwide turnover by comparison with that of the other members of the cartel, the undertaking concerned would find it easier to find the funds necessary to pay its fine, which, in order to ensure that the fine is sufficiently deterrent, justifies the application of a multiplier. In that context, the financial resources of the undertaking must be assessed, in order to achieve properly the objective of deterrence, while observing the principle of proportionality, on the date on which the fine is imposed. In that regard, for the same reasons, it must be noted that, in the context of Article 15(2) of Regulation No 17, the upper limit of the fine, fixed at 10% of the turnover of the undertaking concerned, is determined by reference to the turnover achieved during the business year preceding the decision.

Second, the Commission may take into account the legal and economic infrastructures which place undertakings in a better position to recognise that their conduct constitutes an infringement. That factor is intended to impose a more severe penalty on large undertakings, which are presumed to have knowledge and sufficient structural means to be aware that their conduct constitutes an infringement and to evaluate the advantages to be gained from it. In that hypothesis, the turnover on the basis of which the Commission determines the size of the undertakings concerned, and therefore their ability to determine the nature and the consequences of their conduct, must relate to their situation at the time of the infringement.

An increase of 100% of the starting amount of the fine to take account of the size and overall resources of the undertakings concerned does not exceed the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines.

(see paras 374, 379, 382, 387)

10. Whilst it is true that the third paragraph of Section 1 B of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty speaks, with respect to long-term infringements of the competition rules, of a 'significant increase'

in the starting amount of the fine, the use of those words does not, however, permit the conclusion that an increase in excess of 100% for an infringement lasting more than 10 years would be contrary to the calculation method provided for in those guidelines or would exceed the limits fixed by those guidelines or by Article 15(2) of Regulation No 17. Even though the third indent of the first paragraph of Section 1 B of the Guidelines does not provide for an automatic increase of 10% per year for long-term infringements, it leaves a margin of discretion in that regard to the Commission, which may fix such an increase without breaching the principle of proportionality.

(see paras 395-396)

11. Even on the assumption that certain kinds of cartels, such as cartels on prices and sales volumes, are intrinsically conceived in order to last, a distinction must always be drawn, in application of Article 15(2) of Regulation No 17, between the duration of their actual functioning and their gravity as resulting from their actual nature. The increase for the duration of the infringement therefore does not take account of the gravity of the infringement for a second time.

(see paras 397-398)

12. In the context of an administrative procedure in competition matters, the Commission fails to respect an undertaking's rights of defence when it establishes an aggravating circumstance as against that undertaking on the basis of elements of fact which, although mentioned at various points in its statement of objections, were, taken as a whole, insufficiently precise as to their scope and characterisation, so that it is only at the decision stage that those elements were brought together into a single part and the objection became clearly apparent.

(see paras 424, 431, 433)

13. 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 refer to an 'infringement of the same type' by the same undertaking. In those circumstances, once an undertaking commits an infringement of the same type, even though the economic sector concerned is a different one, the Commission may find that there is an aggravating circumstance.

In that regard, the Commission cannot find that an undertaking has committed a repeated infringement by referring to a previous decision imposing a penalty on that undertaking for an infringement of the same type where that decision was annulled by the Community judicature before the decision making a finding of repeated infringement was adopted. Article 231 EC provides that where an action for annulment is well founded, the Court is to declare the contested act void.

On the other hand, the Commission may rely on a previous decision imposing a penalty on that undertaking for an infringement of the same type but which was the subject of an action for annulment pending before the Community judicature when a stay of execution was not even sought. Such a decision, in accordance with the first paragraph of Article 256 EC, is enforceable, provided that it imposes a pecuniary burden on persons other than the States, notwithstanding the initiation of an action for annulment, since under Article 242 EC an action before the Community judicature does not have suspensory effect.

If, in order to make a finding of repeated infringement, the Commission relied on a number of previous decisions imposing sanctions on the undertaking concerned, one of which was annulled before the adoption of the decision finding a repeated infringement, the error on the Commission's part does not call in question either the characterisation of repeated infringement, which is sufficiently supported by the other previous decisions, or the rate of increase applied, at least where there is nothing to indicate that the Commission's finding that the repeated infringement followed a number of previous infringements gave rise to a greater increase in the fine for an aggravating circumstance than would have been determined if only a single previous infringement had been identified.

(see paras 465-466, 468-470, 474)

14. Where the undertakings concerned by a cartel procedure began to cooperate with the Commission before the adoption of the 2002 Notice on immunity from fines and reduction of fines in cartel cases and where those undertakings relied on the previous 1996 Notice on the non-imposition or reduction of fines in cartel cases, the latter provision is the only one applicable, even though the Commission definitively ruled only after the adoption of the 2002 Leniency Notice and, in particular, on the question of which undertaking, if any, could benefit from immunity from a fine. While it is true that,

in such a hypothesis, the effects of the acts of cooperation were produced after the adoption of the 2002 Leniency Notice, the future rule applies immediately to the future effects of the situation which arose under the former rule only in the absence of transitional provisions. However, Section 28 of the 2002 Leniency Notice clearly provides that that notice is to apply from 14 February 2002 for all cases for which no undertaking has relied on the 1996 Leniency Notice.

Nor can that conclusion be called in question by reliance on the 'most favourable provision' principle. Without there being any need to determine whether such a principle might apply to the Commission's Lenience Notices, it is not possible to characterise the 2002 Leniency Notice as being more favourable overall than the 1996 Leniency Notice, which is amended on several points, as regards both the substantial rules and the procedural rules, some amendments being more favourable to the undertakings concerned, while others are not.

Last, any application by analogy of the 2002 Leniency Notice must be rejected, since this situation may be distinguished from cases in which the 1996 Leniency Notice was applied by analogy to procedures which had commenced before the adoption of that notice but which were not subject to any other legal rule.

(see paras 507-511)

15. The grant of total immunity or a reduction in the amount of the fine under Section B of the 1996 Notice on the non-imposition or reduction of fines in cartel cases requires, in particular, that the undertaking concerned has been the first to adduce decisive evidence of the cartel's existence. In that regard, while such evidence need not necessarily be sufficient in itself to establish the existence of the cartel, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement. That evidence may also be adduced orally.

The Commission has a certain discretion in determining whether, for the performance of its task of finding the existence of an infringement and putting an end to it, the cooperation in question was decisive and it is only where it manifestly exceeds that discretion that it may be criticised by the Community judicature.

The Commission does not make a manifest error of assessment where it considers that an undertaking which provided it at a meeting with a detailed oral description of the activities and functioning of a cartel, supported by relevant documentary evidence to prove its existence, was the first to cooperate within the meaning of Section B of the 1996 Leniency Notice, when another undertaking had, at an earlier meeting, provided a less detailed account of the cartel which did not accurately reflect the object and the functioning of the cartel and which was not supported by any documentary evidence.

(see paras 552-555, 568-569)

16. The application of the principle *non bis in idem* is subject to a threefold condition of identity of the facts, unity of the offender and unity of the protected legal interest. That principle therefore precludes a penalty being imposed on the same person more than once for the same unlawful conduct for the purpose of protecting the same legal asset.

With respect to penalties for infringement of the competition rules, that principle does not apply to situations in which the legal orders and the competition authorities of non-member States intervened in the exercise of their own powers.

In the case of a worldwide cartel, for which penalties are imposed both by the competition authorities of a non-member State and by the Commission, that principle cannot therefore apply, even though the facts at issue before the former and the latter have their origin in the same set of agreements, because the legal interests protected are different. The Commission's action seeks to protect free competition within the common market, which, under Article 3(1)(g) EC, constitutes a fundamental objective of the Community, whereas, if the procedure initiated by the authorities of a non-member State relates to the application of the cartel or its effects other than on the territory of that State, and in particular in the European Economic Area, that would manifestly encroach on the territorial jurisdiction of the Commission.

For the same reasons, considerations relating to fairness, and aimed at securing the deduction from the fine imposed of the penalty imposed by the authorities of the non-member State, cannot be upheld.

(see paras 600-605)

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

18 June 2008(*)

(Competition – Agreements, decisions and concerted practices – Market in sorbates – Decision finding an infringement of Article 81 EC – Calculation of the amount of the fines – Obligation to state the reasons on which the decision is based – Gravity and duration of the infringement – Aggravating circumstances – Principle non bis in idem – Cooperation during the administrative procedure – Access to the file – Duration of the procedure)

In Case T‑410/03,

Hoechst GmbH, formerly Hoechst AG, established in Frankfurt am Main (Germany), represented initially by M. Klusmann and V. Turner, then by M. Klusmann, V. Turner and M. Rüba, and finally by M. Klusmann and V. Turner, lawyers,

applicant,

v

Commission of the European Communities, represented initially by W. Mölls, O. Beynet and K. Mojzesowicz, and subsequently by W. Mölls and K. Mojzesowicz, acting as Agents, assisted by A. Böhlke, lawyer,

defendant,

APPLICATION for annulment, so far as the applicant is concerned, of Commission Decision 2005/493/EC of 1 October 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Chisso Corporation, Daicel Chemical Industries Ltd, Hoechst AG, The Nippon Synthetic Chemical Industry Co. Ltd and Ueno Fine Chemicals Industry Ltd (Case No COMP/E‑1/37.370 – Sorbates) (Summary in OJ 2005 L 182, p. 20), or, in the alternative, a reduction to an appropriate level of the amount of the fine imposed on the applicant,

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 8 February 2007,

gives the following

Judgment

Facts

1 By Decision 2005/493/EC of 1 October 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Chisso Corporation, Daicel Chemical Industries Ltd, Hoechst AG, The Nippon Synthetic Chemical Industry Co. Ltd and Ueno Fine Chemicals Industry Ltd (Case No COMP/E‑1/37.370 – Sorbates) ('the Decision'), the Commission found that a number of undertakings had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a cartel on the sorbates market.

2 The undertakings to which the Decision was addressed are Chisso Corporation, Daicel Chemical Industries Ltd ('Daicel'), The Nippon Synthetic Chemical Industry Co. Ltd ('Nippon Synthetic'), Ueno Fine Chemicals Industry Ltd ('Ueno'), all established in Japan, and the applicant, Hoechst AG, subsequently Hoechst GmbH, established in Germany.

3 The period during which the infringement was found to have been committed lasted from 31 December 1978 until 31 October 1996 (for Chisso, Daicel, Ueno and Hoechst) and from 31 December 1978 until 30 November 1995 (for Nippon Synthetic).

4 'Sorbates', as defined in the Decision, are chemical preservatives (anti-microbial agents) capable of retarding or preventing growth of micro-organisms, such as yeast, bacteria, moulds or fungi. They are used essentially in food and beverages. Sorbates sometimes also preserve other food characteristics such as flavour, colour, texture and nutritional value. In addition, sorbates are also used to stabilise other types of products such as pharmaceutical products, cosmetics, pet food and animal feed (recital 56 to the Decision).

5 According to the Decision, there are three types of sorbates. First, sorbic acid is the main product, from which other sorbates derive. It is a technically complex substance to produce and of limited application owing to its low solubility in water. Second, potassium sorbate is used where high water solubility is desired. Third, calcium sorbate is used for the coating of cheese wrapping paper in France and Italy. Sorbic acid represents almost 30% of sorbates sales in Western Europe, potassium sorbate represents 70% and calcium sorbate represents a residual part (recitals 57 to 61 to the Decision).

6 At the material time there were seven large suppliers of sorbates at worldwide level: two undertakings were European (Hoechst and Cheminova A/S); one was in the United States (Monsanto, later Eastman Chemical Company); and the remaining four undertakings were Japanese (Chisso, Daicel, Nippon Synthetic and Ueno) (recital 64 to the Decision).

7 Until September 1997, when it transferred its sorbates business to one of its wholly-owned subsidiaries (Nutrinova Nutrition Specialities & Food Ingredients GmbH, 'Nutrinova'), Hoechst was the main operator on the worldwide market (more than 20% in 1995) and on the European market (more than 45% in 1995). Hoechst was followed by Chisso, Daicel, Nippon Synthetic and Ueno (each of which had between 9.5 and 15% of the European market for the same year (recitals 65 and 70 (Table I of the Decision)).

8 According to recitals 4 and 5 to the Decision, lawyers acting for Chisso met the representatives of the Commission's services on 29 September 1998 in order to inform the Commission that Chisso was willing to cooperate within the framework of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the 1996 Leniency Notice) concerning a worldwide cartel on the sorbic acid market.

9 On 27 October 1998 Nutrinova's lawyer also contacted the Commission's services and informed them that Nutrinova was willing to cooperate within the framework of the 1996 Leniency Notice.

10 On 29 October 1998, at a meeting between lawyers acting for Hoechst and Nutrinova and the Commission's services, an oral description of the relevant market, the producers, market shares, the proceedings in the United States and the cartel's activities was provided.

11 On 13 November 1998, Chisso provided an oral description of the cartel's activities to the Commission's services and supplied documentary evidence.

12 On 9 December 1998 the Commission's services received oral testimony from Chisso's representative in the cartel, who supplied explanations and clarifications about the documents submitted on 13 November 1998.

13 On 21 December 1998 Nutrinova submitted a memorandum on the sorbates market.

14 On 19 March and 28 April 1999 Nutrinova submitted a memorandum setting out the anti-competitive activities affecting the sorbates market and documentary evidence.

15 On 20 April 1999 Chisso submitted a declaration confirming and expanding upon the oral statement made at the meeting of 13 November 1998.

16 On that basis, the Commission on 26 May and 17 June 1999 issued requests for information to Daicel, Nippon Synthetic and Ueno under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and Article [82 EC] (OJ, English Special Edition 1959-62, p. 87) (recital 6 to the Decision).

17 On 15 July 1999, 24 October 2001 and 21 February 2002 respectively, Nippon Synthetic, Ueno and Daicel expressed their willingness to cooperate under the 1996 Leniency Notice. They responded to the Commission's requests for information (recitals 7, 10 and 11 to the Decision).

18 The Commission subsequently sent further requests for information under Article 11 of Regulation No 17, the last such request being sent on 13 December 2002 (recital 21 to the Decision).

19 Between 1998 and 2001 proceedings were initiated in the United States and in Canada concerning price-fixing in the sorbates sector. Fines were imposed on Daicel, Hoechst, Nippon Synthetic and Ueno (in the proceedings in the United States) and Daicel, Hoechst and Ueno (in the proceedings in Canada) (recitals 30 to 32 to the Decision).

20 On 20 December 2002 the Commission initiated a proceeding under Article 81 EC and Article 53 of the EEA Agreement and issued a statement of objections to the undertakings to which the Decision is addressed (recital 22 to the Decision).

21 On 24 April 2003 the undertakings to which the Decision is addressed took part in the hearing before the Commission (recital 29 to the Decision).

22 On 1 October 2003 the administrative procedure was closed when the Commission adopted the Decision.

23 According to Article 1 of the operative part of the Decision, the following undertakings had infringed Article 81(1) EC and, from 1 January 1994, Article 53(1) of the EEA Agreement, by participating, for the periods indicated below, in a complex, single and continuous agreement and concerted practice in the sorbates sector, by which they had agreed to fix target prices and to allocate volume quotas, to define a reporting and monitoring system and not to supply technology to potential entrants:

a) Chisso, from 31 December 1978 to 31 October 1996;

b) Daicel, from 31 December 1978 to 31 October 1996;

c) Hoechst, from 31 December 1978 to 31 October 1996;

d) Nippon Synthetic, from 31 December 1978 to 30 November 1995;

e) Ueno, from 31 December 1978 to 31 October 1996.

24 In Article 2 of the operative part of the Decision, the Commission ordered the undertakings listed in Article 1 to bring to an end immediately the infringements referred to in that article, in so far as they have not already done so, and to refrain from repeating any act or conduct described in Article 1 and from adopting any measure having equivalent object or effect.

25 On the basis of the findings of fact and the legal assessments made in the Decision, the Commission imposed on the undertakings concerned fines calculated in application of 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 in the 1996 Leniency Notice.

26 In Article 3 of the operative part of the Decision, the Commission imposed the following fines:

a) Daicel: EUR 16 600 000;

b) Hoechst: EUR 99 000 000;

c) Nippon Synthetic: EUR 10 500 000;

d) Ueno: EUR 12 300 000.

27 The amount of the fine imposed on Hoechst takes into account, in particular, the role as leader of the cartel which it played jointly with Daicel, and also of the fact that its conduct constituted a repeated infringement (recitals 363 to 373 to the Decision). However, Hoechst received a reduction of 50% of the amount of the fine for its cooperation during the administrative procedure (recitals 455 to 466 to the Decision).

28 Chisso was considered by the Commission to have been the first to provide decisive evidence in the context of the investigation. On that basis, it was given complete immunity and was not fined (recitals 439 to 447 to the Decision).

29 The Decision was served on Hoechst on 9 October 2003, by letter dated 8 October 2003.

Procedure and forms of order sought by the parties

30 By application registered at the Registry of the Court of First Instance on 18 December 2003, Hoechst brought the present action.

31 On 16 December 2004 the Court rejected an application to intervene by Chisso (order of 16 December 2004 in Case T‑410/03 *Hoechst* v *Commission* [2004] ECR II‑4451).

32 On 2 March 2006 the Commission was requested to answer a question put by the Court and to supply, first, a number of documents in the investigation file, in the form made accessible to Hoechst, and, second, a usable non-confidential version or non-confidential summary of Chisso's letter of 17 December 2002, with the annexes thereto. The Commission responded to that request within the prescribed period. As regards Chisso's letter of 17 December 2002, together with the annexes, the Commission stated that Chisso agreed that the original versions of those documents should be used for the sole purposes of the proceedings before the Court.

33 On 5 April 2006 the Commission's response and the documents supplied by it were notified to Hoechst.

34 On 18 May 2006 Hoechst was invited to submit its observations on the Commission's response. In particular, it was invited to state how the non‑disclosure of Chisso's letter of 17 December 2002, with the annexes thereto, in the form submitted to the Court by the Commission, had prevented it from having knowledge of documents that might be useful to its defence and had thus breached its rights of defence. By letter of 16 June 2006 Hoechst responded to that question within the prescribed period.

35 On 12 July 2006 the Commission was invited to submit its observations on certain points in Hoechst's response. By letter of 5 September 2006 the Commission submitted its observations within the prescribed period.

36 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

37 The parties submitted oral argument and their answers to the questions put by the Court at the hearing held on 8 February 2007.

38 At the hearing the Court ordered the Commission, on the basis of Article 65(b) and the second subparagraph of Article 67(3) of the Rules of Procedure of the Court, to produce, within three weeks from the date of the hearing, the internal notes relating to the telephone conversations which had taken place between its services and Chisso between September 1998 and April 1999.

39 The order of the Court, which was recorded in the minutes of the hearing, was served on the parties on 13 February 2007.

40 The Commission complied with the Court's request within the prescribed period.

41 In accordance with the second subparagraph of Article 67(3) of the Rules of Procedure, the documents submitted by the Commission were not communicated to the applicant while the Court ascertained their confidential nature and their relevance to the result of the case.

42 On 30 April 2007 the oral procedure was closed.

43 On 11 May 2007 the parties were informed that the Court had decided to remove the internal notes referred to in paragraph 38 above from the file and to return them to the Commission.

44 Hoechst claims that the Court should:

– annul the Decision in so far as it concerns the applicant;

– in the alternative, reduce the amount of the fine imposed on it to an appropriate amount;

– order the Commission to pay the costs.

45 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order Hoechst to pay the costs.

Law

46 Hoechst's action is supported by 13 pleas in law.

47 Contrary to the Commission's contention, it is possible upon reading the arguments put forward to determine the scope of the pleas on which Hoechst relies in support of the form of order which it seeks.

48 Thus, the first and fourth pleas seek annulment of the Decision, in its entirety, in so far as it concerns Hoechst.

49 The 13^{th} plea seeks annulment in part of the operative part of the Decision, namely Article 2, in so far as it concerns Hoechst.

50 The remaining pleas seek a reduction in the fine.

I – The pleas seeking annulment of the Decision in its entirety in so far as it concerns Hoechst

51 By its first plea, Hoechst challenges the Commission's refusal to grant it access to a number of exculpatory documents. In the context of its fourth plea, Hoechst emphasises the fact that the hearing officer's file is incomplete.

A – The first plea, alleging refusal to grant access to certain exculpatory documents

1. Summary of the administrative procedure and of the Decision.

52 At a meeting held on 13 November 1998 between Chisso and the Commission, one of the Commission's officials responsible for the case assured Chisso that 'fair warning would be given if another company would look like overtaking Chisso under the requirements of [the Leniency Notice]'.

53 On 9 December 1998 the Commission's services received the oral testimony of Chisso's representative in the cartel.

54 On 5 March 1999, during a telephone interview with the Commission's services, Nutrinova requested that a meeting be arranged. That request went unanswered.

55 On 20 December 2002 the Commission initiated a proceeding under Article 81 EC and Article 53 of the EEA Agreement and sent a statement of objections to the undertakings to which the Decision is addressed. On the same date those undertakings were granted access to the file, in the form of two

CD-ROMs containing a full copy of the documents, apart from business secrets and other confidential information (recitals 22 and 23 to the Decision).

56 The Commission's note on the meeting of 13 November 1998 was in the file.

57 By letter to the hearing officer dated 22 January 2003, Hoechst requested that it and Nutrinova should, through their counsel, have access to the internal documents relating to the telephone conversations between Commission officials and Chisso between September 1998 and the end of April 1999. They also requested access to a letter from Chisso dated 17 December 2002 which appeared in the file in a non-confidential version.

58 As regards the internal documents relating to the telephone conversations between the Commission and Chisso, counsel for Hoechst and Nutrinova referred to the terms of the minute of the meeting of 13 November 1998 and stated:

'It is a crucial point for our clients to know whether and to what extent submissions have been prompted by Commission officials while our clients were cooperating with the Commission.'

59 As regards Chisso's letter of 17 December 2002, counsel for Hoechst and Nutrinova observed in particular that an annex to that letter, namely a letter of 26 March 1999, was entitled '[T]o the Commission concerning Chisso's cooperation with the Directorate-General for Competition'. They added:

'Any arguments made with regard to Chisso's cooperation or – more importantly – any hints that would refer to contacts Chisso has had at the time with Commission officials could on the other hand be very relevant for our clients' defences.'

60 By letter of 24 February 2003 the hearing officer refused the requests set out in the letter of 22 January 2003.

61 The hearing officer stated, in that regard, that the notes relating to the telephone conversations between Chisso and the Commission were internal documents and therefore non-accessible. In the absence of any strong evidence to the contrary, it had to be presumed that the Commission had made an objective assessment of the information that would be useful to Hoechst. Furthermore, as regards Chisso's letter of 17 December 2002 (and the letter of 26 March 1999 annexed to that letter), the hearing officer informed Hoechst that Chisso had requested confidential treatment for those documents.

62 On 7 March 2003 Hoechst, together with Nutrinova, reiterated, through their counsel, the requests set out in the letter of 22 January 2003, in the context of their response to the statement of objections. More particularly, Hoechst insisted, with Nutrinova, on obtaining access to the file, and submitted arguments relating to the unequal treatment which had been in evidence during the proceedings.

63 On 23 September 2003 the hearing officer submitted her final report in the case (OJ 2005 C 173, p. 5). In that report, she observed, in particular:

'… I informed the parties by letter of 24 February 2003 that further access to the file would not be granted at that stage of the procedure. I explained that notes of telephone conversations between parties and Commission officials are internal documents of the Commission and thus, in principle, non-accessible. In this particular case, the Commission had, exceptionally, made accessible some of the internal file notes and had referred to them in the [s]tatement of [o]bjections, in order to explain the facts and dates of the meetings that the Commission held with the different addressees. With regard to the letters from Chisso, the latter had requested confidential treatment for these letters and the parties had been given access to non-confidential summaries of those letters.'

64 A footnote accompanying that paragraph stated:

'Chisso's legal representative subsequently after the [o]ral [h]earing and in response to a request from me to reconsider the confidentiality nature of the letter sent to the Commission on 26 March 1999, confirmed its view that this document contained business secrets and thus as such was confidential.'

65 The hearing officer then observed in her final report:

‘As a result of these claims made by Hoechst and Nutrinova, I have paid special attention to the conclusions of the Commission on the issue of leniency in the present draft decision. I have also examined internal notes of the Commission services in so far as these exist. In the event, the concerns expressed by Hoechst and Nutrinova are largely rendered moot by the conclusions set out in the draft decision on the issue of leniency. In addition, I am satisfied that the actions of the Commission services vis-à-vis the parties have had no impact on the outcome of the case on this issue. I also confirm that no additional access to file is required in order to satisfy Hoechst’s rights of defence. Neither the Commission’s internal documents nor the documents provided by Chisso provide … additional inculpatory or exculpatory evidence which would be required to be made available to Hoechst.’

66 On 1 October 2003 the Commission adopted the Decision and, at recitals 26 and 27, answered Hoechst’s claims as follows:

‘(26) As regards the documents or parts of documents provided by Chisso for which it claimed protection as “business secrets”, their non-transmission to the other parties protects the legitimate commercial interests of this company. It prevents the other parties from obtaining strategic information on Chisso’s commercial interests and on the operation and development of its business, pursuant to Article 20 of Regulation No 17 and the Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 [EC] and 86 [EC], Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89.

(27) Secondly, as to the access to the Commission’s internal documents, according to well established case-law, the Commission is under no obligation with regard to the rights of the defence to grant access to its internal documents during the procedure. Moreover, as far as contacts with undertakings in the context of their cooperation are concerned, the Commission considers that Hoechst’s reasoning is based on a fundamentally wrong premis. Additional access to the Commission’s internal documents in no way would facilitate the companies’ rights of defence and contribute to determine who was the first undertaking to provide the Commission with decisive evidence. In fact, this appraisal will be made exclusively on the basis of the documents provided by the undertakings, to which the parties had access.’

2. Arguments of the parties

a) Arguments of Hoechst

67 Hoechst states that it was only on reading the statement of objections that it observed that at the beginning of the proceedings, more or less in parallel with Hoechst, Chisso had cooperated with the Commission in reliance on the 1996 Leniency Notice. At the same time, the document to which Hoechst had access enabled it to discover irregularities in the administrative procedure. Hoechst makes clear in that regard that it is challenging, in the eighth plea, the fact that the first decisive evidence of the existence of the cartel was supplied by Chisso on 13 November 1998.

68 In its first plea, first, Hoechst disputes the refusal of access to internal documents relating to the conversations between the Commission and Chisso. Second, Hoechst disputes the refusal of access to a letter from Chisso dated 17 December 2002, together with the annexes to that letter. Third, Hoechst draws attention to the fact that the Commission did not agree to its request to carry out fresh investigations. In addition, Hoechst requests that measures of organisation of procedure be taken.

The refusal of access to documents relating to the conversations between the Commission and Chisso

69 The applicant submits that the Commission refused to grant it access to certain documents submitted by Chisso and also to notes drawn up by the Commission concerning the meetings and telephone conversations with Chisso. If the applicant had been able to consult them, it would have been able to obtain a complete picture of the contacts between the Commission and Chisso and it would therefore have been easier for the applicant to prove that it was it, and not Chisso, that had been the first, in time and with respect to content, to adduce decisive evidence of the existence of the cartel and that therefore ought to have obtained a reduction in its fine. It would therefore also have been easier for Hoechst to demonstrate that Chisso’s acts of cooperation had been influenced by information from the Commission.

70 The applicant refers to Case T‑36/91 *ICI* v *Commission* [1995] ECR II‑1847, paragraph 69; Case T‑221/95 *Endemol* v *Commission* [1999] ECR II‑1299, paragraph 65; and Joined Cases T‑191/98 and T‑212/98 to T‑214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II‑3275, paragraph 334, and emphasises that the right to consult the file is one of the fundamental guarantees of Community law in procedural matters, intended to protect the rights of defence of the addressees of a statement of objections. The right of access to the file must, in particular, ensure the effective exercise of the right to be heard, since it provides the opportunity to be aware of and to assess the evidence used by the Commission in the statement of objections and, where possible, to refute that evidence in the response. The Commission's duty is to give access, in principle, to the whole file. The situation is otherwise only with respect to the Commission's internal documents and evidence containing business secrets of third parties.

71 Hoechst also submits that the principle of equality of arms means that the Commission cannot decide alone whether, and to what extent, it will grant access to the documents which a party might use as exculpatory evidence. There would be a breach of the rights of the defence if it were possible to demonstrate that the administrative procedure might have had a different outcome if Hoechst had obtained access to the exculpatory documents concerned. For the documents not in the file, Hoechst ought to have expressly requested to consult the documents in question.

72 In this case, Hoechst made quite clear that all the notes relating to the telephone conversations which took place between September 1998 and April 1999 between the Commission's representatives and Chisso were important for its defence, as they might have been exculpatory documents, showing the lack of impartiality in the conduct of the proceedings at that time.

73 The parts of the file that Hoechst was able to consult show that the applicant was treated unequally by comparison with Chisso.

74 First, the Commission granted Chisso, in autumn 1998, something that it refused to grant at the same time to Hoechst, namely recognition of oral depositions as acts of cooperation. At the same time, the Commission actively invited Chisso to meetings with it, whereas it refused the same meetings to Hoechst. In particular, an internal Commission note dated 9 November 1998 states that '[Chisso's] lawyers [had] at last agreed to hold the promised meetings, following calls initiated from [the Directorate-General for Competition]'. Those repeated telephone calls from the Commission show the partisan way in which it conducted the proceedings.

75 Second, it is also established that during that decisive period of the proceedings, that is to say, at the end of 1998, Chisso unlawfully obtained a promise from the Commission that it would receive a 'warning' if it appeared that other undertakings would overtake it in relation to cooperation. Such partial warnings are not only unlawful in themselves but also relevant for Hoechst's defence. In effect, that defence depends essentially on whether, and to what extent, the Commission gave Chisso such 'warnings' or indications concerning the state of the cooperation supplied by Hoechst. Furthermore, according to settled case-law the principle of sound administration includes the obligation for the competent institution to examine carefully and impartiality all the relevant aspects of the individual case (Case T‑31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II‑1881, paragraph 99). Even on the assumption that Chisso received no warning from the Commission, that has no impact on the complaint that the Commission in any event declared that it was prepared to give such a warning. That breach of the principle of sound administration is in itself sufficient to justify granting Hoechst greater access to the file in order to preserve its rights of defence.

76 In those circumstances, all the documents dealing with the contacts between Chisso's lawyers and the Commission officials responsible for the case are important for Hoechst's defence, as exculpatory documents. Hoechst explained that point of view on several occasions, both in writing (for the attention of the hearing officer and the head of division of the Commission responsible for the case) and at the hearing on 24 April 2003.

77 However, the hearing officer rejected those requests by letter of 24 February 2003 to counsel for Hoechst and Nutrinova, stating, in particular, the following:

'In the absence of strong evidence to the contrary, it has to be presumed that the Commission made an objective assessment of the information which is useful to [your clients] in this regard. No strong evidence to the contrary is conveyed in your letter. Moreover, the reason given (quoted above), for requesting additional access is not an appropriate basis upon which to consider granting access and, more specifically, it is not relevant to the issue of the application of the Leniency Notice in this case.'

78 Those arguments show that the hearing officer, whose actions are attributable to the Commission, misunderstood her powers and her duties to ensure respect for the rights of the defence. In accordance with the case-law, all that can be expected of a party which seeks wider access to the file is that it should establish by relevant arguments what documents may be of interest for its defence, and for what reason (*Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraph 335). Whether a particular document is of interest for the defence must be assessed from the viewpoint of the party defending itself and neither the Commission's agent responsible for the case nor the hearing officer is competent to decide what documents may serve for the defence as exculpatory documents.

79 The applicant also refers to Case T–30/91 *Solvay* v *Commission* [1995] ECR II–1775, paragraphs 81 and 83, and submits that where a case calls for difficult and complex economic assessments, the Commission must ensure that the addressees of a decision have the same knowledge of the facts as the Commission itself and the other parties concerned do. That principle also applies for the Commission's internal documents relating to the contacts with Chisso, to which Hoechst requested access in order to protect its rights. Referring to Case T–9/99 *HFB and Others* v *Commission* [2002] ECR II–1487, paragraph 40, the applicant states that the Commission's internal documents must be communicated where circumstances of the case are exceptional and the applicant makes out a plausible case for the need to communicate them. Access to the Commission's internal documents must be authorised where they serve to prove a breach of the principle of lawfulness by the Commission (order of 18 June 1986 in Case 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11).

80 As regards the hearing officer's reference to the application of the 1996 Leniency Notice in the present case, Hoechst observes that it cannot be for the hearing officer to predict the future reasoning in the Commission's decision and to base her procedural decisions on that reasoning. The hearing officer can neither know nor decide what grounds will be adopted by the College of Members of the Commission and has neither the power nor the right to decide alone on the interest which potentially exculpatory documents might have for the defence (*Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraph 339).

81 In that context, Hoechst requests the Court to adopt measures of organisation of procedure consisting in ordering the Commission to put it and the Court in a position to consult, in their integral version, all the documents in the file, or otherwise in the Commission's possession, showing the content of the contacts between Chisso's lawyers and the Commission's representatives between September 1998 and April 1999. Furthermore, by way of measure of inquiry, Hoechst requests that the two Commission officials then responsible for the case be called as witnesses.

The refusal of access to a letter of 17 December 2002 from Chisso, together with the annexes thereto

82 Hoechst states that it has already claimed, before the adoption of the Decision, that a letter of 17 December 2002 from Chisso's lawyers which was in the file but the content of which was almost entirely concealed ought to have been in an unconcealed form in the file. Hoechst emphasised that the annexes to that letter, including a letter of 26 March 1999, which, according to the summary of its content, dealt with Chisso's cooperation with the Commission, was of great interest for its defence.

83 In so far as that document, as may be inferred from the file to which access was granted, related only to contents or to legal points relating to Chisso's cooperation and to its assessment, Hoechst contends that there is no valid reason for precluding consultation of it.

84 Hoechst adds that Chisso's letter might contain inculpatory evidence (for example, if Chisso accused the applicant of having been a leader of the cartel) and the Commission ought therefore to have given the applicant immediate access without any prompting. Conversely, should there be any sign of discrimination such as the procedural irregularities on the part of the Commission noted above, Chisso's letter might have an exculpatory effect. In that case, the letter ought to have been transmitted when Hoechst requested it, at the latest.

85 In that context, it is immaterial whether or not one of the parties to the procedure requested confidential treatment for the documents in question. The Commission ought to examine of its own

motion, and objectively, the confidential nature of the documents in its file. Hoechst submits in that regard that Article 21(2) of Regulation No 17 provides that the Commission can grant only valid requests for confidential treatment for business secrets.

86 Hoechst contends that only business data such as turnover or market shares in non-historical periods could have constituted a ground for concealing – and only in part – Chisso's letter.

87 Referring to *Endemol* v *Commission*, paragraph 70 above (paragraph 65), Hoechst submits that the protection of confidential information must be weighed up against the rights of defence of the addressees of the statement of objections. The addressees of the statement of objections should be in a position to determine, in full knowledge of the facts, whether the documents described are relevant for their defence (*ICI* v *Commission*, paragraph 70 above, paragraph 104). In the present case, Hoechst maintains that its opportunity to defend itself was restricted in so far as it was unable to clarify certain decisive procedural and factual points.

88 In particular, in so far as Hoechst disputes the fact that Chisso was the first to supply decisive evidence, Chisso's letter of 26 March 1999, which, as the summary shows, concerned the latter's cooperation with the Commission, might have enabled conclusions to be drawn as to the content and date of the acts of such cooperation, in particular before 29 October 1998.

89 In that context, Hoechst requests the Court to adopt measures of organisation of procedure consisting in ordering the Commission to make available to the Court and to Hoechst Chisso's lawyers' letter of 17 December 2002 to the Commission, in the full version, together with the annexes. Furthermore, by way of measure of inquiry, Hoechst requests that the two Commission officials then responsible for the case be called as witnesses.

90 In its letter of 16 June 2006, in answer to a written question from the Court inviting it to submit further observations on the documents previously transmitted by the Commission, including, in particular, Chisso's letter of 17 December 2002, together with the annexes thereto (see paragraph 34 above), Hoechst claims that certain evidence has been rejected and that a number of irregularities vitiated the administrative procedure.

91 As regards the evidence which it claims to have been rejected, first, Hoechst contends that the letter of 11 January 1999 from Chisso's counsel to the Commission, which is now available for consultation for the first time, constitutes an exculpatory document.

92 That letter shows that on 3 November 1998, or several days after Hoechst requested immunity, Chisso sought confirmation that no other undertaking had offered to cooperate with the Commission.

93 That proves that on that date Chisso had not requested immunity from the Commission. Chisso requested immunity only after 11 January 1999, as shown in the very terms of the letter. It is not possible to make good a failure to request immunity. That element was not mentioned in the Decision and is of such a kind as to confirm that Hoechst had been the first undertaking to cooperate with the Commission.

94 Second, Hoechst maintains that Chisso's letter to the Commission of 26 March 1999 is also an exculpatory document.

95 According to Hoechst, that letter shows that, at the time when it was sent, the written statements which the Commission had requested from Chisso had still not been submitted.

96 First of all, Hoechst observes, in that regard, that Chisso was informally granted extra time, for which there is no provision in the 1996 Leniency Notice.

97 Next, if certain documents were still missing on 26 March 1999, it is impossible to consider, contrary to what is stated at recital 458 to the Decision, that the Commission had proof of the existence of the cartel on the basis of the cooperation provided by Chisso. The Commission therefore gave unlawful commitments to Chisso and also adhered to them by subsequently granting Chisso immunity from a fine.

98 Hoechst also observes that it provided the Commission with documentary evidence on 19 March 1999, even though its personnel still faced the risk of criminal proceedings in the United States and

though the 1996 Leniency Notice required only evidence of the existence of the cartel, which Hoechst provided as early as 29 October 1998.

99 As regards the irregularities which are alleged to vitiate the administrative procedure, Hoechst emphasises that the Commission, at recital 461 to the Decision, refused to accept that the applicant had been the first to cooperate, on the ground that it had documents without producing them, when it was agreed that, in view of the proceedings pending in the United States, Hoechst could provide those documents at a later stage.

100 At the same time, as shown by the letter of 26 March 1999, the Commission clearly allowed Chisso 'extra time' to submit documents. Furthermore, the documents produced by Chisso in April 1999 could have been provided earlier. Accordingly, Chisso's cooperation should have been rejected on the same grounds as those used against Hoechst.

101 In fact, no lack of cooperation was alleged on Chisso's part in spite of a strictly comparable situation. That constitutes unequal treatment to the detriment of Hoechst.

The request to carry out further investigations

102 Hoechst states that, in its letter of 22 January 2003 to the hearing officer, it had requested that further investigations be carried out at the Commission's premises in the form of questioning of witnesses. Although that request was not refused by either the hearing officer or the Commission, no action was taken, since the requested investigation was clearly not carried out. In so far as that investigation was decisive for the content of the Decision, for the reasons set out in the present plea, the Commission has breached the principle of sound administration.

b) Arguments of the Commission

The refusal to grant access to certain documents

103 The Commission emphasises that Hoechst does not deny that access to certain documents may in principle be refused when they are internal documents or contain business secrets.

104 In that context, first, the Commission states that the hearing officer paid 'particular attention' to her findings in the draft decision, concerning the question of the benefit of favourable treatment with respect to the fine. The hearing officer 'moreover' examined the Commission's internal notes before stating that she was convinced that 'the acts of the Commission's services vis-à-vis the parties [had] not had any influence on the outcome of the procedure from that point of view'.

105 Second, the Commission asserts that the first decisive evidence of the existence of the cartel was provided by Chisso at the meeting of 13 November 1998. The decision as to which undertaking was the first to supply decisive evidence to the Commission was taken solely on the basis of the documents produced by the undertakings, to which the parties had access. Accordingly, the warning promised to Chisso at the meeting of 13 November 1998 cannot logically have influenced the decision as to which undertaking was the first to cooperate. It follows at the same time that the criticisms concerning the conduct of the procedure after that date could not be of the slightest importance in that regard. That also applies to the complaints relating to the refusal to grant access to Chisso's letter of 17 December 2002 and the annexes thereto.

106 Nor, third, has Hoechst succeeded in casting serious doubts on the objectivity of the Commission's conduct of the procedure that might justify wider access to its internal documents.

107 The Commission submits, in that regard, that the opportunity given to Chisso on 9 December 1998 to submit oral observations served only to explain the written evidence submitted on 13 November 1998. On the other hand, the meeting proposed by Hoechst by telephone on 5 March 1999 was intended to substitute oral testimony for existing written evidence.

108 As regards the 'refusal' to agree to the meeting proposed by Hoechst, the Commission suggests that what it did was more in the nature of a general reference to the conditions of the application of the 1996 Leniency Notice than a definitive refusal of any new contact with Hoechst. The Commission also states that its position was based on a provisional assessment, first, of Hoechst's willingness to cooperate, in view of the fact that of Hoechst was not prepared to cooperate fully before the outcome of the criminal and civil proceedings in the United States, and, second, of the probative

value of the information thus far sent to the Commission by Hoechst. As Hoechst did not state that it was prepared, at the time of the requested meeting, to cooperate fully with the Commission and to give information of a different nature from that which it had already supplied, it would have made no sense, either for the Commission or for Hoechst, to arrange a new meeting.

109 As regards the fact that the Commission actively invited Chisso to meetings and arranged such meetings, the Commission states that by its telephone call it was merely reacting to an initiative by Chisso. It was agreed at the meeting of 29 September 1998 that the lawyers would take the initiative for a new meeting with the Commission within two weeks. As they did not do so within the agreed period, the Commission resumed contact in order to ascertain whether the lawyers still desired a meeting.

110 Furthermore, the proper functioning of the Commission in the field of competition depends, in particular, on the effectiveness of the Leniency Notice and therefore on the confidence which cooperating undertakings are able to have in the confidentiality of the contacts which they make in that regard. It is therefore necessary to reject Hoechst's assertion that its interest in establishing the existence of any procedural defects prevails over the proper functioning of the institution. In that context, *Solvay* v *Commission*, paragraph 79 above, does not assist Hoechst to overcome the absence of exceptional circumstances in the present case. That case did not concern internal notes of the Commission but only the confidential documents of one of the parties. Furthermore, the facts of that case were very different from those of the present case, which do not involve difficult and complex economic assessments.

111 Last, the Commission, referring to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above (paragraph 340), submits that where the documents that might have contained exculpatory evidence were not communicated to a party, a breach of the rights of the defence can be found only if it is established that the administrative procedure might have led to a different outcome if that party had had access to the documents in question during that procedure. That is precluded in this case, however, as regards the fact that Chisso was the first undertaking to cooperate by its contribution of 13 November 1998.

112 In its response of 5 September 2006 to a written question put by the Court, the Commission made the following comments on the supplementary observations communicated by Hoechst on 16 June 2006 (see paragraphs 34 and 90 to 101 above).

113 As regards, first, Chisso's letter of 11 January 1999, the Commission states that that document was already accessible during the administrative procedure and therefore cannot in any event be characterised as evidence to which the Commission did not provide access.

114 In any event, the Commission states that Section E, paragraph 1, of the 1996 Leniency Notice requires that undertakings 'contact' the Commission's Directorate-General for Competition. Although in the German version of that provision the word 'applicant' (Antragsteller) is used in that context, there is no need to submit a formal application. Nor, moreover, did Hoechst formulate an 'application' in its letter of 27 October 1998.

115 As to which undertaking was the first to cooperate within the meaning of Section B of the 1996 Leniency Notice, the Commission contends that it is not the date of the 'application' that is decisive; what matters is which undertaking 'is the first to adduce decisive evidence of the cartel's existence'. Furthermore, the wording used in the letter of 11 January 1999 shows that Chisso clearly presumed that in had already begun to cooperate.

116 As regards, second, Chisso's letter of 26 March 1999, the Commission emphasises that that document concerns only questions relating to the time-limits which had been imposed on Chisso, and not on Hoechst, to produce further documents, at a time when Chisso had already satisfied the conditions for the application of Section B(b) of the 1996 Leniency Notice by virtue of its contribution of 13 November 1998. Hoechst is therefore wrong to claim that that letter is an exculpatory document. It cannot be an exculpatory document, since it does not relate to any of the reasons why Hoechst is unable to benefit from Section B of the 1996 Leniency Notice, which are set out at recitals 455 to 464 to the Decision, and to which the Commission refers.

117 The fact that Chisso is considered to be the first undertaking to have cooperated is based not on the observations which it submitted on 20 April 1999 but on the documents produced on 13 November 1998. The extensions of the time-limits therefore did not have the effect of retroactively recognising that Chisso was the first to cooperate.

118 If it is Hoechst's intention to assert that it follows from that document that Chisso no longer satisfied the conditions for the application of Section B(d) of the 1996 Leniency Notice, the Commission contends that its argument cannot be upheld, since a person cannot rely on an unlawful act committed in favour of a third party (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T–87/03 and T–91/03 *Tokai Carbon and Others* v *Commission*, not published in ECR, paragraph 373). What is more, even if Chisso should actually lose the benefit of Section B of the 1996 Leniency Notice, that would have no impact on Hoechst.

119 The Commission adds that the evidence necessary for the purposes of the application of Section B (b) of the 1996 Leniency Notice is decisive evidence of the existence of the cartel. Contrary to Hoechst's opinion, evidence which merely put the Commission in a position to carry out an investigation is not sufficient.

120 It is true that information provided orally is not excluded a priori. However, such evidence is not relevant in itself in the context of the application of Section B(b) of the 1996 Leniency Notice and becomes relevant only from the time when it is recorded on the appropriate medium (Case T–15/02 *BASF* v *Commission* [2006] ECR II–497, paragraph 505).

121 The applicant ought to have expressly requested that the Commission draw up a minute to that effect (*BASF* v *Commission*, paragraph 120 above, paragraph 502), in any event so long as the Commission did not propose to do so in the context of its administrative practice. Furthermore, the minute could help to prove the existence of the cartel only if the Commission were able to establish the authenticity of the statement.

122 As regards, third, the irregularities which are alleged to have vitiated the administrative procedure, Hoechst infers from the letter of 26 March 1999 that Chisso no longer satisfied the conditions for the application of Section B(d) of the 1996 Leniency Notice. That argument must be rejected, on the ground that no one can rely to his advantage on an unlawful act committed in favour of a third party.

123 Furthermore, the question as to whether the conditions for the application of Section B(d) of the 1996 Leniency Notice are satisfied must, in the Commission's submission, be determined on a case-by-case basis. One of the significant elements in that context is whether the conduct of the undertakings concerned gave rise to an appreciable delay in the procedure. If the procedure is considered as a whole, it is clear that that was not so in the present case. The Commission also emphasises that Hoechst did not transmit the second part of its observations until April 1999, some days after Chisso had lodged its own declarations (which Hoechst describes as being late).

124 Last, the Commission disputes certain factual assertions in Hoechst's observations.

The request for the new investigations

125 The Commission asserts that an investigation was indeed carried out, but that it produced no results favourable to Hoechst. The official responsible for the case at the time was questioned and confirmed that Chisso had received no warning concerning the possibility that it might be overtaken in relation to cooperation. Chisso was not put on notice in that regard. The Commission refers on that point to recital 458, *in fine*, to the Decision.

3. Findings of the Court

126 The Court notes, by way of preliminary observation, that Hoechst claims on a number of occasions in the context of the first plea that there has been a breach of the principles of sound administration and equal treatment, in support of its assertion that there has been a breach of the right of access to the file. Those arguments, moreover, are again developed in the context of the eighth and ninth pleas, whereby the applicant seeks a reduction in the fine.

127 In those circumstances, the Court considers it appropriate to examine those arguments first, before analysing, more specifically, the breach of the right of access to the file alleged by Hoechst.

a) Breach of the principles of sound administration and equal treatment

128 It must be borne in mind that during an administrative procedure before the Commission, the

Commission is required to observe the procedural guarantees provided for by Community law (Case T–348/94 *Enso Española* v *Commission* [1998] ECR II–1875, paragraph 56).

129 Among the guarantees conferred by the Community judicial order in administrative procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case (Case T–44/90 *La Cinq* v *Commission* [1992] ECR II–1, paragraph 86, and *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above, paragraph 99).

130 As regards the principle of equal treatment, the Commission cannot, when assessing the cooperation provided by undertakings, ignore that general principle of Community law, which, according to consistent case-law, is breached when comparable situations are treated differently or when different situations are treated in the same way, unless such treatment is objectively justified (Joined Cases T–45/98 and T–47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II–3757, paragraph 237, and Case T–38/02 *Groupe Danone* v *Commission* [2005] ECR II–4407, paragraph 453).

131 In the present case, first, so far as it concerns Hoechst's assertion that the Commission granted Chisso, in autumn 1998, what it at the same time refused the applicant, namely recognition of its oral contributions as acts of cooperation, and for the reasons set out at paragraphs 572 to 578 below, the Court considers, on the one hand, that in the Decision the Commission finally accepts Hoechst's oral contributions as acts of cooperation and, on the other, in any event, that the fact that it was the Commission's intention not to take certain oral contributions into consideration was the consequence of uncertainty as to the actual cooperation provided by Hoechst at the beginning of the procedure. Hoechst's arguments in that regard must therefore be rejected.

132 Second, as regards the Commission's internal note of 9 November 1998, relating in particular to the meeting of 29 October 1998, which states that '[t]he lawyers … have at last agreed to hold the promised meetings, following calls initiated from [the Directorate-General for Competition]', the Court considers that the telephone conversations initiated by the Commission's services were a consequence of the fact that those services had already met Chisso's lawyers on 29 September 1998, without there being any need to determine whether or not Chisso's identity had been officially revealed. As the Commission observes in its internal note of 1 October 1998, it had been agreed that the lawyers would contact the Commission services within two weeks. The fact that, in that context, the Commission services resumed contact is not of such a kind as to cast doubt on the lawfulness of the proceedings in that regard.

133 Third, as regards the fact that Hoechst's requests for further investigations met with no response, it must be noted that Hoechst's request, contained in a letter of 22 January 2003 to the hearing officer, formed part of a request for access to the internal documents relating to the telephone contacts between the Commission and Chisso between September 1998 and April 1999. More specifically, Hoechst requested the hearing officer to investigate those telephone contacts. In fact, it follows from the hearing officer's final report that, '[a]s a result of these claims made by Hoechst and Nutrinova', the hearing officer had 'examined internal notes of the Commission services in so far as these exist[ed]'. Hoechst's assertion that its request met with no response is therefore factually incorrect.

134 Fourth, as regards what the applicant claims to have been a biased approach or unequal treatment in the application of the 1996 Leniency Notice, the Court observes that in an internal note of 9 November 1998 referring to the first meetings held with Chisso and Hoechst, the Commission stated:

'We have obviously not informed them [that is to say, Chisso's lawyers] that other companies are also providing information, nor have these others been informed that … Chisso [had] applied for leniency.'

135 In fact, it follows from the minute of the meeting of 13 November 1998 between Chisso and the Commission that one of the officials responsible for the present case stated that 'fair warning would be given if another company would look like overtaking Chisso under the requirements of [the Leniency Notice]'.

136 It follows, first, that on 9 November 1998 the Commission clearly displayed its intention not to

disclose to the cooperating undertakings, in particular to Hoechst, the fact that other undertakings had approached its services in order to obtain immunity from a fine when, on 13 November 1998, that is to say, some days later, it assured Chisso that it would be warned if other undertakings attempted to overtake it in relation to cooperation.

137 Those elements lead the Court to conclude that, in this case, the Commission failed to have regard to the principles of sound administration and equal treatment. The Court would emphasise in that regard that even if the assertion of the official concerned at the meeting of 13 November 1998 does not show that the promise made to Chisso was in fact subsequently kept, it none the less constitutes a breach of those two principles.

138 It must be observed, at this stage, that Hoechst does not claim that the Decision should be annulled in so far as the Commission breached the principles of sound administration and equal treatment. However, since it relied on a breach of those principles in support of the breach of the right of access to the file, which will be examined below, and in so far as Hoechst's arguments are developed again in the context of the eighth and ninth pleas concerning the application of the 1996 Leniency Notice, it is appropriate to ascertain the impact on the content of the Decision of the breach found at paragraph 137 above.

139 In that regard, in the first place, it must be observed that the unlawful act found at paragraph 137 above is not of such a kind as to call in question the infringement found in the Decision, which, moreover, is supported by documentary evidence. Nor has Hoechst put forward any argument to that effect.

140 In the second place, as regard cooperation by undertakings, it follows from recital 440 to the Decision that:

'At a meeting held on 13 November 12998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence … The Commission considers that on that occasion Chisso was the first undertaking to adduce decisive evidence [of] the existence of the cartel which is found in this Decision.'

141 It follows that the Commission relied solely on the oral description of the cartel's activities and on the written evidence submitted at the meeting of 13 November 1998, and not later, as the basis for its conclusion that Chisso had been the first undertaking to adduce evidence of the existence of the cartel.

142 In those circumstances, even on the assumption that Chisso was induced to cooperate further with the Commission after 13 November 1998, the Commission could not have arrived at a different result in the Decision as concerns the application of the 1996 Leniency Notice, subject to examination of the eighth and ninth pleas, whereby Hoechst seeks to demonstrate that, on the substance, the evidence submitted by Chisso on 13 November 1998 was not decisive. The same would apply if Hoechst had been induced further, after 13 November 1998, after becoming aware of Chisso's cooperation.

143 The Court therefore considers that the unlawful act found at paragraph 137 above is not of such a kind as to affect the validity of the Decision in so far as it concerns the finding of the infringement and the fact that Chisso was the first to cooperate.

144 Independently of the question of the impact of the unlawful act found at paragraph 137 above on the right of access to the file, which will be examined below, and therefore the question of the impact of that illegality on the validity of the Decision as a whole, and in so far as Hoechst's arguments are developed again in the context of the eighth and ninth plea, whereby it seeks a reduction in the fine, the Court, at this stage, reserves its position as to whether the fine should be varied.

b) Breach of the right of access to the file

145 It must be borne in mind at the outset that the right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the

Commission and other confidential information (see 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 68 and the case–law cited).

146 As regards the inculpatory evidence, the undertaking concerned must demonstrate that the result which the Commission reached in its decision would have been different if a document that was not disclosed on which the Commission relied to make a finding of infringement against that undertaking ought to have been excluded as inculpatory evidence. As regards the exculpatory evidence, the undertaking concerned must establish that its non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertakings was found to have engaged and, accordingly, the level of the fine. The possibility that a document that had not been disclosed might have had an influence on the conduct of the procedure and the content of the Commission's decision can be established only after a provisional examination of certain evidence showing that the undisclosed documents might have had – from the aspect of that evidence – a significance which ought not to have been overlooked (see *Aalborg Portland and Others*, paragraph 145 above, paragraphs 73 to 76 and the case-law cited).

147 Furthermore, it should be emphasised that it is not solely for the Commission, which notifies the objections and adopts the decision imposing a penalty, to determine the documents which are of use to the defence of the undertakings concerned. However, the Commission may exclude from the administrative procedure the evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation. An applicant cannot properly put forward as a ground of annulment the fact that irrelevant documents were not communicated to it (see *Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 126 and the case-law cited).

148 Last, it must be borne in mind that a breach of the right of access to a file can entail annulment of a Commission decision in whole or in part only where the lack of proper access to the investigation file during the administrative procedure had prevented the undertaking or undertakings concerned from perusing documents which were likely to be of use in their defence and had thus infringed their rights of defence. That is the case if disclosure of a document would have had even a slight chance of altering the outcome of the administrative procedure if the undertaking concerned had been able to rely on it during that procedure (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraphs 101 and 131).

149 It is in the light of those considerations that the Court must assess whether Hoechst's right of access to the file was breached in this case as regards, first, Chisso's letter of 17 December 2002 together with the annexes thereto and, second, the internal documents relating to the telephone conversations between the Commission and Chisso between September 1998 and April 1999.

Chisso's letter of 17 December 2002 and the annexes thereto

150 First, it should be observed that the Commission decided to incorporate Chisso's letter of 17 December 2002, together with the annexes thereto, in a non–confidential version, in the investigation file that was made available to the undertakings which were parties to the proceedings. The Commission therefore of necessity considered that those documents were of relevance to the investigation.

151 Second, Chisso's letter of 17 December 2002, together with the annexes thereto, was not used by the Commission in the Decision in order to establish that the undertakings concerned had committed an infringement. Those documents therefore do not constitute inculpatory evidence.

152 Third, it must be noted that Hoechst did in fact have access to the non-confidential version of Chisso's letter of 17 December 2002, together with the annexes. However, in the form made available to Hoechst during the administrative procedure, those documents consisted of 101 pages, virtually all of which were blank and marked 'Business secrets'. No more comprehensible non-confidential version, or even a summary of the content of those documents, was provided during the

administrative procedure. Only a list setting out the date, sender and addressee of the documents and, where appropriate, the subject-matter, were mentioned in Chisso's letter of 17 December 2002. In those circumstances, the non-confidential version of Chisso's letter of 17 December 2002, with the annexes, in the form make available to Hoechst during the administrative procedure, bears a close relationship to failure to disclose the documents in question, which, in so far as they formed part of the file, were of relevance to the investigation.

153 Fourth, it must be emphasised that more appropriate access to Chisso's letter of 17 December 2002, together with the annexes, was requested by Hoechst on a number of occasions during the administrative procedure. That access was refused, according to the terms of recital 26 to the Decision, on the ground that Chisso had requested confidential treatment for them. The Commission cannot make a general reference to confidentiality to justify a total refusal to disclose documents in its file (Joined Cases T–305/94 to T–307/94, T–313/94 to T–316/94, T–318/94, T–325/94, T–328/94, T–329/94 and T–335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II–931, paragraph 1017). The right of undertakings and associations of undertakings to protect their business secrets must be balanced against the safeguarding of the right to have access to the whole of the file (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, (Cement), paragraph 147).

154 In the circumstances of the present case, taking account of Hoechst's express request to that effect, the Commission ought to have drawn up, or to have had drawn up, a non-confidential version of the documents in issue or, where appropriate, if that proved difficult, to have prepared a list of the documents concerned and a sufficiently precise non-confidential summary of their content.

155 For all of those reasons, the Court considers that Hoechst's access to Chisso's letter 17 December 2002, together with the annexes thereto, was not properly organised by the Commission.

156 However, it must be borne in mind that a breach of the right of access to a file can lead to annulment in whole or in part of a Commission decision only where the lack of proper access to the investigation file during the administrative procedure prevented the undertaking or undertakings concerned from perusing the documents that were likely to be of use in their defence and thus infringed their rights of defence.

157 It was in those circumstances that the Court adopted the measures of organisation of procedure set out at paragraphs 32 to 35 above and that Hoechst was able to submit further observations on the complete documents which had thus been made available to it.

158 It must be noted in that regard, by way of preliminary observation, that certain documents in the investigation file, in particular a letter from Chisso dated 11 January 1999, were produced at the request of the Court since the Decision referred to them in order to find that Chisso had supplied an oral description of the cartel's activities and also certain evidence at the meeting of 13 November 1998. It is common ground, moreover, that those documents formed part of the investigation file made available to the parties to the proceedings, which the Commission confirmed in its observations without that point being disputed by Hoechst. In those circumstances, Hoechst cannot validly maintain that there has been a breach of the right of access to the file in that regard.

159 As regards Chisso's letter of 17 December 2002, together with the annexes, Hoechst's further observations specifically concern one of those annexes, namely a letter from Chisso dated 26 March 1999.

160 It must be emphasised, in that regard, that the Commission's final position on which undertaking had been first to adduce decisive evidence was taken, in the present case, at the time when it adopted the Decision. At no point during the procedure did the Commission inform the undertakings whether or not they would be immune from a fine. In those circumstances, the non-disclosure of Chisso's letter of 26 March 1999 could not affect Hoechst's rights of defence during the administrative procedure.

161 In any event, it must be made clear that Chisso's letter of 26 March 1999 cannot alter the Commission's conclusion that Chisso was the first undertaking to adduce decisive evidence of the

cartel's existence, independently of whether or not that conclusion was well founded. The purpose of Chisso's letter of 26 March 1999 was to explain why Chisso was late in supplying an 'account of the facts'. That cannot attenuate the fact that, at the meeting of 13 November 1998, and according to the Commission, Chisso provided an oral description of the cartel's activities and also certain written evidence. Likewise, the fact that the Commission was able to grant Chisso further time to provide supplementary factual evidence following the meeting of 13 November 1998 cannot have any effect on the fact that Chisso was the first to cooperate, once that conclusion is based solely on the evidence adduced at that meeting.

162 In light of the foregoing, Hoechst's plea, so far as Chisso's letter of 17 December 2002, together with the annexes, is concerned, must be rejected.

The internal documents relating to the telephone contacts between the Commission and Chisso between September 1998 and April 1999

163 As a preliminary point, it must be noted that during the administrative procedure Hoechst requested access only to the internal documents relating to the telephone conversations between the Commission and Chisso between September 1998 and April 1999. That is clear, in particular, from a letter which Hoechst sent to the hearing officer on 22 January 2003, and was confirmed at the hearing.

164 It must be borne in mind, next, that the right of access to the file implies that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence, with the exception, in particular, of the Commission's internal documents (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 68).

165 The restriction on access to such documents is justified by the need to ensure the proper functioning of the Commission when it deals with infringements of the Treaty competition rules. The Commission's internal documents can be made available only if the exceptional circumstances of the case so require, on the basis of serious indicia which it is for the party concerned to supply (see *Cement*, paragraph 153 above, paragraph 420 and the case-law cited, and Joined Cases T–236/01, T–239/01, T–244/01 to T–246/01, T–251/01 and T–252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II–1181, paragraph 40).

166 In the present case, for the reasons set out at paragraphs 128 to 144 above, the arguments put forward by Hoechst concerning a breach of the principles of sound administration and equal treatment were rejected, save as regards the assurance given to Chisso at the meeting of 13 November 1998 that it would be warned if another undertaking attempted to overtake it in the context of the 1996 Leniency Notice.

167 As stated at paragraph 143 above, however, the illegality found in that regard is not of such a kind as to affect the validity of the Decision as regards, first, the finding of the infringement and, second, the determination of the undertaking which was the first to cooperate and therefore the granting of immunity from a fine.

168 Accordingly, the Court considers that no serious indicia exist, for the purposes of the case-law cited above, that would justify access by Hoechst to the internal documents in question. For that reason, Hoechst's plea, in so far as it concerns the breach of the right of access to the internal documents relating to the telephone conversations between the Commission and Chisso between September 1998 and April 1999, must be rejected.

169 In the interest of completeness, and in the desire to demonstrate the truth in light of the breach of the principles of sound administration and equal treatment referred to above, the Commission was ordered, on the basis of Article 65(b) and the second subparagraph of Article 67(3) of the Rules of Procedure, to produce the internal documents in question to enable the Court to verify them. In accordance with the second subparagraph of Article 67(3) of the Rules of Procedure, the documents transmitted by the Commission were not communicated to the applicant while the Court verified their confidentiality and their relevance to the outcome of the case.

170 In the context of that verification, the Court considered that the internal documents in question did not apparently contain evidence relevant for the result of the case. Consequently, in view of the confidentiality normally attaching to documents of that type, the Court decided to remove them

from the file and return them to the Commission (see, to that effect, Case T‑5/02 *Tetra Laval* v *Commission* [2002] ECR II‑4381, paragraph 78, and, by analogy, order in Joined Cases T‑134/94, T‑136/94 to T‑138/94, T‑141/94, T‑145/94, T‑147/94, T‑148/94, T‑151/94, T‑156/94 and T‑157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II‑2293, paragraphs 40, 44 and 45).

171 For all of those reasons, and without there being any need to have recourse to the further measures of organisation or inquiry requested by Hoechst once the Court considers that it is sufficiently enlightened by the documents in the file, the first plea must be rejected.

B – The fourth plea, alleging that the hearing officer's final report is incomplete

1. Arguments of the parties

a) Arguments of Hoechst

172 Hoechst observes that it raised a number of criticisms with the hearing officer concerning the conduct of the administrative procedure and in particular the fact that, first, it was not allowed to cooperate by means of oral testimony whereas that form of cooperation had been permitted in Chisso's case; second, the applicant was refused new meetings with the Commission's agents although such meetings had been proposed to Chisso; and, third, Chisso was unlawfully promised that it would be warned if other parties attempted to 'overtake' it in the context of cooperation.

173 In so far as those criticisms were ignored in the hearing officer's final report, the College of Members of the Commission that adopted the Decision was not correctly informed about the breach of Hoechst's rights of defence.

174 In Hoechst's submission, the hearing officer considered, wrongly – and without stating particular reasons – that whether or not the criticisms set out above were well founded was irrelevant. The applicant refers to *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraph 104), and submits that it is possible that the lack of objectivity in the conduct of the procedure does not affect the lawfulness of a decision markedly and contrary to the rights of the defence, if that lack of objectivity is not the result of 'biased thinking' on the part of the Commission's agent. On the other hand, Hoechst contends that a different legal assessment must be made where, as in the present case, there are repercussions in procedural acts that unilaterally favour one party.

175 Hoechst concludes that the hearing officer ought to have verified those elements and to have set them out in her final report, in order to provide the Members of the Commission responsible for adopting the Decision with a true picture of the conduct of the proceedings.

b) Arguments of the Commission

176 The purpose of the hearing officer's final report is to supplement the draft decision submitted to the Members of the Commission.

177 The Commission refers to the first paragraph of Article 15 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21; 'the terms of reference') and submits that in the present case the hearing officer's final report fully complied with its function. The report shows that the parties' right to be heard was not infringed from any aspect whatsoever. Referring, moreover, to the judgment of 29 April in *Tokai Carbon and Others* v *Commission*, paragraph 165 above (paragraph 53), the Commission contends that in the final report the hearing officer was not required to address the details of the complaints of a procedural order.

178 In the final report, the hearing officer even went further than was strictly necessary by referring to those complaints and stating why they were not decisive. Thus, the report states that 'procedural defects' were alleged, in particular 'discrimination by comparison with Chisso on a whole series of points linked with cooperation'. In addition, the hearing officer states that she took advantage of those criticisms to pay 'particular attention' to the findings of the Commission in that regard in the draft decision. It would have been pointless to provide further detail in the final report, particularly since the Decision itself also deals with the criticisms in question (recitals 453 and 458).

2. Findings of the Court

179 Under Article 1 of the terms of reference, the Commission is to appoint one or more hearing officers 'who shall ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission'.

180 Article 13(1) of the terms of reference provides:

'The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time-limits for replying to the statement of objections and the proper conduct of the oral hearing.'

181 According to the first paragraph of Article 15 of the terms of reference:

'The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.'

182 Under Article 16(1) of the terms of reference, '[t]he hearing officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information, as regards the course of the procedure and respect of the right to be heard'.

183 In the present case, it is sufficient to note that the arguments put forward by Hoechst in support of its plea, which reiterate those already invoked in the context of the first plea on the right of access to the file, do not support the view that Hoechst's right to be heard was not respected in the administrative procedure conducted by the Commission.

184 As regards the breach of the principles of sound administration and equal treatment found at paragraph 137 above, it must be emphasised that that breach did not relate to Hoechst's right to be heard within the meaning of the terms of reference.

185 The hearing officer stated, moreover, in her final report that 'the actions of the Commission services vis-à-vis the parties have had no impact on the outcome of the case on [leniency]'. That is consistent with the finding of the Court, in the context of the examination of the first plea, that the illegality found at paragraph 137 above is not of such a kind as to affect the validity of the Decision so far as concerns, in particular, the determination of the undertaking that was the first to cooperate.

186 It should further be noted that in the Decision the Commission sets out, at recital 453, the procedural objections put forward by Hoechst and that it responds to them, in particular, at recital 458. In those circumstances, it cannot be maintained, as Hoechst contends, that the College of Members of the Commission was not sufficiently informed.

187 For all of those reasons, the fourth plea must be rejected.

II – The 13th plea, seeking annulment of Article 2 of the Decision in so far as it concerns Hoechst

A – Arguments of the parties

1. Arguments of Hoechst

188 Hoechst maintains that the findings of the Commission set out at recital 298 to the Decision, namely that the cartel came to an end in November 1996 at the latest, deprive the order set out in Article 2 of the Decision of its factual basis.

189 If, seven years after the end of the cartel, the Commission still wished to make an order that the

infringement should cease, there must be sufficient indicia that the infringement is continuing. Otherwise, the measure in question would be based on mere suspicion, which would be contrary to Article 3 of Regulation No 17. Apart from the adverse effect that that would have on the reputation of the addressee of the Decision, it might cause problems linked with civil actions that third parties might bring against it.

190 Furthermore, the illegality of Article 2 of the Decision is clear, since Hoechst gave up its sorbates business in 1996, when it transferred that business in its entirety to a third company wholly unconnected with its group, Celanese AG.

191 Hoechst concludes that Article 2 of the Decision must be annulled in so far as it relates to it.

2. Arguments of the Commission

192 The Commission submits that, as in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above, Article 2 of the Decision contains an express reservation, namely 'in so far as they have not already done so'. The Court held in that case that, '[as regards the plea raised] by Hoechst ... it [was] sufficient to note that Article 2 of the decision [was] expressly addressed to undertakings "which [were] still involved in the PVC sector"' and that '[t]he argument in support of [that] claim [was] manifestly devoid of all foundation, (paragraph 1247).

193 In the present case, the Commission maintains that it was not required to establish definitively whether the infringement which had taken place at a certain time was still continuing at the time when the Decision was adopted or whether it had already come to an end. The Commission emphasises, moreover, that the parties had managed to act in the greatest secrecy for almost two decades (recital 306 to the Decision) and that Article 2 of the Decision was a preventive 'cease and desist' order (recital 307 to the Decision). The fact that Hoechst had transferred its sorbates business did not prevent the Commission from addressing an injunction in terms such that the obligation to bring the infringements to an end affected the undertaking only 'in so far as [it had] not already done so'.

B – Findings of the Court

194 By way of preliminary observation, the Court notes that it is clear from the application that, by its 13th plea, Hoechst seeks annulment of Article 2 of the operative part of the Decision in so far as it concerns the applicant.

195 On the substance, it must be held that Article 2 of the operative part of the Decision actually contains two orders.

196 First, that provision requires that the undertakings concerned immediately bring to an end the infringements referred to in Article 1 of the operative part of the Decision, in so far as they have not already done so. On that point, in so far as Hoechst was no longer involved in the sorbates sector at the time of adoption of the Decision, the argument raised against that provision is manifestly devoid of all foundation, since although Hoechst was among the undertakings named in Article 1 of the operative part of the Decision, it was not concerned by the injunction in question (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above, paragraph 1247). That circumstance also renders inoperative Hoechst's arguments as to the slur on its reputation or the possibility that third parties might bring civil actions against it.

197 Second, Article 2 of the operative part of the Decision requires that the named undertakings refrain from repeating any act or conduct described in Article 1 and from adopting any measure having equivalent object or effect.

198 It must be borne in mind, in that regard, that the application of Article 3(1) of Regulation No 17 may include a prohibition on continuing certain activities, practices or situations which have been found to be unlawful, but also a prohibition on adopting similar future conduct. Such obligations on undertakings must not however exceed the limits of what is appropriate and necessary to achieve the aim pursued (see *Cement*, paragraph 153 above, paragraphs 4704 and 4705 and the case-law cited). Furthermore, the Commission's power to issue injunctions is to be applied according to the nature of the infringement found (Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969,

paragraph 298; and Case T‑128/98 *Aéroports de Paris* v *Commission* [2000] ECR II‑3929, paragraph 82).

199 In the present case, the Commission found, at Article 1 of the operative part of the Decision, that Hoechst, with other undertakings, had infringed Article 81(1) EC and, from 1 January 1994, Article 53(1) of the EEA Agreement, by participating, during what, moreover, was a very long period, in a complex, single and continuous agreement and concerted practice in the sorbates sector, in which they had agreed to fix target prices and to allocate volume quotas, to define a reporting and monitoring system and not to supply technology to potential market entrants. Hoechst does not challenge the Decision in that regard. In those circumstances, by enjoining the undertakings concerned to refrain in future, in the sorbates market, from any measure capable of having equivalent object or effect, the Commission did not exceed the powers conferred on it by Article 3 (1) of Regulation No 17.

200 The fact that Hoechst was no longer involved in the sorbates sector on the date of adoption of the Decision, or that the Commission states at recital 298 to the Decision that the cartel had ended in November 1996 at the latest, cannot call that conclusion in question. An injunction such as that issued in the present case is by nature preventive and does not depend on the situation of the undertakings concerned at the time of adoption of the Decision.

201 For all of those reasons, the 13th plea must be rejected.

III – The pleas aimed at securing a reduction in Hoechst's fine

202 The Court considers that the pleas whereby Hoechst seeks a reduction in its fine should be examined in a different order from that followed in the application. Likewise, certain pleas have been grouped together, for the purposes of analysis, since they concern the same substantive problem.

A – The 12th plea, alleging that the procedure was excessively long

1. Summary of the administrative procedure

203 It follows from the facts set out in the Decision, and not disputed by Hoechst, that the first request for information pursuant to Article 11 of Regulation No 17 was sent by the Commission on 26 May 1999 to Daicel, Nippon Synthetic and Ueno (recital 6 to the Decision).

204 Further requests for information pursuant to Article 11 of Regulation No 17 were subsequently sent, notably between May and November 2002 (recitals 12 to 18 to the Decision).

205 On 20 December 2002 the Commission sent a statement of objections to the undertakings to which the Decision is addressed (recital 22 to the Decision).

206 On 24 April 2003 the undertakings to which the Decision was addressed took part in the hearing before the Commission (recital 29 to the Decision).

207 On 1 October 2003 the Commission adopted the Decision.

2. Arguments of the parties

a) Arguments of Hoechst

208 Hoechst criticises the Commission for having breached the principle that the procedure must take place within a reasonable time. It refers to 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, paragraph 170, and submits that that principle forms part of the general principles of Community law and has its origin (through Article 6(2) EU) in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

209 In this case, Hoechst observes that the period between the first request for information addressed to Daicel, Nippon Synthetic and Ueno on 26 May 1999 and the statement of objections, dated 20 December 2002, was more than 42 months. During that time the Commission was completely

inactive for almost 31 months, namely between the request for information of 25 October 1999 and the request for information of 14 May 2002, or, in any event, until the interview with Daicel on 21 February 2002.

210 In view of the punitive nature of the fine, it can be acceptable for the investigation and the deliberations to take such a long time only where there are exceptional circumstances. Hoechst contends, however, that such circumstances are not present in the present case.

211 Hoechst infers that the duration of the administrative procedure exceeded the limits of what is reasonable. In those circumstances, referring to Case C‑185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I‑8417, paragraph 48 et seq., Hoechst submits that reasons of procedural economy require that the complaint alleging that the length of the proceedings was excessive has the effect that the Decision must be annulled in so far as it fixes the amount of the fine.

212 Hoechst further submits that the rules on limitation periods laid down in Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) do not preclude a complaint based on the excessive duration of the proceedings. Hoechst emphasises, in that regard, that the rules on limitation periods do not protect an undertaking from excessively long proceedings, since the commencement of an investigation interrupts the limitation period (Article 2 of Regulation No 2988/74).

b) Arguments of the Commission

213 The Commission submits, first of all, that Hoechst’s plea is bound to fail merely because it refers to the amount of the fine and not to the Decision in its entirety. The Commission observes, in that regard, that only the rule on limitation periods in Regulation No 2988/74 is decisive.

214 If the fact of exceeding a reasonable period, in particular where it entails breach of the rights of defence of the parsons concerned, were a ground for annulment of a decision finding an infringement of the competition rules, that would not apply where it is the amount of the fines imposed in that decision that is disputed, since the Commission’s power to impose fines is governed by Regulation No 2988/74, which establishes a limitation period in that regard.

215 The Commission refers to Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 46 to 49: Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 to 22; and Joined Cases C‑74/00 P and C‑75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I‑7869, paragraphs 139 to 141) and contends that, in the presence of Regulation No 2988/74, there is no room for consideration of the Commission’s duty to exercise its power to impose fines within a reasonable time.

216 The Commission submits, next, in a desire to be exhaustive, that even if it is proved that the reasonable time has been exceeded, that constitutes a ground for annulment of the decision only if the breach of that principle adversely affected the rights of defence of the undertakings concerned (Joined Cases T‑5/00 and T‑6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II‑5761, paragraph 74). In this case, Hoechst has not explained in what way its defence was impeded by what it alleges to have been the Commission’s dilatory treatment of the case.

217 Furthermore, the excessive duration of that phase of the administrative procedure is not in itself capable of adversely affecting the rights of the defence, since the persons concerned are not the subject of a formal accusation of infringement of the competition rules until they receive the statement of objections, and therefore have no need to defend themselves (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 78).

218 Last, the Commission maintains that the ‘total’ duration of the proceedings did not exceed a reasonable time (Case T‑67/01 *JCB Service* v *Commission* [2004] ECR II‑49, paragraph 43).

3. Findings of the Court

219 It must be observed, first of all, that, as the Commission submits, the present plea seeks, according to the actual wording of the application, to obtain 'annulment of the Decision in so far as it fixes the amount of the fine'. This plea therefore seeks, in substance, to obtain annulment of or, at least, a reduction in the amount of the fine imposed on Hoechst.

220 While the fact that a reasonable period is exceeded may, in certain circumstances, justify annulment of a decision finding an infringement of the competition rules, that does not apply where what is being disputed is the amount of the fines imposed by that decision, since the Commission's power to impose fines is governed by Regulation No 2988/74, which establishes a limitation period for that purpose (Case T–213/00 *CMA CGM and Others* v *Commission* [2003] ECR II–913, paragraph 321).

221 The second recital in the preamble to Regulation No 2988/74 states that the limitation period was introduced to ensure legal certainty. According to that recital, 'for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions imposing fines, penalties or periodic penalty payments; … such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period; [and] in this respect the interests of undertakings and associations of undertakings on the one hand, and the requirements imposed by administrative practice, on the other hand, should be taken into account'. Thus, with regard to the Commission's power to impose fines, Article 1(1)(b) of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of the Community competition rules (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraphs 322 and 323).

222 Under Article 1(2) of that regulation, time is to begin to run upon the day on which the infringement is committed or, in the case of continuing or repeated infringements, on the day on which the infringement ceases. However, the limitation period may be interrupted or suspended, in accordance with Articles 2 and 3, respectively, of Regulation No 2988/74. Under Article 2(1) of Regulation No 2988/74, actions which interrupt the running of the period are to include, in particular, written requests for information by the Commission, the commencement of proceedings by the Commission and notification of the statement of objections. The limitation period is to be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which have participated in the infringement. Under Article 2(3) of Regulation No 2988/74, each interruption is to start time running afresh; however, the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty. The limitation period in proceedings is to be suspended for as long as the Commission's decision is the subject of proceedings pending before the Court of Justice of the European Communities.

223 It follows that Regulation No 2988/74 established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules. In that regard, it must be emphasised that, with respect to fines imposed under the Community competition rules, it follows from Article 2(3) of Regulation No 2988/74 that, subject to any suspension, the limitation period expires in any event after 10 years where it is interrupted pursuant to Article 2(1) of that regulation, so that the Commission cannot put off a decision about fines indefinitely without incurring the risk of the limitation period expiring (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraph 324).

224 In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraph 324; see also, to that effect, Case 48/69 *ICI* v *Commission*, paragraph 215 above, paragraphs 46 to 49, and *Geigy* v *Commission*, paragraph 215 above, paragraphs 20 to 22).

225 In the present case, it is common ground that the infringements in question were continuous. Furthermore, the Commission considered, without that point being disputed by Hoechst, that the infringements found had ceased no later than the end of October 1996. Accordingly, in light of the subsequent actions interrupting the limitation period, in particular the requests for information under Article 11 of Regulation No 17 and the statement of objections, and having regard to the fact that the entire period between the end of October 1996 and the adoption of the Decision on 1 October 2003 did not exceed 10 years, the proceedings were not time barred when the Commission adopted the Decision, a circumstance which Hoechst has not in any way disputed in these

proceedings (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 90).

226 For those reasons, Hoechst's present plea, in that it seeks 'annulment of the Decision in so far as it fixes the amount of the fine', must be rejected.

227 In any event, it must be borne in mind that the fact that a reasonable time is exceeded, even on the assumption that it is established, does not necessarily constitute a ground for annulment of the Decision. For the purposes of the application of the competition rules, the fact of exceeding a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements, provided that it has been established that the breach of that principle adversely affected the rights of defence of the undertakings concerned. Other than in that specific case, failure to observe the duty to deal with the matter within a reasonable time has no effect on the validity of the administrative procedure under Regulation No 17 (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 152 above, paragraph 122; Case T‑62/99 *Sodima* v *Commission* [2001] ECR II‑655, paragraph 94; and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 74; see also, to that effect, Case C‑105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elktrotechnisch Gebied* v *Commission* [2006] ECR I‑8725, paragraphs 42 to 44).

228 Hoechst has not maintained that the fact that a reasonable time was exceeded in the present case adversely affected its rights of defence. Furthermore, even on the assumption that Hoechst's application may be interpreted in that sense, the arguments put forward in that regard must be regarded as general arguments and would not be of such a kind as to establish that there was an actual breach of its rights of defence, which must be examined by reference to the specific circumstances of each case (see, to that effect, Case C‑105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 227 above, paragraph 59).

229 For all of those reasons, the 12th plea must be rejected.

B – The 13th plea, alleging improper concealment of certain grounds of the Decision

1. Summary of the Decision

230 At recital 37 to the Decision, the Commission states:

'... Chisso's total worldwide turnover in 2002 was [Japanese yen] 117,711 million (EUR 973.4 million).'

231 At recital 42 to the Decision, the Commission states:

'... Daicel's total worldwide turnover in the fiscal year 2002 was [Japanese yen] 271,341 million (EUR 2,243.9 million).'

232 At recital 50 to the Decision, the Commission states:

'... Nippon [Synthetic]'s total worldwide turnover in the fiscal year 2002 was [Japanese yen] 38,872 million (EUR 321.5 million).'

233 At recital 55 to the Decision, the Commission states:

'... Ueno's total worldwide turnover in 2002 was [Japanese yen] 25,034 million (EUR 199.5 million).'

234 Table I of the Decision is set out as follows:

Size and relative importance in the sorbates market

Undertaking	Worldwide sorbates turnover (in EUR million) and estimated market shares for	EEA sorbates turnover (in EUR million) and estimated market shares for the year

	the year 1995	1995
Chisso	… (more than 9.5% and less than de 15%)	… (more than 4% and less than 15%)
Daicel	… (more than 9.5% and less than 15%)	… (more than 4% and less than 15%)
Hoechst	42.4 (23.6%)	21.6 (48%)
Nippon Synthetic	… (more than 9.5% and less than 15%)	… (more than 4% and less than 15%)
Ueno	… (more than 9.5% and less than 15%)	… (more than 4% and less than 15%)
Others including Cheminova and Eastman	… (less than 30%)	… (less than 16%)
Total	180 (100%)	45 (100%)

235 Last, recital 352 to the Decision is worded as follows:

'Table I shows that in 1995 Hoechst was by far the largest producer of sorbates in the worldwide market with a market share [above 20%] (in the EEA [above 45%]). It is therefore placed in the first group. Daicel, Chisso[,] Nippon [Synthetic] and Ueno all have market shares between [9.5%] and [15%] (in the EEA between [4%] and [15%]). Therefore, they are placed in the second group.'

236 The sign '…' in recitals 37, 42, 50 and 55 and in Table I of the Decision corresponds to a passage concealed by the Commission for reasons of confidentiality, according to the explanation given in the Decision.

2. Arguments of the parties

a) Arguments of Hoechst

237 Hoechst contends that in a final decision in which a fine is imposed, at the latest in the version notified to the persons concerned, there must no longer be any deleted passages containing evidence or assessments of fact or of law. Otherwise, there is a breach of the rights of the defence. Hoechst submits that the obligation to communicate the reasoning on which the Decision is based applies to the addressee of the decision. The situation is fundamentally different from any general interest which the parties to the proceedings may have in maintaining the confidentiality of the evidence vis-à-vis third parties.

238 In this case, recitals 37, 42, 50 and 55 to the Decision contain deleted passages. In particular, in Table I of the Decision the market shares for the determining year (1995) are concealed in such a way that Hoechst can reconstruct only its own market share and not the market conditions applicable to the other undertakings concerned. In so far as, at recital 352 to the Decision, the calculation of the starting amount of the fine is determined by the size of the undertakings and by the market conditions as defined in Table I of the Decision, Hoechst and the Court are unable to understand sufficiently an essential point of the Decision. Furthermore, data relating to 1995 are historical data which can no longer be confidential, even in the public version of the decision appearing in the *Official Journal of the European Union*. The fact that confidential treatment was requested and granted during the administrative procedure has no effect on the question whether the concealed passages in question are still justified in the context of the Decision adopted and notified, as the Commission appears to consider in its letter of 30 October 2003. Hoechst wonders what justification there can be for keeping such data confidential, specifically vis-à-vis Hoechst, when it transferred its sorbates business long ago and has withdrawn from the market in question.

239 Even if the Commission is under no obligation to carry out an arithmetical calculation of the amount of the fines, that does not mean that it does not have the option to do so. On the other hand, where the Commission does carry out such calculations, it is required to communicate them to the addressees of the decision.

240 Referring to the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above (paragraphs 219 and 227 et seq.), Hoechst contends that any addressee of a decision imposing a fine is entitled to non-discriminatory treatment which complies with the principle of equal treatment in the context of a calculation of fines based on categories determined by reference to market shares. It is clear that errors in the process are of concern not only to the undertakings which, being in the second category, were ordered to pay excessive fines, but also to those in the

first category on which excessive fines were perhaps imposed. The disproportionate nature of the bases for calculation for undertakings which were placed in the first category of fines might be the direct consequence of the relatively low amount of the bases for calculation used in the second category, and vice versa.

241 Hoechst emphasises, moreover, that none of the deleted passages was replaced by summaries or by sufficiently precise figures that would have enabled the grounds of the Decision to be understood precisely.

242 Hoechst also states that, by letter of 10 October 2003 to the hearing officer and to the Commission, it challenged the fact that the passages of the Decision referred to above were wrongly deleted. The Commission responded to that request by a letter of refusal received by Hoechst on 10 November 2003. Hoechst replied by letter of 11 November 2003 and the Commission, by letter of 17 November 2003, informed Hoechst that the decision as notified was complete. Should the Commission maintain that it adopted a decision addressed solely to Hoechst, it would be appropriate to request the minutes of the meeting of the Commission of 1 October 2003 in order to ascertain the number and the form of the decisions adopted on that date in the present case. That is particularly appropriate, since the Commission has departed from its normal procedure in comparable proceedings, which affects the formal regularity of the Decision. Even in that case, however, the deletion of the recitals cited above would have been unjustified.

243 Hoechst concludes that the Decision is vitiated by a serious failure to state reasons, which also constitutes a breach of the rights of the defence in the context of the calculation of its fine, in so far as it is impossible to reconstruct the factual premisses on which the Commission relied. Hoechst emphasises in that regard that the Court, in its judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, carried out a thorough check of the method which the Commission used in order to place the undertakings in categories and corrected numerous errors in its calculations. In doing so, the Court considered that the market share differentiations of 2% constituted sufficient ground to annul the Commission's initial decisions relating to the division into categories and the starting amount of the fines. The Commission is therefore strictly bound by the criteria for fixing the amount of fines used during the administrative procedure, the non-discriminatory application of which is subject to unlimited individual judicial review.

b) Arguments of the Commission

244 In the Commission's submission, the legitimate interests of the undertakings concerned in the protection of their business secrets must be taken into account not only during the administrative procedure and at the time of publication of the decision pursuant to Article 21(2) of Regulation No 17, but also when it is notified. Notification of the decision does not constitute a derogation.

245 The passages deleted from recitals 37, 42, 50 and 55 and in Table I of the Decision contain information relating to the undertakings involved in the proceedings; those undertakings had requested confidential treatment, which was granted by the Commission during the administrative procedure. The fact that Hoechst is an addressee of the Decision does not deprive the other addressees of their legitimate interest in the maintenance of confidentiality. The Commission emphasises that Hoechst itself, by letter of 16 December 2003, requested that the turnover and market shares relating to it be deleted from the version of the Decision intended for publication and, if necessary, that they be replaced by a sufficiently wide turnover bracket.

246 It is irrelevant that the Commission could have challenged that position when preparing for the adoption of the Decision, on the ground that the information in question no longer constituted business secrets. In the Commission's submission, the Decision, as adopted and notified to Hoechst, satisfied the requirements of Article 253 EC as regards a statement of the reasons on which it was based.

247 First of all, referring to the judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above (paragraphs 463 and 464), and to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above (paragraph 1558), the Commission submits that the obligation to state the reasons on which a decision imposing a fine is based is fulfilled when the Commission indicates the factors which enabled it to determine the gravity and duration of the infringement. It is not even necessary to indicate in the decision any calculations which may have been carried out for the purpose of applying those factors.

248 In any event, even if it were necessary to provide that type of information, the Commission fully

complied with that requirement. In this case, the Commission began by making general findings on the gravity of the infringement and presenting the particular aspects of the cartel from which it was apparent that this was a very serious infringement (recital 344 to the Decision), for which the likely fine was at least EUR 20 million (recital 354 to the Decision). Next, emphasising the considerable differences between the undertakings' market positions, the Commission explained that it was necessary to adjust that amount by reference to the relative importance of the undertakings concerned on the relevant market and therefore by reference to their capacity to cause serious harm to competition (recitals 345 and 346 to the Decision). The factors which it took into account for the purpose of making that adjustment, in particular for dividing the undertakings into two groups, are set out in the Decision at recitals 349 to 353.

249 It follows, in light of the data in Table I of the Decision, that Hoechst's market share was considerably higher than that of the other parties to the proceedings. That difference led to Hoechst being placed in the first group. In that regard, it follows from recital 352 et seq. to the Decision that, on account of Hoechst's position on the market, the Commission began with that undertaking when it calculated the starting amount of the fines for each undertaking. The starting amount of the fines for the other undertakings was then determined. That amount is lower, since the undertakings were in a less strong position on the market than Hoechst. As Hoechst does not dispute that it was by far the most important undertaking on the market, the precise data relating to the other undertakings' market shares play no part in justifying the starting amount of the fine imposed on Hoechst. They can be of importance solely from the point of view of the other undertakings, since they enable them to know exactly where they stand in relation to Hoechst.

250 Furthermore, Hoechst is perfectly capable of determining for itself the difference between its position and that of the undertakings in the second group, on the basis of the presentation of Table I of the Decision. The precise market shares of the undertakings in the second group are of interest solely from the aspect of any further distinction within the second category, which the Commission decided against, as explained at recital 353 to the Decision. The Commission submits that that has no adverse effect on Hoechst.

251 As regards the reference to the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, the Commission contends that Hoechst seeks to infer from a possible error in treatment concerning the undertakings placed in the second category that it was itself the victim of discrimination. The Commission submits in that regard that the Court concluded in that case that one undertaking ought to be placed in a different category and confined itself to placing it in a different category, while maintaining the categories established in the Commission decision. An error consisting in placing an undertaking in one category therefore entails solely the reclassification of that undertaking in a different category and not annulment of the classification of all the undertakings.

252 The Commission therefore maintains that any discrimination within the second category cannot constitute discrimination against Hoechst as an undertaking in the first category.

3. Findings of the Court

253 The Court considers, first of all, in the light of the terms used by Hoechst in its pleadings, that the present plea seeks, in substance, to establish a failure to state reasons as regards recitals 37, 42, 50 and 55 and Table I of the Decision. Thus, Hoechst states that the fact that certain passages in the Decision were deleted constitutes a breach of the Commission's duty to provide its decisions with comprehensible reasoning. That, it contends, makes it impossible for Hoechst and the Court to understand sufficiently an essential point of the Decision. That failure to state reasons must be analysed, in Hoechst's submission, by reference to recital 352 to the Decision, which deals with the classification of the undertakings concerned in different categories for the purposes of determining the starting amount of the fine. Consequently, Hoechst maintains that the failure to state reasons referred to above led to a breach of the rights of the defence.

254 It must be emphasised, moreover, that in so far as the failure to state reasons alleged by Hoechst concerns factors which enabled the Commission to determine the gravity of the infringement, the present plea seeks, in substance, to obtain a reduction in the amount of the fine.

255 First of all, it should be observed that Article 21 of Regulation No 17, which provides that certain decisions are to be published, places the Commission under an obligation to take account of the undertakings' legitimate interest in their business secrets not being published.

256 Next, it must be borne in mind that the statement of reasons for an individual decision must disclose, clearly and unequivocally, the reasoning of the institution which adopted the measure, in such a way as to allow those concerned to know the grounds of the measure adopted and the competent court to exercise its power of review. The requirement to state reasons must be assessed by reference to the circumstances of the case. The reasoning is not required to go into all the relevant facts and points of law, since the question whether it meets the requirements of Article 253 EC must be assessed by reference not only to the wording of the act in question but also to the context in which the act was adopted (Case C‑367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I‑1719, paragraph 63).

257 The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement (Case C‑291/98 P *Sarrió* v *Commission* [2000] ECR I‑9991, paragraph 73, and judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v Commission, paragraph 208 above, paragraph 463).

258 In the present case, without there being any need to determine whether or not the deleted passages contained business secrets, it must be observed that recitals 37, 42, 50 and 55 and Table I of the Decision, read in the light of recital 352, satisfy the Commission's obligation to state reasons.

259 First, recital 352 to the Decision contains factors which enabled the Commission to place the undertakings concerned in two categories, in the context of the determination of the starting amount of the fines, on the basis of the gravity of the infringement.

260 At recital 352 to the Decision, the Commission thus states that Hoechst was by far the largest producer of sorbates in the worldwide market. The Commission also mentions Hoechst's place on the sorbates market in the EEA. Consequently, the Commission concluded that Hoechst must be placed in the first group of undertakings.

261 In order to arrive at that conclusion, the Commission took as its basis the worldwide market shares for 1995 set out in Table I of the Decision, which were obtained on the basis of the worldwide turnover for the relevant product (recital 351 to the Decision).

262 It is the deleted passages in Table I that are disputed by Hoechst.

263 However, Table I of the Decision contains a sufficiently comprehensible record of the factors to serve as a basis for the conclusion which the Commission drew at recital 352 to the Decision.

264 It will be recalled that the conclusion reached at recital 352 to the Decision is based, as stated above, on the 1995 worldwide market shares for the relevant product.

265 In that regard, Table I of the Decision contains brackets of market shares, for 1995, which enabled the Commission to distinguish two types of undertakings: first, the Japanese undertakings, whose market shares were between 9.5 and 15% in 1995, and, second, Hoechst, whose market share was over 20%. Those factors, read in the light of the conclusion which the Commission reached at recital 352 to the Decision, are sufficiently comprehensible.

266 Furthermore, even if the turnover of the undertakings concerned were deleted in Table I of the Decision, it is possible to determine their extent by reference to the brackets of turnover in that table. Table I of the Decision contains a row entitled 'Total', which shows the total turnover and total market shares of the undertakings concerned. On that basis, a bracket of the turnover of each of the undertakings concerned can be calculated.

267 For those reasons, without prejudice to whether the Commission made an error in that regard, which will be examined in the context of the fifth plea, it must be held that Table I of and recital 352 to the Decision contain the factors which enabled the Commission to determine the gravity of the infringement.

268 As regards recitals 37, 42, 50 and 55 to the Decision, it must be observed that those recitals are not referred to by recital 352 to the Decision, the only recital invoked by Hoechst which dealt with the gravity of the infringement and the classification of the undertakings concerned into groups.

269 Furthermore, Hoechst has not stated how those recitals contain elements of assessment that were used by the Commission for the purpose of assessing the gravity, or indeed the duration of the infringement. Hoechst merely indicates that recitals 37, 42, 50 and 55 to the Decision contain deleted passages.

270 In those circumstances, there is no reason to think that the information deleted from recitals 37, 42, 50 and 55 to the Decision ought to lead to the conclusion that the Commission failed, in this case, to fulfil its obligation to state reasons within the meaning of the case-law cited above.

271 In any event, the deleted passages in recitals 37, 42, 50 and 55 to the Decision cover, in part, the same data as those set out in Table I of the Decision. In effect, recitals 37, 42, 50 and 55 to the Decision contain data relating to Chisso, Daicel, Nippon Synthetic and Ueno respectively and correspond to recital 46 to the Decision so far as Hoechst is concerned. According to the version of the Decision notified to Hoechst, which forms the subject-matter of the present action, recital 46 to the Decision contains, in particular, as regards Hoechst, data relating to its worldwide and EEA turnover for 1995 on the sorbates market, which correspond to the data in Table I of the Decision. Accordingly, for the reasons set out at paragraphs 263 to 267 above, no failure to state reasons can be found in that regard.

272 Furthermore, it must be observed that the reasons stated for placing Hoechst in the first group are not vitiated by any defect, since Hoechst does not deny that it had a larger worldwide market share in 1995 than that of the other undertakings concerned. Accordingly, any error in the classification of the other undertakings in the second group is inoperative.

273 In the light of those factors, Hoechst's assertion of a lack of reasoning in the Decision must be rejected. It also follows that the breach of the rights of the defence which is alleged to result from that supposed failure to state reasons cannot be upheld.

274 As regards, last, Hoechst's assertion that the Commission served on the undertakings concerned a decision which differed as to form, it is sufficient to observe that those differences in form are linked to the protection of the business secrets of the undertakings concerned. However, the fact that certain information in the Decision was deleted, for reasons of confidentiality, at the time of final notification to the undertakings concerned does not support the conclusion that its adoption is affected by any irregularity in that regard. In any event, Hoechst submits no precise details from which it might be concluded that the Decision, as notified to the undertakings concerned, contained, in particular, differences in reasoning. In those circumstances, there is no need to grant Hoechst's request for production of the minutes of the meeting of the College of Members of the Commission of 1 October 2003.

275 For all of those reasons, the third plea must be rejected.

C – Fifth plea, alleging an error of law in the determination of the basic amount of the fine

1. Summary of the Decision

276 At recital 321 to the Decision, the Commission states that the basic amount of the fine is determined according to the gravity and duration of the infringement.

277 First, in order to determine the gravity of the infringement, the Commission relies on the nature of the infringement (recitals 323 to 326 to the Decision), the actual impact of the infringement on the sorbates market in the EEA (recitals 327 to 342 to the Decision) and the size of the relevant geographic market (recital 343 to the Decision).

278 As regards the nature of the infringement, the Commission observes that the infringement in question consisted mainly of price-fixing and market-sharing practices. The Commission further stated that the collusive agreements were mostly conceived, directed and encouraged at a very high level of the undertakings concerned and operated entirely for the benefit of the participating producers and to the detriment of their customers and ultimately the general public (recital 323 to the Decision).

279 As regards the actual impact of the infringement on the sorbates market, the Commission indicates in particular that there is no need to take into account the actual effects of an agreement when it appears to have as its object the prevention, restriction or distortion of competition within the

common market. The Commission states, however, that in this case the infringement had an actual impact on the sorbates market in the EEA (recital 327 to the Decision).

280 The Commission concludes that, in this case, the infringement may be classified as very serious (recital 344 to the Decision).

281 Next, the Commission distinguishes between the undertakings according to their position on the sorbates market in 1995 (recitals 345 to 355 to the Decision). The Commission states that in 1995 Hoechst was by far the largest producer of sorbates in the worldwide market, with a market share of above 20% (above 45% in the EEA). For that reason, Hoechst was placed in the first group. Daicel, Chisso, Nippon Synthetic and Ueno all held market shares of between 9.5 and 15% (between 4 and 15% in the EEA). They were placed in the second group (recital 352 to the Decision).

282 At recital 354 to the Decision, the Commission states that the likely fine for very serious infringements is above EUR 20 million.

283 In those circumstances, at recital 355 to the Decision, the Commission fixes the starting amount of the fine at EUR 20 million for the undertakings in the first group (Hoechst) and EUR 6.66 million for the undertakings in the second group (Daicel, Chisso, Nippon Synthetic and Ueno).

284 Last, in order to ensure that the fine has a sufficient deterrent effect on large undertakings and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from that conduct under competition law, the Commission makes a further adjustment to the starting amount of Hoechst's fine. At recital 357 to the Decision, the Commission observes, in that regard, that the starting amount of the fine, calculated on the basis of the criterion of relative importance in the market concerned, should be increased to take account of the 'size and overall importance' of the undertaking. In those circumstances, the starting amount of Hoechst's fine is increased by 100% to EUR 40 million.

285 Second, as regards the duration of the infringement, the Commission observes that Chisso, Daicel, Hoechst and Ueno infringed Article 81(1) EC and Article 53(1) of the EEA Agreement between 31 December 1978 and 31 October 1996. Those undertakings therefore committed a long-term infringement of 17 years and 10 months. The Commission concludes that the starting amount must be increased by 175% (recital 361 to the Decision).

286 Taking into account the gravity and duration of the infringement, the Commission set the basic amount of Hoechst's fine at EUR 110 million (recital 361 to the Decision).

2. Arguments of the parties

a) Arguments of Hoechst

287 In its fifth plea, Hoechst disputes the nature and the duration of the infringement on which the Commission based its determination of the amount of the fine in this case.

288 Hoechst submits, first of all, that the amount of the fine calculated before its cooperation was taken into account, namely EUR 198 million, corresponds to almost five times the total volume of the market for sorbates in the EEA for 1995 as stated in Table I of the Decision, namely EUR 44.6 million. Such a fine is wholly disproportionate.

289 Hoechst further submits that the Commission has a discretion under Regulation No 17 when fixing the amount of the fine, but the exercise of that discretion is not entirely free owing to the general principles of Community law and also to the Guidelines with which the Commission is required to comply when calculating the fine (Hoechst refers in particular to Case T-230/00 *Daesang and Seewon Europe* v *Commission* [2003] ECR II-2733, paragraph 38).

The nature of the infringement

290 Referring first of all in particular to Section 1 A of the Guidelines and to *Daesang and Sewon Europe* v *Commission*, paragraph 289 above (paragraph 38), Hoechst submits that the basic amount of the fine is fixed according to the gravity and duration of the infringement. The gravity of the

infringement is determined according to a number of criteria set out in the Guidelines. Those criteria include the nature of the infringement, its actual impact on the market and the size of the geographical market, and also the actual economic capacity of the undertaking to cause significant damage to its competitors and to consumers.

291 On the substance, Hoechst takes issue in four respects with the finding in the Decision that the infringement was very serious. First, Hoechst contends that the assessment of the gravity of the infringement wrongly attributes damaging effects to it. Second, it submits that none of its directors at a very high level participated in the infringement. Third, Hoechst maintains that the Commission made an error of law in dividing the undertakings into different categories. Fourth, it criticises the multiplier for deterrence used by the Commission.

– The effects of the infringement

292 Hoechst submits that the Commission presumes that the cartel caused harm to consumers. That presumption is an essential ground that led to the imposition of a heavy penalty on the undertakings concerned. Hoechst refers, in that regard, to recitals 333 to 336 and 341 and 341 to the decision and also to a Commission press release dated 1 October 2003.

293 In particular, Hoechst maintains that what are alleged to be the harmful effects of the cartel in question were stated to be one of the three factors (nature of the infringement, its impact and the fact that the cartel covered the whole of the EEA) that served to determine the gravity of the infringement (recital 344 to the Decision). Since no weighting of those factors is to be found in the Decision, Hoechst concludes that one third of the total amount of the fine was fixed on the basis of what are alleged to be the harmful effects of the cartel. In fact the Commission has not succeeded in adducing evidence of a negative impact of the infringement in this case.

294 Thus, recitals 105, 109, 333 to 337 and 342 to the Decision contain no evidence that the infringement had a negative impact.

295 As regards recital 105 to the Decision, Hoechst maintains that the fact that for long periods the target prices were not reached should rather be regarded as indicating or as providing evidence that the price agreements did not work. That is apparent, in particular, from recitals 163 to 188 to the Decision. Hoechst refers, moreover, to the information set out at recitals 210, 217, 224 and 228 to the Decision and emphasises that for five consecutive years no increase in the target prices was obtained.

296 As regards recital 109 to the Decision, it is based solely on an estimate on the part of Chisso.

297 As regards recitals 333 and 334 to the Decision, Hoechst emphasises that the Commission recognises that the effects of the cartel on the relevant market in this case cannot be measured precisely. However, the Commission also finds that the agreement in issue undoubtedly had an actual impact on the sorbates market in the EEA. The explanations provided by the Commission in that regard are far from being probative. In particular, Hoechst is unable to see how a concerted reduction in prices, to which the Commission refers, might have harmful effects for competition, and still less how it might serve to prove that harm was caused to third parties. Hoechst emphasises, moreover, that an actual impact can be found only where, first, it was established that the target prices were higher than the hypothetical market prices and, second, those prices had been achieved, at least in part. Those factors are not present in this case.

298 As regards recital 335 to the Decision, Hoechst contends that the fact that the sales volumes found in the table in recital 112 to the Decision (Table II) coincide with the agreed quotas might indicate that the agreements had operated properly if there had not been any ‘grey quantities’, that is to say, quantities sold and not declared to the members of the cartel. In this case, such sales of ‘grey quantities’ were made, in particular by Hoechst. Furthermore, Hoechst maintains that the Commission ought to have proved, in addition, that agreements on volumes had led to an artificial scarcity of supply and thus to abusive prices being charged to buyers.

299 As regards recital 336 to the Decision, it is incorrect to presume that sorbates producers were able to control not only the sorbates market but also to a large extent the preservatives market. Hoechst asserts in that regard that there is no single market for preservatives.

300 As regards, last, recitals 337 and 342 to the Decision, it is contradictory to claim, on the one hand,

that the agreements in question were implemented throughout the infringement period and, on the other, that the existence of external factors, which may themselves also have influenced the evolution of prices for the product, means that it is difficult to reach conclusions as to the relative importance of all possible causes. The conclusion set out at recital 341 to the Decision, that the conscious implementation of the cartel agreements had an actual impact on the sorbates market in the EEA is, in those circumstances, incorrect.

– The participation of high-level directors in the anti-competitive agreements

301 The Commission contends that the anti-competitive agreements were conceived, directed and encouraged by the directors of the undertakings concerned at a very high level (recital 323 to the Decision).

302 Hoechst maintains that that assertion is contrary to the obligation to state reasons imposed on the Commission under Article 253 EC. In particular, the Commission ought to have established what factors were at the basis of its conclusion (Case T‑15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II‑1613, paragraph 210).

303 It is not true, moreover, that the persons who participated in the cartel were directors at a very high level, at least so far as Hoechst is concerned. Referring to the grounds of the judgment in *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraphs 33 to 38), Hoechst emphasises that its two most senior employees, referred to at recital 96 to the Decision, were sales directors of one of Hoechst's 8 to 12 business areas. They both reported to a sector director and to a sales director of the business sector concerned, and both were at below-director level. The other employees named in the decision were junior management or had no management role.

304 Last, even if employees of other undertakings concerned were to be considered to be directors at a very high level, that could not lead to an increase in the basic amount of Hoechst's fine. In effect, the gravity of Hoechst's infringement cannot depend on the position of the employees of the other undertakings that took part in the infringement.

– The division of the undertakings into categories

305 Hoechst claims that the distinction between the starting amounts, EUR 20 million for Hoechst and EUR 6.66 million for all the other undertakings concerned, is unacceptable in the light of the nature of the infringement, which is the same for all the undertakings.

306 Furthermore, referring to *CMA CGM and Others* v *Commission*, paragraph 220 above (paragraph 405 et seq.), Hoechst asserts that the division of the undertakings into categories, in the context of the calculation of the starting amount, should first and foremost observe the principle of equal treatment.

307 In this case, the Commission differentiated the undertakings' starting amounts according to their supposed capacity to harm competition and according to the damage alleged to have been caused to competition (recital 349 to the Decision). It chose as a yardstick the market share of each undertaking on the worldwide sorbates market (recital 350 to the Decision).

308 In that regard, first, Hoechst observes that the four Japanese producers each held market shares of up to 15%, which, taken together, might constitute a worldwide market share equivalent to more than twice Hoechst's share. In the light of the solidity of the Japanese producers' export cartel and their always perfectly concerted conduct at cartel meetings, Hoechst was of secondary importance in the evolution of the worldwide market. Thus, on the basis of the bracket of the Japanese producers' market shares, Hoechst contends that the basic amount for those producers ought to have been between 1.61 and 2.54 times higher than for Hoechst. That would have corresponded, assuming an appropriate fine for the Japanese producers (including Chisso), to a basic amount of between EUR 10.4 million and EUR 16.65 million and therefore – all other things remaining unaltered – to a reduction of between EUR 16.58 million and EUR 47.52 million in Hoechst's fine.

309 Second, in any event, and even if each Japanese producer's market share were to be considered separately, the calculation of the fine per 1% market share would correspond to a starting amount of between EUR 0.44 million and EUR 0.7 million. Hoechst submits that it was at a disadvantage, since, if the Commission had applied the same criteria to it, its starting amount ought to have been between EUR 10.38 million and EUR 16.52 million. All other things remaining equal, its fine was

between EUR 17.3 million and EUR 47.62 million higher than it ought to have been.

310 Third, a comparison with other recent decisions shows that the Commission departed in this case from its principles relating to the fixing of fines by categories. Hoechst refers in that regard to Commission Decision 2006/460/EC of 17 December 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement against SGL Carbon AG, Le Carbone-Lorraine SA, Ibiden Co., Ltd, Tokai Carbon Co., Ltd, Toyo Tanso Co., Ltd, GrafTech International, Ltd, NSCC Techno Carbon Co., Ltd, Nippon Steel Chemical Co., Ltd, Intech EDM BV and Intech EDM AG (Case COMP/E-2/37.667 – Specialty graphites), which forms the subject-matter of the judgment of 15 June 2005 in Case T–71/03 *Tokai Carbon and Others* v *Commission*, paragraph 118 above. In that decision, the Commission, inter alia, fixed fines with a starting amount of EUR 20 million for an undertaking with a market share of between 30 and 40% and at EUR 14 million for an undertaking with a market share of between 21 and 27%. Furthermore, in the same decision, because they had participated in a different cartel relating to extruded specialty graphite, the two undertakings concerned, whose market shares were between 25 and 30%, were given fines with a starting amount of EUR 15 million. By way of proof, Hoechst offers the non-confidential version of that decision (after publication) and also the testimony of a Commission official. In the light of those principles, Hoechst contends that its basic amount in the present case ought to have been much lower (EUR 24.75 million or EUR 29.7 million, depending on whether the starting amount was EUR 14 million or EUR 15 million, all other things being equal).

– The increase to take account of Hoechst's size and worldwide resources

311 The Commission again subjected Hoechst to unequal treatment when it multiplied its starting amount of EUR 20 million by a group factor of 2. Other undertakings concerned by the Decision were and still are large undertakings operating at international level. Furthermore, the significant reduction in Hoechst's size which has taken place in the meantime and which reduced its group turnover to approximately EUR 9 billion for the reference year 2002, together with the fact that it is restricted to holding activities and has sold its sorbates business to third parties, renders void the justification for a steep increase in its fine. In any event, a factor of 2 should not have been used as a multiplier.

The duration of the infringement

312 Hoechst contends that the increase of 175% decided upon by the Commission to reflect the duration of the infringement is exorbitant and disproportionate.

313 First, increases for the duration of the infringement which exceed 100% are fundamentally contrary to the method for calculating fines established by the Commission in the Guidelines. Hoechst notes that the factors associated with the gravity of the infringement enable a basic amount to be fixed, which, in the second stage, is adjusted according to the duration of the infringement. Under the latter aspect, Section 1 B of the Guidelines provides only for a 'heavy increase' in the basic amount, and not for the fixing of an entirely new amount of a size completely different from that of the basic amount.

314 Second, the increase for the duration of the infringement takes account, for a second time, of the gravity of the infringement. Hoechst contends, in that regard, that cartels on prices and volumes are typically infringements of long duration. Consequently, if the Commission places those cartels in the highest category of 'very serious infringements' it cannot take the serious nature of the infringement into account for a second time when assessing the duration of the infringement.

315 Third, Hoechst fundamentally challenges the fact that a directly proportionate increase, at a flat rate of 10% per annum, can be applied over a long period for the purpose of penalising a cartel. Hoechst emphasises in that regard that in the context of long-term infringements regarded as a single infringement, all sanctions systems provide for *facteurs de majoration* of the penalty at a rate which reduces exponentially as the duration increases. That approach, moreover, observes the principle of proportionality. If it is fair that offences committed in the distant past become time-barred at a given time, then the sanction imposed cannot ignore the same principle. Hoechst further submits that even if the 'principle of the link of continuity' enshrined in Article 1(2) of Regulation No 2988/74 were still applied in Community law, it could not lead to endless increases in the fines imposed.

316 Last, the increase is disproportionate by comparison with the Commission's previous practice.

317 Hoechst refers first of all to Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/35.733 – VW) (OJ 1998 L 124, p. 60), where the Commission decided that an increase of 10% for each year of the infringement is appropriate only if the gravity of the infringement remains the same throughout the infringement period. In this case, nothing to prove or demonstrate such a fact has been put forward, which is contrary to the Commission's obligation to state reasons.

318 Hoechst refers, next, to a number of decisions in which the Commission increased the basic amount from the second year only, since the Guidelines make provision for an increase only for infringement periods in excess of what is regarded as an 'average' duration. In particular, Hoechst refers to the increase applied in 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), and refers also to the judgment in Case T-220/00 *Cheil Jedang Corporation* v *Commission* [2003] ECR II-2473, paragraph 137). Hoechst concludes that only an increase of 165% was foreseeable in this case.

b) Arguments of the Commission

319 As a preliminary observation, and in response to the arguments developed by Hoechst by way of introduction to its fifth plea, the Commission submits that the comparison between the fine and the overall turnover of sorbates on the EEA market in 1995 is not valid. The turnover achieved on the market in one year does not reveal the negative impact which a cartel that has lasted more than 17 years may have had. Furthermore, the amount of the fine before Hoechst's cooperation is taken into account may be explained in this case by a whole range of factors. In addition, EUR 20 million corresponds to the minimum starting amount envisaged in the Guidelines for very serious infringements. That sum is also consistent with the Commission's practice in taking decisions. Last, the Commission emphasises that the specific starting amount is merely an intermediate amount which, when the method defined by the Guidelines is applied, is then adapted to reflect the duration of the infringement and any aggravating or attenuating circumstances (*Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 95).

The effects of the infringement

320 The Commission contends that it was entitled to assume that the prices charged by the cartel were in principle at least higher than market prices, in any event so far as Hoechst was concerned. The Commission emphasises in that regard that Hoechst had the opportunity to comment on the conclusions set out at recitals 105, 109 and 288 to the Decision, which correspond to paragraphs 78, 82 and 265 of the statement of objections. In the statement of objections, the Commission also indicated that it would take account of the 'impact on the market', in accordance with the Guidelines (paragraphs 291 and 295). In its response to the statement of objections, Hoechst merely stated, concerning that impact, that it was of no relevance to the establishment of the existence of the infringement. Hoechst thus expressly stated in its response that it did not substantially contest the facts of the sorbates cartel, as described in the Commission's statement of objections (recitals 29 and 451 to the Decision).

321 The Commission emphasises, next, that in this case the undertakings concerned had discussed target prices that customers would accept to pay (recital 102 to the Decision). Those prices do not correspond to a free determination by each member of the cartel. Nor does Hoechst seriously deny that the monitoring mechanisms actually allowed the target prices to be reached generally or at least that the parties actively endeavoured to achieve them (recitals 331 and 334 to the Decision). In the Commission's submission, the target prices had to be used systematically as a basis for negotiation (recital 104 to the Decision). Sometimes the participants expressly stated that the target prices had been achieved (recital 205 to the Decision).

322 However, the Commission left open the question of the differential between the prices imposed by the cartel and those that might have been achieved in a situation of normal competition (recitals 333 and 340 to 342 to the Decision). The Decision does not state that prices had increased continuously, but only that the target prices had been fixed in such a way as to enable prices higher than market prices to be achieved. In the Commission's submission, that could include price reductions, the effect of which, however, was only to attenuate the impact of the reduction of market prices for members of the cartel (recital 224 to the Decision).

323 As regards the cartel's consequences for sales volumes, Hoechst does not specifically challenge the figures in Table II in the Decision. Hoechst's assertion (contrary to recital 419 to the Decision) that

there were higher sales of 'grey quantities' by other producers than by Ueno, notably by Hoechst, is wholly inaccurate. Furthermore, the problem of grey quantities became apparent only at the end of 1992, and therefore towards the end of the cartel (recitals 112 and 193 to the Decision). The Commission also observes that in this case supply was adjusted to demand, and refers to recitals 108 and 109 to the Decision.

324 As regards Hoechst's comments on the markets in question, the Commission states that it merely observed, at recital 336 to the Decision, that sorbates were the most-used preservatives and that no other preservative constituted a perfect substitute. It was therefore permissible to conclude that sorbates manufacturers were in a position to control the preservatives sector 'to a great extent'. The Commission further submits that it did not definitively establish whether there was a separate market for sorbates. Even if that were so, the Commission's finding would remain valid.

325 Last, as regards the significance of the harmful consequences of the infringement for the determination of the amount of the fine, Hoechst's argument that those consequences account for exactly one third is wholly unfounded. The Commission's press release to which Hoechst refers contains merely an abridged presentation of the Decision and must not be taken to mean that the impacts in question played a decisive role in the calculation of the fines. That aspect is not even mentioned in the part of the press release entitled 'Calculation of the fines'. Furthermore, factors relating to the object of conduct may be more significant than those relating to its effects, particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing (Case T–141/94 *Thyssen Stahl* v *Commission* [1999] ECR II–347, paragraph 636).

The participation in the anti-competitive agreements of directors at a very high level

326 As regards the grounds of the Decision, the Commission contends that Hoechst obviously understood what is covered by the expression 'at a very high level' and that, moreover, the statement of objections makes clear that the agreements had been conceived, directed and encouraged at a very high level in the undertakings concerned. Hoechst did not dispute those findings and there was no need to develop that point in greater detail.

327 On the substance, *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above, does not provide a definition of the concept of 'a very high level', applicable to all situations and excluding anyone carrying out lower-level duties than those at issue in that judgment. At recital 323 to the Decision, the Commission seeks to demonstrate that the cartel was not organised by junior staff but by persons at a level capable of conferring authority and stability on the cartel. The sales managers of the Hoechst division concerned satisfy those conditions.

The division of the undertakings into categories

328 Hoechst ignores the fact that the Guidelines are based on the specific weight of each undertaking (Section 1 A, fourth, sixth and seventh paragraphs). The fact that the Japanese manufacturers held regular meetings before the joint meetings and normally also met after those meetings does not necessarily mean that they constitute one and the same undertaking.

329 Furthermore, the Commission observes that, in dividing the undertakings into categories, it began with Hoechst, on which it imposed the minimum fine recommended for very serious infringements. Hoechst's argument that the starting amount of the fine for the undertakings in the second category, which is one third of its own starting amount, is too low, cannot be accepted, since no one can rely to his own advantage on an unlawful act committed in favour of another (Case T–16/99 *Lögstör Rör* v *Commission* [2002] ECR II–1633, paragraph 350). In addition, when fixing the amount of each fine, the Commission has a discretion and cannot be required to apply a precise mathematical formula for that purpose (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraphs 252 and 383). It is therefore immaterial that the starting amount of the fine for the undertakings in the second category was not adapted in precise proportion to the market shares of the undertakings concerned.

330 As regards the practice in taking decisions on which Hoechst relies, the Commission contends that that practice does not in itself serve as a legal framework for fines in competition matters, which is defined solely in Regulation No 17, and that the factors for comparison can be no more than indicative when the circumstances of competition cases, such as markets, products, countries, undertakings and periods concerned are not the same. The Commission refers, on those points, to

JCB Service v *Commission*, paragraph 218 above (paragraphs 187 and 188). The comparison drawn by Hoechst is therefore irrelevant.

The increase to take account of Hoechst's size and global resources

331 The Commission contends that fixing a factor for deterrence is consistent with the case-law and with its practice in taking decisions. The Commission refers, in particular, to *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraph 162 et seq.).

332 That factor takes account of the size and resources of the undertaking concerned, which go hand in hand with its importance. In 2002 Hoechst was at least four times as large as Daicel, the next-largest undertaking in terms of turnover. On the other hand, the nature of Hoechst's activity at the time of the adoption of the Decision is irrelevant. The fact that Hoechst transferred its sorbates business to a third party was already taken into consideration when the relevant comparison of the size of the undertakings concerned was made.

The duration of the infringement

333 As regards Hoechst's arguments relating to the method laid down in the Guidelines, the Commission submits that an increase of 10% per annum is provided for at Section 1 B of the Guidelines, with the object of really penalising the restrictions which produced harmful effects on a lasting basis. The Court of Justice has again had occasion recently to emphasise that it is consistent with the general interest to avoid anti-competitive practices, to discover them and to impose sanctions (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 54).

334 The Commission emphasises, moreover, that the increase envisaged for the duration of the infringement is not subject to an absolute maximum (as the 100% suggested by Hoechst) and refers, on that point, to its practice in taking decisions in a number of cases.

335 Furthermore, the criteria of gravity and duration of the infringement exist autonomously alongside each other. Together, they enable the basic amount to be determined. To define the increase for the duration of the infringement by reference to the criterion of gravity would be contrary to the autonomy of the two criteria and therefore inappropriate.

336 Furthermore, contrary to Hoechst's opinion, the category of very serious infringements is not reserved for long-term horizontal infringements. It is therefore appropriate to take the actual duration of the infringement fully into account.

337 Nor are the considerations on limitation relevant. In the case of lasting or continuous infringements time begins to run only on the date on which the infringement comes to an end.

338 As regards the argument that in any event only an increase of 165% was foreseeable, on the ground that the first year of the infringement does not count, the Commission replies that the increase of 10% per annum is perfectly consistent with the principles laid down in the Guidelines. The only provision in that regard is that, for infringements of short duration, in general less than one year, no increase is applied (*Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 133). A comparison of the wording of the second and third indents of Section 1 B of the Guidelines shows that, where an infringement lasts more than one year, the increase is supposed to be applied 'per year' of the infringement, thus including the first year.

339 As regards, last, the decision-taking practice to which Hoechst refers, whereby an increase of less than 10% per year was imposed, the Commission observes that *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, had the particular characteristic that the increase for duration came to 10% for some undertakings and less than 10% for others, so that the decision was not consistent (paragraph 139 of the judgment). The Commission adds that the fact that it may in the past have applied a certain rate of increase to the fine, by reference to the duration of the infringement, cannot deprive it of the option of raising that rate within the limits indicated by Regulation No 17 and the Guidelines, if that is necessary to ensure the implementation of Community competition policy (Case T–203/01 *Michelin* v *Commission* [2003] ECR II–4071, paragraph 277).

340 Furthermore, in the last decisions to which Hoechst refers, the Commission undoubtedly increased the fine by 10% per year for the duration of the infringement. It is necessary, on that point, to

reject Hoechst's assertion that the increase of 10% per year is in any event inadequate since the intensity of the infringement varied. The passage in the Decision which Hoechst cites in order to demonstrate that change in the intensity of the infringement does not permit the slightest conclusion to that effect. In addition, the increase in the fine by 10% per year of the infringement is justified even if the intensity of the infringement may have varied during the period concerned, once the very serious infringement was pursued (*Michelin* v *Commission*, paragraph 339 above, paragraph 278).

3. Findings of the Court

341 As a preliminary point, it should be noted that Hoechst's fifth plea is supported by two parts. The first part is entitled 'Nature of the infringement' and the second 'Duration of the infringement'. However, the first part is aimed, in fact, at the constituent elements of the 'gravity' of the infringement, which incorporates the nature of the infringement. Hoechst must therefore be taken to challenge, in the first part, the elements identified by the Commission as to the gravity of the infringement.

342 Next, it is appropriate to reject Hoechst's general argument that the amount of its fine, calculated before the application of the 1996 Leniency Notice, is disproportionate in so far as it amounts to almost five times the overall volume of the EEA market, for 1995, set out in Table I of the Decision. It must be borne in mind, in that regard, that when determining the amount of each fine, the Commission has a discretion (Case C‑283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I‑9855, paragraph 47, and Case T‑303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II‑4567, paragraph 151). Furthermore, under Article 15(2) of Regulation No 17, the amount of the fine is to be determined on the basis of the gravity of the infringement and its duration. In addition, that amount is the result of a series of arithmetical calculations performed by the Commission in accordance with the Guidelines. That amount is set, inter alia, on the basis of various factors linked to the individual conduct of the undertaking in question, such as the existence of aggravating or attenuating circumstances (Case T‑304/02 *Hoek Loos* v *Commission* [2006] ECR II‑1887, paragraphs 82 and 85). It cannot be inferred from that legal framework that the Commission must ensure a proportion between the amount of the fine, as thus calculated, and the overall volume of the relevant product market in the EEA, for a given year of the infringement (in this case 1995), when the infringement in question lasted more than 17 years and when the amount of the fine also depends on other factors linked to the individual conduct of the undertaking. It follows that Hoechst's general argument in that regard must be rejected.

a) The gravity of the infringement

343 It must be borne in mind that the Guidelines state, inter alia, that in assessing the gravity of the infringement account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements are thus put into one of three categories: minor infringements, serious infringements and very serious infringements (Section 1A, first and second paragraphs).

344 It must also be borne in mind that the gravity of 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 criteria to be applied has been drawn up (judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above, paragraph 465, and Joined Cases C‑189/02 P, C‑202/02 P, C‑205/02 P to C‑208/02 P and C‑213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I‑5425, paragraph 241).

The effect of the cartel on the sorbates market in the EEA

345 As a preliminary point, it must be noted that the three aspects of the assessment of the gravity of the infringement which are referred to at paragraph 343 above do not have the same weight in the context of the global examination. The nature of the infringement plays a preponderant role, in particular, in characterising 'very serious' infringements. In that regard, it follows from the description of very serious infringements in the Guidelines that agreements or concerted practices aimed in particular, as in this case, at setting target prices or the allocation of sales quotas by volume may entail, solely on the basis of their very nature, the characterisation as 'very serious', without there being any need to characterise such conduct by a particular impact (see, to that effect, Joined Cases T‑49/02 to T‑51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR

II–3033, paragraph 178).

346 In the present case, first, it must be observed that Hoechst does not call in question the unlawful nature of the cartel, namely the setting of target prices, the allocation of sales quotas by volume, the definition of a system of information and control and also the refusal to supply technology to undertakings seeking to enter the market.

347 Second, it must be observed that, in the Decision, the Commission took into consideration the actual impact of the cartel on the market when it assessed the gravity of the infringement. While the Commission asserts, at recital 327 to the Decision, that there is no need to take into account the actual effects when a cartel is shown to have an anti-competitive object, it none the less states, at recitals 333 to 336 to the Decision, that such effects exist in the present case, even though it asserts at recital 333 that it is not possible to measure them in a precise manner. Those effects are the consequence, in particular, of the implementation of the agreements in question. The Commission observes, in that regard, at recitals 330 to 332 to the Decision, referring to Part I of the Decision, that the agreements in question were carefully implemented. Recitals 334 and 336, which deal with the actual effects of the cartel on the market, also refer to the implementation of the agreements in question. At recital 337 to the Decision, which contains the finding concerning the developments devoted to the actual impact of the cartel on the market, the Commission states that that ‘continuous implementation has had an impact on the sorbates market’.

348 The Commission’s finding concerning the implementation of the cartel is not challenged by Hoechst before the Court. It must be emphasised, in that regard, that in the particular case of a price cartel it is permissible for the Commission to draw the inference that the infringement has had effects from the fact that the members of the cartel took measures to apply the agreed prices. On the other hand, when the implementation of a cartel is established, the Commission cannot be required to demonstrate systematically that the agreements actually allowed the undertakings concerned to attain a higher level of prices than that which would have prevailed in the absence of a cartel (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above, paragraphs 743 to 745). Accordingly, Hoechst’s arguments cannot upset the Commission’s finding concerning the effects of the cartel flowing from the implementation of the agreement in issue.

349 In addition, it must be observed that the cartel had as its object, inter alia, price-fixing. It must be borne in mind, in that regard, that setting a price, even one that is merely indicative, affects competition because it allows all the participants in the cartel to foresee with a reasonable degree of certainty what pricing policy will be pursued by their competitors. More generally, such cartels entail direct interference with the essential parameters of competition on the relevant market. In expressing a common intention to apply a certain level of prices to their products, the producers concerned no longer determine their policy on the market in an autonomous manner, thus adversely affecting the concept inherent in the Treaty provisions on competition (Case T–64/02 *Heubach* v *Commission* [2005] ECR II–5137, paragraph 81). It follows that, by fixing, inter alia, target prices, the cartel in issue necessarily affected the play of competition.

350 Furthermore, Table II of the Decision shows that the sales quotas agreed between the parties to the cartel were implemented, as the Commission states at recital 335. The figures set out in the table are not disputed by Hoechst, which observes only that ‘grey material’ – that is to say, quantities sold and not declared to the members of the cartel – cast doubt on the proper functioning of the agreements in question. It follows from recitals 112 and 193 to the Decision that the discussions of the members of the cartel concerning any ‘grey material’ related to sales volumes of the Japanese producers which were not included in the ‘official statistics’, that is to say the published export data of those producers. In particular, at recital 335 to the Decision, the Commission states that such ‘grey material’ can be attributed to Ueno. Therefore, even on the assumption that such ‘grey material’ did have an impact on Ueno’s sales figures, or on those of other Japanese producers, set out in Table II of the Decision, those quantities would have no impact on Hoechst’s sales figures. In those circumstances, the cartel would have had, at least, the effect of limiting or controlling the outlets of a competitor present on the EEA market. In that regard, as regards Hoechst’s assertions that it also sold ‘grey material’ of the product concerned, it is sufficient to observe that they are not supported by any objective element, which, moreover, was not provided to the Commission in good time.

351 In the light of the foregoing, Hoechst’s arguments concerning the effect of the cartel on the sorbates market in the EEA must be rejected.

The participation of Hoechst’s high-level directors in the cartel

352 As a preliminary point, it must be noted that the Commission's finding that the collusive agreements in issue were essentially conceived, directed and encouraged at high level in the undertakings concerned is repeated in the context of the assessment of the nature of the infringements in issue.

353 However, there is no ground for concluding that that finding, if it proved incorrect for Hoechst, could in itself call in question the Commission's conclusion that the infringements in question, which were characterised in particular by the setting of target prices and the allocation of sales quotas by volume, were by their very nature very serious.

354 In any event, it is sufficient to observe that the Commission's finding clearly relies on the lists of employees of the undertakings concerned who participated in the meetings, which are set out at recitals 88, 91 and 96 to 98 to the Decision. As regards Hoechst, at recital 96 to the Decision the Commission states that its representatives at the joint meetings were, in particular, the sales directors or sales managers for the product concerned. Hoechst's assertion that the Commission failed to state reasons must therefore be rejected in that regard.

355 It must also be observed that the list of Hoechst's employees set out at recital 96 to the Decision already appeared at paragraph 62 of the statement of objections. Furthermore, at paragraph 295 of the statement of objections the Commission clearly stated that it would take account of the fact that the collusive agreements were conceived, directed and encouraged at top level in the undertakings concerned.

356 Those facts were not disputed by Hoechst during the administrative procedure.

357 There is no ground for the view that the Commission made a manifest error of assessment in concluding that 'sales directors' belonged to the 'top level' in the organisation of the undertakings concerned. In particular, Hoechst merely challenges that conclusion by stating that sales directors are themselves accountable to other directors, without adducing firm evidence to support that assertion, which was not in any event presented to the Commission in good time. Besides, the fact that the sales directors are themselves accountable to other directors does not necessarily mean, in itself, that they were not 'top level' directors.

358 As regards, last, Hoechst's reference to *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraphs 33 to 38), it is sufficient to state that in that case the Commission had been referring to the role played by the 'group directorate' of the undertaking concerned, which distinguishes that case from the present case.

359 In the light of those factors, Hoechst's arguments concerning the participation of its top level directors in the cartel must be rejected.

The division of the undertakings concerned into categories.

360 As a preliminary point, it must be borne in mind that the differentiation made in respect of the cartel on the sorbates market consisted in determining, in accordance with Section 1 A, third, fourth and sixth paragraphs, of the Guidelines, the individual contribution of each undertaking, in terms of actual economic capacity, to the success of the cartel for the purpose of its classification in the appropriate category (see, to that effect, judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 225).

361 At recital 349 to the Decision, the Commission states, in that regard, that the method chosen makes it possible to estimate the relative capacity of each undertaking, its contribution to the overall damage caused to competition in the EEA and its contribution to the effectiveness of the cartel as a whole.

362 In this case, the Commission assessed the individual contribution of the undertakings concerned on the basis of the market share held by each of them in 1995 for the relevant product on a worldwide scale.

363 Hoechst does not take issue with the fact that the Commission divided the undertakings concerned into categories, or the method used in order to do so. Hoechst submits principally that it received unequal treatment by comparison with the Japanese undertakings as regards the starting amounts chosen according to the categories.

364 It must be borne in mind, in that regard, that when the Commission divides undertakings into categories, it must observe the principle of equal treatment, which provides that it is prohibited to treat comparable situations differently and different situations in the same way, unless such treatment is objectively justified (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraph 406, and judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, paragraph 219).

365 First, it is clear from the Decision that, after concluding that the infringement in question was 'very serious' (recital 344 to the Decision), the Commission considered that in 1995 Hoechst was the largest producer of sorbates in the worldwide market and placed it in the first category of undertakings (recital 352 to the Decision). Hoechst does not dispute the finding that it was the largest producer of sorbates for 1995, which, moreover, is confirmed by the data in Table I of the Decision. As regards Hoechst's argument that it ought to have been compared with the four Japanese producers taken together, it must be recalled that the Decision, although drafted in the form of a single decision, must be analysed as a bundle of individual decisions finding in respect of each of the undertakings to which it is addressed the infringements alleged and imposing fines on them, where appropriate, as supported, moreover, by the wording of the operative part, and in particular Articles 1 and 3 thereof (order in *Hoechst* v *Commission*, paragraph 31 above, paragraph 16). In those circumstances, the Commission cannot be criticised for having analysed individually the situation of the Japanese undertakings concerned.

366 Second, at recital 354 to the Decision, the Commission states that the likely fine for very serious infringements is above EUR 20 million.

367 Third, at recital 355 to the Decision, the Commission fixes the starting amount of the fines at EUR 20 million for the undertakings in the first group (Hoechst) and at EUR 6.66 million for the undertakings in the second group (Daicel, Chisso, Nippon Synthetic and Ueno).

368 It follows that, in order to apply differentiated treatment to the undertakings concerned, the Commission began by fixing, for the undertakings in the first category (that is to say, Hoechst, which, according to the Decision, was the largest producer of sorbates in 1995), the amount of EUR 20 million envisaged by the Guidelines. The Commission then determined, on the same basis, the amount for the undertakings in the second category.

369 There is nothing in the Decision to permit the conclusion that the amount set for the undertakings in the first category was fixed by reference to the amount set for the undertakings in the second category. Nor is there anything in the Decision to permit the conclusion that the amount of EUR 20 million set for the undertakings in the first category was the result of a mathematical formula applying a starting amount per level of turnover, contrary to Hoechst's apparent suggestion.

370 In those circumstances, even on the assumption that the amount of EUR 6.66 million set for the undertakings in the second category is too low or that certain undertakings classified in the second category ought to have been placed in the first category, that would constitute an unlawful act committed in favour of the undertakings in the second category.

371 It must be emphasised that respect for the principle of equal treatment must be reconciled with respect for the principle of legality, according which no one may rely to his own advantage on an unlawful act committed in favour of a third party (Case T‑327/94 *SCA Holding* v *Commission* [1998] ECR II‑1373, paragraph 160, and *Lögstör Rör* v *Commission*, paragraph 329 above, paragraph 350).

372 Last, as regards the Commission's practice in taking decisions, on which Hoechst relies, it must be borne in mind that that practice does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see *Michelin* v *Commission*, paragraph 339 above, paragraph 292 and the case-law cited) and that, furthermore, operators cannot place a legitimate expectation in the maintenance of an existing situation that might be altered by the Commission in the exercise of its discretion (see Case C‑350/88 *Delacre and Others* v *Commission* [1990] ECR I‑395, paragraph 33 and the case-law cited, and *Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 171).

373 In those circumstances, and without there being any need to grant Hoechst's request to have witnesses called when the Court considers that it has sufficient information from the documents in the file, Hoechst's arguments concerning the division of the undertakings concerned into categories

must be rejected.

The increase to take account of Hoechst's size and overall resources

374 In order to take account of Hoechst's 'size and overall resources', the starting amount of its fine was increased by 100% to EUR 40 million (recital 357 to the Decision).

375 That increase, according to recital 356 to the Decision, is intended to ensure a sufficient deterrent effect on large undertakings and to take account of the fact that those undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from that conduct under competition law.

376 In that regard, the Guidelines provide that, in addition to the nature of the infringement, its actual impact on the market and the size of the relevant geographic market, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph).

377 Account may also be taken of the fact that large undertakings are in a better position to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from it under competition law (Section 1 A, fifth paragraph).

378 In the present case, although recitals 356 and 357 to the Decision appear under the heading 'Sufficient deterrence', it follows from recital 356 to the Decision that the Commission took account, first, of the need to ensure that the fine had a sufficient deterrent effect, within the meaning of Section 1 A, fourth paragraph, of the Guidelines and, second, of the fact that large undertakings, like Hoechst, are better able to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from it under competition law, within the meaning of Section 1 A, fifth paragraph, of the Guidelines, in order to apply an increase of 100% to the starting amount of the fine.

379 As regards the first factor, namely the need to ensure that the fine has a sufficient deterrent effect, it requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality. The Court thus observed, in the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, that owing to its enormous worldwide turnover by comparison with that of the other members of the cartel, one of the undertakings concerned in that case would find it easier to find the funds necessary to pay its fine, which, in order to ensure that the fine was sufficiently deterrent, justified the application of a multiplier (paragraph 241). In that context, the financial resources of the undertaking must be assessed, in order to achieve properly the objective of deterrence, while observing the principle of proportionality, on the date on which the fine is imposed. In that regard, for the same reasons, it must be noted that, in the context of Article 15(2) of Regulation No 17, the upper limit of the fine, fixed at 10% of the turnover of the undertaking concerned, is determined by reference to the turnover achieved during the business year preceding the decision (Case C‑291/98 P *Sarrió* v *Commission* [2000] ECR I‑9991, paragraph 85).

380 It should be noted, in that regard, that in the Decision the Commission does not specify what data were used as a basis for its conclusion that it was necessary to ensure that Hoechst's fine was sufficiently deterrent.

381 However, in the Decision the Commission sets out the worldwide turnover of the undertakings concerned for 2002 (recitals 37, 42, 46, 50 and 55), the year corresponding to the last business year preceding the adoption of the Decision. The Commission also refers to 2002 in its written pleadings before the Court. The worldwide turnover for 2002 came to EUR 9.2 billion for Hoechst, EUR 2.243 billion for Daicel, EUR 973.4 million for Chisso, EUR 321.5 million for Nippon Synthetic and EUR 199.5 million for Ueno. Thus in 2002 Hoechst was by far the largest of the undertakings concerned by the Decision. In particular, its worldwide turnover was at least five times that of the second undertaking concerned, by size, namely Daicel. In those circumstances, the Commission was entitled to seek to ensure that the fine had a deterrent effect on Hoechst.

382 As regards the second factor taken into account by the Commission for the purposes of increasing the starting amount of the fine, namely the legal and economic infrastructures which place undertakings in a better position to recognise that their conduct constitutes an infringement, it must be emphasised, in contrast to what has been set out previously, that that factor is intended to impose a more severe penalty on large undertakings, which are presumed to have knowledge and sufficient structural means to be aware that their conduct constitutes an infringement and to evaluate the advantages to be gained from it. It must be considered that, in that hypothesis, the turnover on the basis of which the Commission determines the size of the undertakings concerned, and therefore their ability to determine the nature and the consequences of their conduct, must relate to their situation at the time of the infringement.

383 In this case, in the Decision, the Commission does not specify what data were used to found its conclusion that Hoechst was in a better position to recognise that its conduct constituted an infringement and to be aware of the consequences stemming from that conduct under competition law.

384 However, it is common ground that Hoechst's worldwide turnover was EUR 28.181 billion in 1995, the last full year before the end of the infringement (recital 46 to the Decision). It cannot be maintained that, on that basis, Hoechst did not have the legal and economic infrastructures available to large undertakings, and Hoechst does not claim that it did not. The fact that the other undertakings concerned may also have been large undertakings in 1995 cannot affect the Commission's assessment in that regard.

385 It follows from the foregoing that the Commission did not err in deciding to apply an increase in this case.

386 The other arguments put forward by Hoechst cannot alter that finding. In particular, the fact that Hoechst contracted and its turnover fell to EUR 9 billion in 2002, or that it transferred its sorbates business before the adoption of the Decision, cannot influence the legality of the application of the increase in this case. The reduction in Hoechst's size does not alter the fact that its worldwide turnover was EUR 28.181 billion in 1995, the last full year of the infringement; and the fact that it transferred its sorbates business does not alter the fact that in 2002, the year corresponding to the last business year before the adoption of the Decision, Hoechst was the largest of the undertakings concerned.

387 As regards Hoechst's assertion that a factor of 100% should not have been applied in this case, it is not founded on any detailed element. In any event, first, there is no reason to consider that the increase applied by the Commission exceeds the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines. Second, it must be borne in mind that Hoechst's worldwide turnover in 2002 was at least four times that of the second undertaking concerned, by size, namely Daicel. The factor applied by the Commission reflects the difference in worldwide turnover in 2002 between Hoechst and the other undertakings concerned. Furthermore, as regards the fact that Hoechst had, in 1995, legal and economic infrastructures which meant that it was better able to recognise that its conduct constituted an infringement and to be aware of the consequences stemming from it, and on the assumption that the other undertakings concerned were also large undertakings in 1995, there is no need, in that regard, to draw a distinction between two undertakings whose turnover is such that they can be characterised in any event as large undertakings with such infrastructures. It follows from those elements that the factor of 100% applied by the Commission cannot be regarded in this case as disproportionate.

388 In the light of those elements, Hoechst's arguments against the application of an increase of 100% to take account if the undertaking's size and overall resources must be rejected.

389 The first part of the fifth plea must therefore be rejected.

b) The duration of the infringement

390 Under Article 15(2) of Regulation No 17, the duration of the infringement is one of the factors to be taken into consideration when determining the amount of the fine to be imposed on undertakings which have infringed the competition rules.

391 As regards the factor relating to the duration of the infringement, the Guidelines distinguish between infringements of short duration (in general, less than one year), for which the starting amount determined for gravity should not be increased; infringements of medium duration (in

general, one to five years), for which the starting amount may be increased by 50%; and infringements of long duration (in general, more than five years), for which the starting amount may be increased by 10% per year (Section 1 B, first paragraph, first to third indents).

392 In this case, in the Decision, the Commission states at recital 359 that Chisso, Daicel, Hoechst and Ueno infringed Article 81(1) EC and Article 53(1) of the EEA Agreement from 31 December 1978 until 31 October 1996. Hoechst does not dispute that finding, or the fact that the infringement was characterised by the Commission as a 'long-term' infringement.

393 It follows that, as the Commission correctly observes in the Decision, the infringement in question lasted 17 years and 10 months.

394 The increase of 175% applied in Hoechst's case is therefore not in itself contrary to the Guidelines (see, to that effect, *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 137).

395 As regards Hoechst's argument that the Guidelines make provision for only a 'significant increase' and not for an entirely new amount, there is no reason to consider that the increase applied by the Commission exceeds the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines. The use of the words 'significant increase' does not permit the conclusion, as Hoechst maintains, that an increase in excess of 100% would be contrary to the calculation method provided for in the Guidelines. It must be emphasised in that regard that the powers conferred on the Commission by Regulation No 17 are designed to enable it to carry out the task entrusted to it by Article 81 EC of ensuring compliance with the competition rules in the common market. In that context, it is consistent with the general interest to avoid anti-competitive practices and agreements, to uncover them and to impose sanctions (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 54).

396 Furthermore, it must be observed that even though the third indent of Section 1 B of the Guidelines does not provide for an automatic increase of 10% per year for long-term infringements, it leaves a margin of discretion to the Commission in that regard (see, to that effect, *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 134). The arguments which Hoechst puts forward in support of its plea do not seek to demonstrate that the Commission made a manifest error of assessment in that regard. It should further be emphasised that, in so far as the Guidelines provide that infringements lasting more than five years are to be regarded as long-term infringements, and that such infringements warrant an increase which may be fixed at 10% per year of the amount decided on to reflect the gravity of the infringement, no breach of the principle of proportionality can be found in the determination of the duration of the infringement in which Hoechst took part (see, to that effect, Case T–65/99 *Strintzis Lines Shipping* v *Commission* [2003] ECR II–5433, paragraph 194).

397 As regards Hoechst's assertion that agreements on prices and volumes are typically long-term infringements and that, accordingly, an increase for the duration of the infringement takes the gravity of the infringement into account for a second time, it must be borne in mind that, even on the assumption that certain types of cartels are intrinsically conceived in order to last, a distinction must always be drawn, in application of Article 15(2) of Regulation No 17, between the duration of the actual functioning and their gravity as resulting from their actual nature (judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 275). The increase for the duration of the infringement therefore does not take account of the gravity of the infringement for a second time.

398 As regards the contention that events which took place in the distant past become time-barred at a given time and that, accordingly, the level of the fine should reduce exponentially with the passing of time, it is sufficient to recall that the increase applied by the Commission does not exceed the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines and that the Commission's action was not time-barred in this case in the light of Regulation No 2988/74 (see paragraph 225 above).

399 As regards, last, the Commission's previous practice, and in particular the fact that in certain cases it increased the starting amount of the fine only from the second year, it must be borne in mind that that practice does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see *Michelin* v *Commission*, paragraph 339 above, paragraph 292 and the case-law cited) and that, furthermore, operators cannot have a legitimate expectation in the maintenance of an existing situation that might be modified by the Commission in the exercise of its discretion (see *Delacre and Others* v *Commission*,

paragraph 372 above, paragraph 33 and the case-law cited, and *Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 171). In addition, it is only in the case of infringements of short duration (in general, less than one year) that the Guidelines state that no increase will be applied. For infringements of long duration, on the other hand, the Guidelines provide that an increase of 10% 'per year' may be applied. In view of the terms used in the Guidelines in that regard, there is no reason to consider that the first year of the infringement must be systematically ignored in the Commission's calculation (see, to that effect, for infringements of medium duration, *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 133).

400 For all of those reasons, the second part of the fifth plea and, accordingly, the fifth plea in its entirety must be rejected.

D – The second and sixth pleas, relating to the objection concerning the role as leader of the cartel which, according to the Decision constituted an aggravating circumstance

401 By its second plea, Hoechst claims that there has been a breach of its right to be heard in respect of the objection relating to its role as a leader of the cartel, which, according to the Decision, constituted an aggravating circumstance. By its sixth plea, Hoechst contends that the increase based on its capacity as a leader is unwarranted.

402 The Court will examine the second plea first.

1. Summary of the Decision

403 At recitals 363 to 367 to the Decision, read in the light of recitals 92 to 95, the Commission states that, in Hoechst's case, the gravity of the infringement is aggravated by Hoechst's role as a leader of the cartel.

404 More particularly, in the Decision the Commission observes that Hoechst, along with Daicel, was an important driving force and one of the most active members of the cartel, in the light, particularly, of its position on the market. Hoechst thus succeeded in gaining the most from the cartel and in imposing its proposals on the Japanese producers, for example in 1992, when it proposed to establish a price difference between sorbic acid and potassium sorbates, a proposal which was followed by the Japanese producers in 1994.

405 Furthermore, the Commission states in the Decision that Hoechst, along with Daicel, was responsible for scheduling and chairing the joint meetings. It acted as host for the meetings in Europe, which it organised and paid for. Hoechst also organised some meetings outside the Community. It had regular contacts with Daicel in order to exchange information. In addition, Hoechst took several initiatives to ensure effective monitoring of volume quotas (for example, by proposing the creation in Switzerland of a neutral organisation responsible for collecting the sales figures of the Japanese producers or by unilaterally adding 600 tonnes to its quota in 1995 on account of the existence of 'grey material'). Furthermore, as a member of the Chemical Industrial Products Export Cooperative (CIPEC), Hoechst had access to statistics on Japanese exports.

406 Hoechst also succeeded, according to the Decision, in ensuring control of the European branch of the cartel, in particular by maintaining regular and exclusive contacts with the only other European undertaking in the sector.

407 Last, the Commission states in the Decision that in November 1996, when the last joint meeting took place, Hoechst, along with Daicel, tried to convince the other members to continue with the meetings and the agreements.

408 In the light of those factors, and in order to take account of Hoechst's role as a leader of the cartel, the Commission increased the basic amount of the fine by 30% to take account of the aggravating circumstances.

2. Arguments of the parties

a) Arguments of Hoechst

409 Hoechst observes that the Commission took account of what it alleged to have been the applicant's

position as ‘co-leader’ when setting its fine.

410 Hoechst takes issue with the Commission for not having heard it on the legal assessment which it proposed to make of the applicant’s alleged conduct as a leader. In particular, Hoechst submits that the Commission did not address a statement of objections to it on that point.

411 Before adopting a decision imposing a fine, the Commission ought to give the undertakings the opportunity to defend themselves sufficiently against the objections made in respect of them. That means that the criticisms in fact and in law that the Commission intends to address to them must be communicated to the future addressees of the decision by means of a statement of objections (Hoechst refers, in that regard, to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraphs 193 and 194).

412 In the present case, there was nothing in the statement of objections addressed to Hoechst to indicate that the Commission would apply the aggravating circumstance of leader of the cartel. Nor did the Commission, after issuing the statement of objections, inform the applicant that it intended to extend its objections in respect of Hoechst by characterising it as a leader. Hoechst also emphasised that, in the absence of objections on that point, it saw no need to address the question of characterisation as a leader (Hoechst refers to its response to the statement of objections). Hoechst submits that it made the same observations at the hearing on 24 April 2003.

413 That oblique approach on the Commission’s part is all the more incomprehensible because the arguments relied on in that regard in the Decision could have been presented at the time of the statement of objections, since they are not based on matters which only subsequently came to the Commission’s attention. The Commission has not only breached Hoechst’s rights of defence but has also breached the right to a fair trial. The principle of equality of arms requires that the essential elements of the subsequent decision be transmitted at the same time as the statement of objections only with respect to facts and evidence invoked later, but also with respect to their legal assessment.

414 It is clear that if Hoechst had been aware of such an objection against it, it would not have awaited the judicial proceedings but would have defended itself at the stage of the administrative procedure. It is absurd, moreover, that the parties concerned should submit observations *pro domo*, as a precautionary measure, on the fact that the requisite factual conditions are not satisfied.

415 Hoechst concludes that the characterisation as a leader applied by the Commission in the Decision cannot be maintained. The increase in the fine on the basis of that characterisation is therefore unlawful. The same applies to the arguments put forward in the grounds of the Decision that, owing to its position as a ‘leader’, the application of Title B of the 1996 Leniency Notice was precluded by law.

b) Arguments of the Commission

416 The Commission contends that the rights of the defence have been respected since, in the Decision, it does not hold the undertakings concerned responsible for different infringements from those referred to in the account of the objections and had regard only to facts on which those concerned had the opportunity to provide an explanation. The account of the objections satisfied that requirement since it sets out, albeit succinctly, but clearly, the essential facts on which the Commission relies (the Commission refers to Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 26 and 94, and to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraphs 138 and 191 et seq.).

417 In the present case, the statement of objections already contained a description of the circumstances of law and of fact taken into account in the Decision for the purposes of the calculation of the fine. Thus, at paragraph 295 of the statement of objections, the Commission stated that it would take account, in particular, of ‘the role played by each participant, in particular the leading role played by some companies’. At paragraph 60 of the statement of objections, Hoechst is expressly criticised for having been a ‘leader’ of joint meetings together with Daicel (the Commission also refers to paragraph 64 of the statement of objections). At paragraph 282 of the statement of objections, Hoechst is presented as one of the ‘main actors’ in the cartel.

418 Furthermore, Hoechst was given advance notice of all the facts on the basis of which it was characterised as a leader of the cartel, by means of the statement of objections (in particular paragraphs 60, 77, 79, 94, 166, 178, 179, 210 et seq. and 282 of the statement of objections). The

Commission also refers to recitals 347 to 367 to the Decision, where there is a reference to recitals 92 to 95.

419 The Commission concludes that Hoechst had the opportunity before the Decision was adopted to express its views on the objection relating to its role as leader, and did so, moreover, both in its response to the statement of objections and at the hearing. The fact that Hoechst did not agree with that objection and that it sought to refute it in its response to the statement of objections does not alter the fact that the objection was levelled against it.

3. Findings of the Court

420 It must be borne in mind that respect for the rights of the defence in any proceedings which might lead to the imposition of penalties, notably fines or periodic penalties, constitutes a fundamental principle of Community law, which must be observed, even in the context of administrative proceedings (Case 85/76 *Hoffmann-Laroche* v *Commission* [1979] ECR 461, paragraph 9; Case C–176/99 P *Arbed* v *Commission* [2003] ECR I–10687, paragraph 19; and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 32).

421 That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see *Arbed* v *Commission*, paragraph 420 above, paragraph 20 and the case-law cited).

422 As regards, more particularly, the calculation of the fines, the Commission fulfils its obligation to respect the undertakings' right to be heard provided that it indicates expressly in the statement of objections that it is going to consider whether it is appropriate to impose fines on the undertakings concerned and provided that it sets out the main elements of fact and of law which might entail a fine, such as the gravity and duration of the alleged infringement and the fact that the infringement was committed 'deliberately or negligently'. In doing so, the Commission provides the undertakings concerned with the necessary material to defend themselves not only against a finding of infringement but also against the imposition of a fine (*Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 428; see also Case T–23/99 *LR AF 1998* v *Commission* [2002] ECR II–1705, paragraph 199 and the case-law cited; judgment of 15 June 2005 in *Tokai Carbon* v *Commission*, paragraph 118 above, paragraph 139; see also, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

423 It must also be borne in mind that the role of 'leader' played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the fine, since the undertakings which have played such a role must for that reason bear particular responsibility by comparison with the other undertakings (judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, paragraph 301, and *BASF* v *Commission*, paragraph 120 above, paragraph 281; see also, to that effect, Case T–347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II–1751, paragraph 291). In accordance with those principles, Section 2 of the Guidelines establishes, under the heading 'Aggravating circumstances', a non-exhaustive list of circumstances which may justify an increase in the basic amount of the fine, including, inter alia, the 'role of leader in, or instigator of the infringement' (third indent). In that context, in order to be characterised as a leader, the undertaking in question must have represented a significant driving force in the cartel (see, to that effect, *BASF* v *Commission*, paragraph 120 above, paragraph 374).

424 In the present case, first, it must be observed that, although all the elements of fact on which the Commission relied in the Decision to substantiate the objection that the applicant was a leader of the cartel were already to be found in the statement of objections, they were set out at various points in that statement of objections, without any link being established between them and without being characterised in any particular way by the Commission. It was only at the stage of the Decision that those elements were brought together in a single part and that the objection that Hoechst was a leader was clearly apparent.

425 More specifically, only paragraph 60 of the statement of objections, among the paragraphs on which the Commission relies in support of its defence, uses the word 'leader' ('führende Rolle' in the German version of the statement of objections) with respect to Hoechst. However, the sentence

concerned, as a whole, reads as follows: 'Hoechst was a leader … of the joint meetings held with the four Japanese producers, together with Daicel'. A similar sentence was set out at paragraph 64 of the statement of objections, concerning Daicel ('[Daicel] … was a leader of the joint meetings, along with Hoechst'). However, the abovementioned sentence at paragraph 60 of the statement of objections may mean that Hoechst had had a particular role in arranging the joint meetings – as is demonstrated, moreover, by the other matters set out at the same paragraph, which deal with the actual organisation of those meetings – without giving the clear impression that Hoechst was a 'leader of the infringement' for the purposes of the Guidelines. That interpretation is borne out, furthermore, by the fact that the Commission changed the terminology used in the Decision. Thus, at recital 92 to the Decision the Commission states: 'Along with Daicel, Hoechst was in charge of scheduling and chairing the joint meetings'. The same change was made with respect to Daicel; the Commission states in the Decision: 'Along with Hoechst, [Daicel] was in charge of scheduling and chairing the joint meetings' (recital 89). In addition, although the Commission states in the Decision that Hoechst, along with Daicel, was in charge of 'scheduling' the joint meetings, in the statement of objections that role seemed to be attributed solely to Daicel, as may be seen from paragraph 64 of the statement of objections, which reads: '[Daicel] organised the pre-meetings, it was in charge of scheduling the joint meetings and was a leader of the joint meetings, along with Hoechst'.

426 Second, as regards the fact, stated at paragraph 77 of the statement of objections, that Hoechst was 'usually' the first to announce the new price in Europe, followed by the Japanese producers, it must be emphasised that the mere fact that a member of a cartel was the first to announce a new price or a price increase cannot be regarded as indicating that it had the role of leader of the cartel when the circumstances of the case show that the price or price increase in question was previously fixed by joint agreement with the other members of the cartel and when those other members also decided which of them would be first to make the announcement, such a designation showing that the fact of being first to announce the price or price increase is merely an act of strict observance of a plan predefined by common intention and not a spontaneous initiative giving an impetus to the cartel (*BASF* v *Commission*, paragraph 120 above, paragraph 427). In this case, as shown at paragraphs 150, 158 and 190 of the statement of objections, certain price announcements were scheduled by the members of the cartel, who decided which undertaking would be the first to make them. Paragraph 77 of the statement of objections therefore does not permit the clear conclusion, in the light of the other elements in that document, that the price announcements made by Hoechst corresponded to a spontaneous initiative giving impetus to the cartel.

427 Third, as regards the fact, described at paragraph 94 of the statement of objections, that Daicel and Hoechst agreed on the agenda for the joint meetings, it must be noted, as shown by paragraph 207 of the statement of objections, that the agenda for the joint meetings were first of all prepared by the Japanese producers during the preparatory meetings and then proposed to Hoechst. Those preparatory meetings also enabled the Japanese producers, as may be seen from paragraph 204 of the statement of objections, to agree upon the target prices and volume allocations, which were then proposed to Hoechst.

428 Fourth, the fact, set out at paragraph 166 of the statement of objections, that Hoechst, as a member of CIPEC, had access to the Japanese export statistics, whereas the Japanese producers could not have access to the official German statistics, cannot be interpreted as meaning in itself that Hoechst represented a driving force for the cartel.

429 Fifth, concerning the bilateral meetings between Hoechst and the Japanese producers referred to at paragraphs 210 and 211 of the statement of objections, it must be observed that even if those contacts were to a large extent with Daicel, Hoechst also maintained relations with Ueno and Nippon Synthetic, as stated at paragraph 211 of the statement of objections. As regards the other bilateral contacts referred to at paragraph 212 et seq. of the statement of objections, it must be held that, as stated in particular at paragraphs 219 and 220 of the statement of objections, certain of those contacts were the result of the intention of all the members of the cartel, or indeed of the Japanese producers alone.

430 Sixth, as regards the sentence set out at paragraph 282 of the statement of objections, and highlighted by the Commission, namely that Hoechst was one of the main players in the cartel, it must be placed in its context. Paragraph 21 et seq. of the statement of objections is clearly intended to specify the extent of the responsibilities of Hoechst and those of Nutrinova, in so far as Nutrinova took over Hoechst's sorbates business from September 1997. That sentence could not be taken, in any event in a sufficiently precise manner, as delimiting any role as leader played by Hoechst.

431 Admittedly, certain factual elements set out in the statement of objections, notably at paragraphs 79 (a proposal to establish a price difference between sorbic acid and potassium sorbates), 178 (a

proposal to increase Hoechst's volume quota) and 179 (a proposal to provide the Japanese producers' sales figures to a neutral organisation), reflect occasional initiatives on Hoechst's part. Taken together, however, the elements mentioned by the Commission in the statement of objections, and on which the Commission based its conclusion in the Decision that Hoechst had played a role as leader, were insufficiently precise as to their scope and their characterisation.

432 Furthermore, even though the Commission gave the impression, at paragraph 295 of the statement of objections, that it would take account of the leading role played by 'some companies', that indication was not sufficient, in light of the lack of precision of the rest of the statement of objections, to allow Hoechst to determine whether or not it was concerned by any characterisation as leader.

433 For all of the foregoing reasons, it must be considered that, even though the facts in respect of which Hoechst is criticised were addressed in the statement of objections, the Commission did not characterise them sufficiently precisely to enable the applicant to defend itself properly.

434 It should further be observed in that regard that, in its response to the statement of objections, Hoechst stated:

'Hoechst/Nutrinova did not play a determining role in the cartel. The word "leader" used in para. 60 of the [statement of objections] is unclear in this respect. … The language referring to "leader" in para. 60 of the [statement of objections] concerns exclusively Hoechst/Nutrinova's role as host and organiser of those joint meetings held in Europe.'

435 Likewise, at the hearing on 24 April 2003, counsel for Hoechst and Nutrinova declared that that undertaking satisfied all the conditions for obtaining immunity from a fine, stating that:

'As regards the role played by Hoechst and Nutrinova as hosts of the joint meetings held in Europe, it must be emphasised that as my clients were the only European undertaking to have participated in those joint meetings, it was quite natural that they should be responsible for organisation of the meetings in Europe. However, that does not mean that they played any role as leader of the cartel.'

436 It follows that the lack of precision in the statement of objections concerning the characterisation of Hoechst as a leader led that undertaking to focus on the organisation of the joint meetings, the only topic initially addressed by the Commission at paragraph 60 of the statement of objections. In the absence of greater precision, and as the other factual elements were scattered throughout the statement of objections, Hoechst was not placed in a position to adopt an effective defence on that point.

437 It must further be borne in mind that the Commission was aware of the lack of precision of the word 'leader' used at paragraph 60 of the statement of objections. That may be seen, in particular, from the fact that the Commission altered the wording used in the Decision.

438 For all of those reasons, the second plea must be upheld. Accordingly, without there being any need to analyse the sixth plea, the Decision must be varied in that it establishes the aggravating circumstance of having been a leader of the cartel as against Hoechst.

439 The consequences of that variation will be determined below.

E – The seventh plea, alleging that the increase in the fine imposed for a repeated infringement was unjustified

1. Summary of the Decision

440 Recital 363 to the Decision reads as follows:

'The gravity of the infringement is aggravated in Hoechst's case by the following circumstances:

(a) Hoechst's role as a leader of the cartel (recitals 92 to 95);

(b) Hoechst has been subject to previous decisions finding an infringement of the same type.'

441 Footnote 211, which accompanies recital 363 to the Decision, reads as follows:

‘See Commission Decisions 94/599/EC (*PVC II*) (OJ L 239, 14.9.1994, p. 14), 89/191/EEC (*PVC I*) (OJ L 74, 17.3.1989, p. 21), 86/398/EEC (*Polypropylene*) (OJ L 230, 18.8.1986, p. 1) and 69/243/EEC (*Dyestuffs*) ([*Journal officiel*, 7.8.1969, p. 11]).

442 At recital 368 to the Decision, the Commission states:

‘It is necessary to ensure that the level of the fine has sufficient deterrent effect. The Commission notes that previous Decisions addressed to Hoechst ordered the company to put an end to its anti-competitive conduct and to refrain from repeating it (see recital 363). This should have prompted it to pay special attention to compliance with Community competition law and refrain from all deliberate violations. The fact that it repeated the same conduct shows that the previous fines were not such a deterrent as to make it change its conduct.’

443 In response to the arguments put forward by Hoechst, the Commission states at recital 372 to the Decision:

‘Concerning Hoechst’s position as recidivist, the Commission notes that the last decision ordering Hoechst to put an end to its anti-competitive conduct and to refrain from repeating it dates from July 1994. After that decision Hoechst continued the infringement which is the subject of these proceedings for more than two years. This clearly shows that the previous decision did not deter Hoechst from continuing its participation in a similar cartel.’

444 In the light of those facts, and to take account of the fact that Hoechst’s conduct constituted a repeated infringement, the Commission increased the basic amount off the fine by 50% to reflect the aggravating circumstances (recital 373 to the Decision).

2. Arguments of the parties

a) Arguments of Hoechst

445 Hoechst states that the Commission increased the basic amount of its fine, EUR 110 million, by 50% because this was a repeated infringement. Hoechst contends that that increase is disproportionate and is unable to see on what ground it could be subjected to an increase for repeated infringement connected with past infringements.

446 First, Hoechst contends that the old proceedings referred to at recital 363 to the Decision (namely the proceedings that led, respectively, to the adoption of Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – PVC) (OJ 1994 L 239, p. 14), ‘the PVC II decision’; Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866 – LdPE) (OJ 1989 L 74, p. 21), ‘the PVC I decision’; Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 – Polypropylene) (OJ 1986 L 230, p. 1); and Commission Decision 69/243/EEC of 24 July 1969 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/26.267 – Dyestuffs) (*Journal official* 1969 L 195, p. 11) are wholly unconnected with the present case. More particularly, Hoechst maintains that the *PVC II* decision merely reiterates the *PVC I* decision, which was declared non-existent by the Court of First Instance and then annulled by the Court of Justice. Furthermore, the *PVC I* and *PVC II* decisions relate to old facts, since the facts ceased in 1984. The Commission is therefore wrong to seek, at recital 372 to the Decision, to establish a connection between the *PVC II* decision and the present case. In addition, Hoechst’s former activities in the animal feedingstuffs additives sector have no bearing on its activities in the PVC sector. Hoechst also submits that the Commission recently undertook to establish joint group liability by imposing increases of 10% per year for the period between the decision imposing a fine in one case and the end of the infringement forming the subject-matter of another case. Hoechst refers, in that regard, to Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case COMP/E–1/37.152 – Plasterboard) (OJ 2005 L 166, p. 8). That practice is appropriate in connection with new infringements knowingly committed by one and the same group management, notwithstanding that parallel conduct has been found to constitute an infringement. In the present case, however, the fact that the *PVC II* decision and the infringement at issue in the present case relate to the same period results from the fact that the Commission was not in a position to adopt the *PVC II* decision until 11 years after the infringement at issue in that case had ceased.

447 Second, the cases to which the Commission refers at recital 363 to the Decision concern conduct which came to an end in 1984 at the latest. The facts are therefore time-barred. Hoechst contends that the *Dyestuffs* decision became final more than 30 years ago, by a judgment of the Court of Justice. That decision is too old to support the 'repeated infringement' argument. Hoechst further submits that the facts referred to by the *Polypropylene* decision were definitively settled only in July 1999, and those referred to by the *PVC I and PVC II* decisions in October 2002, thus long after the facts of the present case had come to an end.

448 Third, even if it should ultimately be held that different infringements committed independently within a group and without any subjective connection between them constitute an aggravating circumstance, the increase applied is disproportionate. In particular, the fact that Hoechst is part of a group has already been taken into account twice by the Commission: first when the Commission fixed the starting amount of the fine at EUR 20 million and second when it increased that amount by 100% on account of the size of the Hoechst group. It cannot be fair to add further increases. By way of comparison, Hoechst had to bear a starting amount practically 14 times Daicel's, on account of its group structure, while its turnover is only four times as high. Hoechst also emphasises that in the proceedings leading to the *Plasterboard* decision, an increase of 10% per year had been imposed for the period between the preceding decision imposing a fine and the end of the infringement concerning the relevant product. In this case the increase is 22% per year.

449 In the alternative, Hoechst contends that an increase for repeated infringement is unfair when the undertaking concerned cooperates fully during the administrative procedure. The purpose of the penalty cannot justify that increase.

b) Arguments of the Commission

450 The Commission refers to *Thyssen Stahl* v *Commission*, paragraph 325 above (paragraph 617), and *Michelin* v *Commission*, paragraph 339 above (paragraph 284), and contends that the concept of repeated infringement, as understood in a number of national legal orders, implies that a person has committed new infringements after being punished for similar infringements.

451 In this case, the proceedings culminating in the *PVC I*, *PVC II* and *Dyestuffs* decisions referred to in the Decision all concerned cartels on prices or quotas. The infringements in those cases were therefore similar to the one forming the subject–matter of the present case.

452 It is immaterial, in that context, that certain infringements (such as that giving rise to the *Dyestuffs* decision) are old. The increase for repeated infringement does not serve to increase ex post facto penalties imposed in the past, but to pursue cases of repeated infringement effectively. The Commission emphasises in particular that it must ensure that its action has a deterrent effect (*Irish Sugar* v *Commission*, paragraph 198 above, paragraph 245) and that repeated infringement is among the relevant criteria used to determine the fine (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 91). The Commission further submits that there is no doubt in this case as to the continuity of the undertaking to which the decisions mentioned at recital 363 to the Decision were addressed.

453 Contrary to Hoechst's contention, moreover, the Commission maintains that an increase for repeated infringement may be imposed when the infringement at issue was committed even when the infringement in respect of which a sanction had previously been imposed had not yet become final. A warning is given immediately the Commission's decision is notified and not just when the decision becomes final. Likewise, the fact that the starting amount was increased on account of the size of the Hoechst group does not prevent the basic amount from being increased on account of repeated infringement. The increase imposed on account of the size of the group has no connection with the punishment of past infringements. The fact that past infringements are taken into account does not therefore constitute a 'double penalty'.

454 It is also immaterial that Hoechst discontinued its own commercial operations on the relevant market before the infringement ceased, since it was active on that market throughout the infringement.

455 Last, it is irrelevant that the earlier infringements concerned sectors other than the sorbates sector. The penalties applied to collusive activities relating to a product are intended to deter undertakings from breaching the prohibition in question, irrespective of the product at issue.

456 As regards the amount of the increase for repeated infringement, the Commission observes that it has a margin of discretion when fixing the amount of the fine (Case T–150/89 *Martinelli* v *Commission* [1995] ECR II–1165, paragraph 59), and that it is not required to apply a precise mathematical formula. The Commission refers in that regard to a number of decisions in other cases implementing Article 81 EC, and also to *Michelin* v *Commission*, paragraph 339 above (paragraph 292), where increases of 50% were applied or authorised.

457 The comparison which the applicant draws between the present case and the *Plasterboard* case is irrelevant since, between 1969 and 1994, Hoechst was 'warned' on several occasions, without drawing the necessary consequences. It is therefore not excessive to increase the basic amount of the fine by 50%.

458 Last, the fact that the 1996 Leniency Notice was applied does not mean that Hoechst's repeated infringement ceases to be an aggravating circumstance. In the Commission's submission, the 1996 Leniency Notice defines the conditions in which undertakings which have cooperated with the Commission may have their fines reduced. That notice cannot however justify the absence of a penalty in the case of a repeated infringement.

3. Findings of the Court

459 Section 2 of the Guidelines refers, as an example of aggravating circumstances, to 'repeated infringement of the same type by the same undertaking(s)'.

460 Repeated infringement, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements (*Thyssen Stahl* v *Commission*, paragraph 325 above, paragraph 617, and *Michelin* v *Commission*, paragraph 339 above, paragraph 284).

461 Any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 91, and Case C–3/06 P *Groupe Danone* v *Commission* [2007] ECR I–1331, paragraph 26).

462 The Commission has a discretion as regards the choice of factors to be taken into account for determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account. The finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and the Commission cannot be bound by any limitation period when making such a finding (*Groupe Danone* v *Commission*, paragraph 461 above, paragraphs 37 and 38).

463 In the present case, Hoechst does not deny that the four earlier decisions to which the Commission refers in the Decision to support its finding that this was a repeated infringement concerned Hoechst and related to an infringement of the same type as that in the present case.

464 As regards the *Dyestuffs* decision (adopted on 24 July 1969) and the *Polypropylene* decision (adopted on 23 April 1986), it must be observed that the infringement found in the Decision began 10 years after the adoption of the *Dyestuffs* decision, while the *Polypropylene* decision was adopted while that infringement was continuing. Furthermore, although Hoechst was the subject of a finding of infringement in the context of the *Polypropylene* decision in 1986, it continued for 10 years to engage in its unlawful conduct on the sorbates market. The fact that Hoechst repeated its unlawful conduct shows a propensity on its part not to draw the appropriate consequences from a finding that it had infringed the Community competition rules (see, to that effect, Case T–38/02 *Groupe Danone* v *Commission*, paragraph 130 above, paragraph 355). In the light of those factors, Hoechst could expect that the Commission would take account of the earlier decisions referred to above when considering whether the infringement in the present case constituted a repeated infringement. Accordingly, there was nothing to prevent the Commission from relying on the *Dyestuffs* and the *Polypropylene* decisions for the purpose of finding that Hoechst had committed a repeated infringement in the present case.

465 As regards the *PVC I* decision (adopted on 21 December 1988), it must be noted that that decision was declared non-existent by the Court of First Instance (Joined Cases T-79/89, T–84/90 to

T–86/89, T–89/89, T–91/89, T–92/89, T–94/89, T–96/89, T–98/89, T–102/89 and T–104/89 *BASF and Others* v *Commission* [1992] ECR II–315) and ultimately annulled by the Court of Justice (Case C–137/92 P *Commission* v *BASF and Others* [1994] ECR I–2555), before the Commission adopted the Decision in the present case. It should be noted in that regard that, as regards the annulment of the *PVC I* decision by the Court of Justice, Article 231 EC provides that if the action is well founded, the Court of Justice is to declare the contested act void. Furthermore, although the *PVC II* decision, which was adopted by the Commission following the annulment of the *PVC I* decision, to a large extent sets out the factual elements of the latter decision, it may be distinguished from that decision, in particular, by the fact that it finds that the agreement or concerted practice in question dated from around August 1980, whereas the *PVC I* decision stated that the agreement or concerted practice in question dated from approximately September 1976. The same applies to the amount of the fines imposed on Hoechst (ECU 1 million in the *PVC I* decision and EUR 1.5 million in the *PVC II* decision). It follows that the two decisions cannot be regarded as identical. In those circumstances, it must be held that the Commission erred in referring to the *PVC I* decision, in the Decision, for the purpose of finding that Hoechst's conduct constituted a repeated infringement.

466 As regards the *PVC II* decision, it was indeed adopted on 27 July 1994, or during the period of the infringement, but it was the subject of judicial proceedings which culminated, after the end of the infringement at issue in the present case, in the judgments of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above, and of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above. It must be emphasised, however, that at Community level, and in accordance with the first paragraph of Article 256 EC, the *PVC II* decision was enforceable, provided that it imposed a pecuniary burden on persons other than the States, notwithstanding the action for annulment of that decision initiated under Article 230 EC. In effect, under Article 242 EC an action before the Community judicature does not have suspensory effect (Case T–275/94 *CB* v *Commission* [1995] ECR II–2169, paragraphs 50 and 51; see also, to that effect, Case T–28/03 *Holcim (Deutschland)* v *Commission* [2005] ECR II–1357, paragraph 121). It is common ground, moreover, that Hoechst did not seek a stay of execution of the *PVC II* decision pursuant to the second sentence of Article 242 EC. Last, it must be observed that the judgments of the Court of First Instance and of the Court of Justice, which, moreover, confirmed the decision, were delivered before the adoption of the Decision. It follows that the Commission was entitled to rely on the *PVC II* decision to find that Hoechst's conduct constituted a repeated infringement.

467 In the light of those factors, it must be concluded that, in finding that Hoechst's conduct constituted a repeated infringement, the Commission was entitled to rely on the *Dyestuffs*, *Polypropylene* and *PVC II* decisions but not on the *PVC I* decision.

468 However, the error on the Commission's part concerning the *PVC I* decision cannot call in question the characterisation of Hoechst's conduct as a repeated infringement in the present case or even the rate of the increase applied.

469 As regards the characterisation of the infringement as a repeated infringement, it is sufficiently supported by the *Dyestuffs*, *Polypropylene* and *PVC II* decisions.

470 As regards the rate of the increase applied in the present case, there is nothing in the Decision to indicate that the Commission's finding that the repeated infringement followed a number of previous infringements gave rise to a greater increase in the fine for an aggravating circumstance than would have been determined if only a single previous infringement had been identified (see, to that effect, judgment of 25 October 2005 in *Groupe Danone* v *Commission*, paragraph 130 above, paragraph 366).

471 Furthermore, as regards Hoechst's argument that the increase applied is disproportionate, including by comparison with the other undertakings at which the Decision was addressed, it is sufficient to bear in mind that the Commission has a discretion when setting the fine and that it is not required to apply a precise mathematical formula. In addition, when determining the amount of the fine the Commission must ensure that its action is deterrent. A repeated infringement is a circumstance that justifies a considerable increase in the basic amount of the fine. Repeated infringement is proof that the penalty previously imposed was not sufficiently deterrent. In this case, there is no reason to consider that the increase of 50% in the basic amount of the fine designed to steer Hoechst's conduct towards respect for the competition rules is disproportionate (see, to that effect, *Michelin* v *Commission*, paragraph 339 above, paragraph 293).

472 It must therefore be held that the characterisation of the applicant's conduct as a repeated

infringement in the present case and the rate of increase applied are well founded.

473 The other arguments put forward by Hoechst cannot affect that conclusion.

474 As regards the fact that Hoechst's former activity in the feedingstuffs additives sector had nothing to do with its activities in the PVC sector, it must be emphasised that the Guidelines refer to an 'infringement of the same type' by the same undertaking. In those circumstances, once an undertaking commits an infringement of the same type, even though the economic sector concerned is a different one, the Commission may find that there is an aggravating circumstance. Hoechst's argument in that regard cannot therefore be upheld.

475 As regards the fact that, in another case preceding the Decision, the Commission undertook to establish joint group liability by imposing increases of 10% per year for the period between the decision imposing a fine in one case and the end of the infringement in another case, it must be borne in mind that the Commission's previous practice in taking decisions does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see *Michelin* v *Commission*, paragraph 339 above, paragraph 292 and the case-law cited) and that, furthermore, operators 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 (see *Delacre and Others* v *Commission*, paragraph 372 above, paragraph 33 and the case-law cited, and *Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 171).

476 Last, as the Commission emphasises, the fact that the 1996 Leniency Notice was applied does not mean that Hoechst's repeated infringement ceases to be an aggravating circumstance. Therefore Hoechst's argument that an increase for repeated infringement is unfair when the undertaking concerned cooperates in full during the administrative procedure is inoperative.

477 For all of those reasons, the seventh plea must be rejected.

F – The 10th plea, claiming that the 2002 Leniency Notice should be applied by analogy, under a 'most favourable provision' principle

1. Summary of the Decision

478 At Section 12.2.3 of the Decision, which deals with the application of the 1996 Leniency Notice, the Commission observes that Hoechst considers that the 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') should be applicable in this case.

479 First of all, the Commission rejects Hoechst's arguments, on the ground that Section 28 of the 2002 Leniency Notice provides that that notice is to apply from 14 February 2002 for all cases for which no undertaking has relied on the 1996 Leniency Notice. In this case, a number of undertakings – including Hoechst – contacted the Commission on the basis of the 1996 Leniency Notice. The 2002 Leniency Notice is therefore not applicable (recitals 431 and 432 to the Decision).

480 Next, as regards the 'most favourable provision' principle on which Hoechst relies, first, the Commission states that the Leniency Notices do not affect the legal framework established by Article 15(2) of Regulation No 17. Since the 'most favourable provision' principle requires a modification of the legal framework determining the amount of fines, that principle does not apply in this case (recital 434 to the Decision). Furthermore, the undertakings concerned which offered to cooperate with the Commission acquired a legitimate expectation that their cooperation would be based solely on the 1996 Leniency Notice, the only one applicable at that time (recital 435 to the Decision).

481 Second, the Commission emphasises that the approach taken in Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/F – 3/33.708 – British Sugar plc, Case IV/F – 3/33.709 – Tate & Lyle plc, Case IV/F – 3/33.710 – Napier Brown & Company Ltd, Case IV/F – 3/33.711 – James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1) cannot to be transposed to this case, as the situations are different. The Commission points out on that point that in the *British Sugar/Tate & Lyle* case no leniency regime was yet in force when the Commission decided to apply, by analogy, the provisions of the 1996 Leniency Notice (recital 436 to the Decision).

482 Third, it is not possible to conclude that the 2002 Leniency Notice is, overall, more favourable to undertakings than the 1996 Leniency Notice. Whether or not the resulting amendments procure an advantage to a given undertaking is highly dependent in its individual situation (recital 437 to the Decision).

2. Arguments of the parties

a) Arguments of Hoechst

483 Hoechst claims that it ought to have obtained immunity, in application, by analogy, of the 2002 Leniency Notice. It submits that it has already set out those arguments in its response to the statement of objections.

484 Hoechst observes that it had already begun to cooperate in autumn 1998, when only the 1996 Leniency Notice existed. However, it is necessary to take into account the fact that, according to the general principles of criminal law, the most favourable rules should be applied. Where the 2002 Leniency Notice is more favourable than the 1996 Leniency Notice, it is the former that ought to be applied.

485 According to the 2002 Leniency Notice, every undertaking which has participated in a cartel, and therefore even a ‘leader’, can apply for immunity. Hoechst emphasises that the provision in Section B of the 1996 Leniency Notice under which a significant reduction in the fine cannot be granted in the case of leaders was not followed in the 2002 Leniency Notice. Furthermore, the 2002 Leniency Notice is more favourable to the first undertaking to cooperate, in the sense that it is no longer a requirement that that undertaking submits evidence enabling the Commission to take a decision ordering an investigation under Article 14(3) of Regulation No 17. For the application for immunity to succeed, it is not even necessary to submit all the evidence which the undertaking has. Such evidence may also be submitted orally, according to the Commission’s consistent practice, if the undertaking relies on a risk that the evidence will be communicated to the United States.

486 In this case, the information which Hoechst provided on 29 October 1998 was sufficient for it to be granted immunity under the 2002 Leniency Notice. Thus, Hoechst was the first to submit a formal request for immunity and was also the first to make the necessary oral statements to the Commission. If the 2002 Leniency Notice had been applicable, the Commission would in those circumstances have sent Hoechst a letter at the beginning of 1999 granting provisional immunity. Its application for immunity would thus have succeeded on the basis of the 2002 Leniency Notice, contrary to what the Commission asserts at recital 437 to the Decision.

487 Hoechst then submits that, as a general principle of law, the ‘most favourable provision’ principle is applicable both in criminal proceedings and in administrative proceedings. Hoechst refers in particular to Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), which provides that ‘[n]o administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it’ and that ‘[i]n the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively’.

488 Hoechst further submits that the ‘most favourable provision’ principle was applied by the Court of Justice in Case C‑354/95 *National Farmers’ Union and Others* [1997] ECR I‑4559, paragraphs 40 and 41, and that it is part of the legal tradition common to the Member States. Hoechst submits a comparative study which was produced during the administrative procedure.

489 Hoechst further submits that the Commission recognised the principle in the *British Sugar/Tate & Lyle* decision, paragraph 481 above, where it stated that ‘a direct application of [the 1996 Leniency Notice] is only possible for cooperation which took place after the publication of the notice in the Official Journal on 18 July 1996’ and that ‘[i]n all other cases of cooperation, the notice will be applicable by analogy, meaning in this context essentially an extension ratione temporis. Such analogous application means that favourable treatment in line with [the 1996 Leniency Notice] will depend on fulfilment of all the substantive requirements of cooperation as set out in that Notice’.

490 Hoechst contends that the Court of First Instance confirmed those principles in Joined Cases T‑202/98, T‑204/98 and T‑207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II‑2035,

paragraph 157 et seq.).

491 Likewise, Hoechst submits that in Commission Decision 2004/421/EC of 16 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Wieland Werke AG, Outokumpu Copper Products OY, Outokumpu Oyj, KM Europa Metal AG, Tréfimétaux SA and Europa Metalli SpA (Case COMP/E‑1/38.240 – Industrial tubes) (OJ 2004 L 125, p. 50), 'the industrial copper tubes decision', the Commission stated that, 'unlike point 23 of the 2002 Leniency Notice, the 1996 Leniency Notice does not provide for any specific reward to a leniency applicant that discloses facts previously unknown to the Commission and affecting the gravity or duration of the cartel' and that '[i]t is therefore appropriate to consider any such cooperation under the attenuating factors' (recital 384 to the industrial copper tubes decision). In consequence, the Commission reduced the basic amount of the fine imposed on one undertaking (Outokumpu) from EUR 38.98 million by EUR 22.22 million 'for effective cooperation outside the 1996 Leniency Notice' (recital 387 to the industrial copper tubes decision). The Commission observed, in that regard, that 'Outokumpu should not be penalised for its cooperation by imposing on it a higher fine than the one that it would have had to pay without its cooperation' and that '[t] herefore, the basic amount of Outokumpu's fine [was] reduced by a lump sum of EUR 22.22 million so that it [would] be the same as the hypothetical amount of fine that would have been imposed on Outokumpu for a four-year infringement' (recital 386 to the industrial copper tubes decision).

492 Hoechst further submits that, even on the principle that the 1996 Leniency Notice does create legitimate expectations on the part of third parties that must be protected, that point is immaterial in the present case. Only Chisso could claim to be a third party deserving of protection. However, Chisso was not alleged to have been a leader and its oral contributions were not denied recognition as acts of cooperation. On the contrary, Chisso had the possibility, and was recognised as having the right, to rely on the fact that the oral and written contributions which it made during the investigation would be taken into account as attenuating circumstances. Nor would Chisso's legitimate expectation have been frustrated if the Commission had applied those principles to Hoechst and if Hoechst had thus been exempted from a fine under one or other Leniency Notice (or under both). In both cases, Hoechst's acts of cooperation ought to have entailed an exemption from the fine whereas Chisso's acts of cooperation, which came about subsequently, ought to have entailed a reduction in the fine.

493 Hoechst concludes that if the Commission was not obliged to grant immunity from a fine under the 1996 Leniency Notice, it ought to have done so in application, by analogy, of the 2002 Leniency Notice.

494 Hoechst further submits that, contrary to the Commission's answer to a question put by the Court, the application of the 2002 Leniency Notice would have allowed it to obtain immunity.

495 First, in Hoechst's contention, in October/November 1998 Chisso did not provide all the documents that could have been submitted. That objection ought therefore not to be addressed solely to Hoechst. In addition, Hoechst states that the Commission officials responsible for the file did not immediately require the submission of the documents declared and submitted later. Nor did they require, at the time, a list of documents that would be submitted later.

496 Second, it is absurd to consider that the material communicated by Hoechst on 29 October 1998 was not sufficient for the purpose of adopting a decision ordering investigations under Article 14(3) of Regulation No 17. Hoechst emphasises, in that regard, that the Commission was in a position to prove the existence of the cartel without there being any need to order an investigation. As regards the fact that the Commission did not have specific information about the undertakings concerned (in particular the addresses of their offices), Hoechst observes that the Commission sent requests for information to those undertakings. It therefore already knew, at the time and on account of Hoechst's cooperation, to whom to address such requests for information.

b) Arguments of the Commission

497 The Commission contends that the application of the 'most favourable provision' principle presupposes an amendment of the legal basis which determines the imposition of the fine. No amendment of that type took place. In particular, Article 15(2) of Regulation No 17 was not amended by the 2002 Leniency Notice. That notice defines only the criteria for the grant of preferential treatment to certain undertakings wishing to cooperate with the Commission, but does not alter the legal framework which determines the fines to be imposed. In that regard, the Commission refers, by analogy, to *LR AF 1998* v *Commission*, paragraph 422 above (paragraph

233).

498 The Commission also submits that, even though it is bound in the exercise of its discretion by the Leniency Notice in force, it is so bound only while those rules are applicable. The Commission emphasises at this point that those rules create a legitimate expectation on the part of the undertakings concerned. In this case, the undertakings' legitimate expectation that they would be given favourable treatment as a consequence of their cooperation was based solely on the Leniency Notice then in force, namely the 1996 Leniency Notice. In so far as the 1996 Leniency Notice did not create a legitimate expectation solely on the part of Hoechst, the application of the 2002 Leniency Notice is precluded.

499 Nor does the present case concern actual criminal provisions, but provisions capable of justifying the imposition of a penalty. The 'most favourable provisions' principle cannot apply with respect to a Leniency Notice. Both the former and the new provisions proceed from the principle that immunity can be granted only to a single undertaking. An application of the 'most favourable provision' principle would have the consequence that, where two undertakings entered into unlawful agreements and sought immunity, one undertaking having been the first to cooperate under the 1996 Leniency Notice and the other the first to do so under the 2002 Leniency Notice, both undertakings would have to be granted immunity. That would lead to a complete lack of penalty for both parties to the agreement, which cannot be the object of a Leniency Notice.

500 Furthermore, the present case may be distinguished from the case in which the Commission adopted Decision 1999/210 (paragraph 481 above). At the time, the Commission applied the 1996 Leniency Notice by analogy in the pending proceedings during which the undertakings concerned had cooperated before the publication of that notice. In the present case, according to the Commission, such an approach was not indicated, since the 2002 Leniency Notice itself contains, at paragraph 28, clear guidelines concerning the treatment of transitional cases. Those guidelines ensure that all the undertakings concerned are treated equally.

501 As regards the industrial copper tubes decision, referred to at paragraph 491 above and relied on by Hoechst, the Commission states that it did not apply the 'most favourable provision' principle with respect to the 2002 Leniency Notice. It merely considered, in accordance with Section 3, sixth indent, of the Guidelines, that a circumstance which, under the new regime, justified a particular reward constituted effective cooperation by the undertaking in the proceedings, outside the scope of the 1996 Leniency Notice.

502 The Commission further submits, in answer to a question put by the Court, that even on the hypothesis that the 2002 Leniency Notice was applicable in this case, Hoechst would not have benefited from immunity, or indeed from a greater reduction of the fine imposed on it.

503 As regards immunity from a fine, first, the Commission observes that Hoechst did not provide, in October/November 1998, all the evidence available to it, contrary to paragraph 13(a) of the 2002 Leniency Notice. For the same reasons, paragraph 13(b) of that notice could not apply, since the Commission did not receive a descriptive list accurately reflecting the nature and content of the relevant evidence. In addition, Hoechst ought to have undertaken to disclose that evidence at a 'later agreed date'. Accordingly, in the Commission's submission, in autumn 1998 Hoechst did not satisfy the conditions laid down in paragraph 13 of the 2002 Leniency Notice. On the basis of the finding that Hoechst provided in March and April 1999 all the evidence available to it, it cannot have satisfied the conditions laid down in paragraph 13 of the 2002 Leniency Notice until then. In fact, the Commission already had sufficient evidence to find an infringement of Article 81 EC, which, in light of paragraph 10 of the 2002 Leniency Notice, prevented Hoechst from benefiting from immunity from a fine.

504 Second, in the absence of detailed information concerning the persons who had taken part in the cartel, and also of the location of the offices, the Commission was unable, according to paragraph 8 (a) of the 2002 Leniency Notice, to adopt a decision ordering an investigation in the sense of Article 14(3) of Regulation No 17. That applies *a fortiori* because the other undertakings involved were Japanese and because Hoechst stated, furthermore, that there was no indication that the only other European operator had participated in the cartel.

505 Third, the Commission refers to recital 456 to the Decision and contends that at the meeting of 29 October 1998 Hoechst provided an imprecise version of the facts and that it misleadingly emphasised the moderate nature of the cartel. That description cannot be regarded as 'evidence' enabling the Commission to find an infringement of Article 81 EC within the meaning of paragraph 8

(b) of the 2002 Leniency Notice.

506 As regards a reduction in the fine, the Commission emphasises that it cannot be greater than 50% under the 2002 Leniency Notice and that it may even be smaller. That reduction takes account of the date and the degree of added value of the evidence in question. On that basis, the Commission maintains that Hoechst's misleading statement as to the moderate nature of the cartel was used against it and that a reduction of under 50% was granted to it.

3. Findings of the Court

507 As a preliminary point, any application 'by analogy' of the 2002 Leniency Notice must be rejected, since Hoechst's cooperation during the proceedings was governed by the 1996 Leniency Notice. The present situation may be distinguished, in that regard, from the cases referred to by Hoechst in which the 1996 Leniency Notice was applied by analogy to situations which had commenced before the adoption of that notice but which were not subject to any other legal rule.

508 In so far as Hoechst's plea may be taken to raise, in reality, the question as to which provision was applicable at the material time, it is sufficient to state that such a question cannot arise. Paragraph 28 of the 2002 Leniency Notice clearly provides that that notice is to apply from 14 February 2002 for all cases in which no undertaking has sought to 'take advantage of [the 1996 Leniency Notice]'. In this case, the undertakings concerned, including Hoechst, sought to take advantage of the 1996 Leniency Notice.

509 It must be observed, moreover, that the cooperation on the part of the undertakings concerned began at the end of 1998, that is to say at a time when only the 1996 Leniency Notice was applicable, but continued after publication of the 2002 Leniency Notice, as the Commission's last request for information was issued on 13 December 2002. It should be emphasised, furthermore, that it was only at the stage of the adoption of the Decision that the Commission definitively ruled on the cooperation of the undertakings concerned and, in particular, on the question of which undertaking, if any, could benefit from immunity from a fine. Accordingly, the acts of cooperation of the undertakings concerned, in the context of the 1996 Leniency Notice, produced their effects after the adoption of the 2002 Leniency Notice. However, in the case of legal situations which have not yet exhausted their effects, a new rule applies immediately to the future effects of a situation which arose under the former rule 'in the absence of transitional provisions' (Case C–512/99 *Germany* v *Commission* [2003] ECR I–845, paragraph 46). As such transitional provisions were in place in this case, it is necessary to take those provisions into account and to consider that the 1996 Leniency Notice was applicable.

510 That conclusion also enables the principles of legal certainty and legitimate expectations to be satisfied. It must be emphasised, in that regard, that a Leniency Notice gives rise to a legitimate expectation in being able to benefit from a certain percentage of reduction (*Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 188). Furthermore, regard being had to the wording of section B(b) of the 1996 Leniency Notice, that notice is designed to reward by a very substantial reduction in the fine only the single undertaking which is the 'first' to adduce decisive evidence (see *BASF* v *Commission*, paragraph 120 above, paragraph 550 and the case-law cited).

511 In addition, and without there being any need to determine whether the principle on which Hoechst relies might apply to the Commission's Leniency Notices, it is sufficient to state that the 2002 Leniency Notice is complex, in that it amends the 1996 Leniency Notice on several points, as regards both the substantial rules and the procedural rules. Some amendments are more favourable to the undertakings concerned, while others are less favourable. In addition, the application of the 2002 Leniency Notice varies according to the case. It is not therefore possible to characterise the 2002 Leniency Notice as being more favourable overall than the 1996 Leniency Notice.

512 Furthermore, and specifically, the application of the 2002 Leniency Notice to the present case would not necessarily result in a more favourable result for Hoechst.

513 In that regard, it must be observed that, in order to benefit from immunity from a fine under the 2002 Leniency Notice, the undertaking must 'immediately' provide the Commission with all the evidence relating to the suspected infringement available to it at the time of the submission, 'or' initially present this evidence in hypothetical terms, in which case the undertaking must present a descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence (paragraph 13(a) and (b) of the 2002

Leniency Notice).

514 In the present case, and for the reasons set out at paragraphs 574 to 578 below, it must be held that Hoechst did not immediately provide all the evidence available to it. Nor is it apparent from the documents in the file that Hoechst provided evidence which allowed the Commission to know the nature and content of the evidence in its possession and which could have been disclosed later.

515 Accordingly, the application of the 2002 Leniency Notice to the present case would not necessarily have led to a reduction in Hoechst's fine.

516 Furthermore, and in so far as the 2002 Leniency Notice provides, in addition to immunity, for a reduction in the fine of up to 50%, its application would not necessarily have led to a greater reduction in Hoechst's fine than that already granted.

517 For all of those reasons, the 10th plea must be rejected.

G – The eighth and ninth pleas, relating to the application of the Leniency Notice

518 By its eighth plea, Hoechst maintains that the Commission made an error of assessment in determining the undertaking which was the first to cooperate in this case. By its ninth plea, Hoechst contends that the Commission erred in assessing the content of its cooperation.

519 The Court will examine the eighth plea first.

1. Summary of the Decision

520 At section 12.2.3 of the Decision, relating to the application of the 1996 Leniency Notice, the following statement is to be found (recital 440 to the Decision):

'At a meeting held on 13 November 1998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence … The Commission considers that on that occasion Chisso was the first undertaking to adduce decisive evidence on the existence of the cartel which is found in this Decision. The evidence handed over to the Commission on 13 November 1998 consisted, in particular, of handwritten notes on a number of cartel meetings. The oral description of the cartel's activities allowed the Commission to put the documents in their real context. The information provided by Chisso enabled the Commission to establish the existence, content and the participants of most of the cartel meetings, as described in Part I.'

521 As regards Hoechst, it is stated at recital 451 to the Decision that '[a]lthough it was not the first company to provide the Commission with decisive evidence, [Hoechst] contributed, at an early stage, to establishing important aspects of the case and, after having received the statement of objections, it did not substantially contest the facts on which the Commission based its allegations'.

2. Arguments of the parties

a) Arguments of Hoechst

522 While accepting that the 1996 Leniency Notice was applicable, Hoechst contends that it ought to have been considered the first undertaking to have cooperated with the Commission and to have provided the essential evidence of the cartel.

523 Hoechst carries out a chronological analysis of the facts and submits that Chisso's lawyers met the Commission on 29 September 1998, in connection with another case. It is apparent from the minute of that meeting that Chisso's lawyers mentioned that they also represented another undertaking which had expressed its desire to cooperate with the Commission concerning a cartel relating to sorbic acid.

524 However, Chisso's lawyers were not prepared, or authorised, to disclose the identity of that undertaking on that date. That is apparent, in particular, from the two Commission internal memos dated 1 and 2 October 1998. The fact that the author of the internal memos joined the meeting after it had begun does not permit the conclusion that Chisso's identity had been disclosed beforehand, in particular to the Commission's then Deputy Director-General for Competition.

Furthermore, the reference to another undertaking in the internal memo of 2 October 1998 is not a typographical error on the Commission's part and therefore does not refer, in fact, to Chisso.

525 Hoechst also contends that no request was formulated, on that date, that satisfied the requirements of Section E.1 of the 1996 Leniency Notice, and that no evidence was offered or handed over at that meeting. Furthermore, no aspect of the infringement was described and the names of the participating undertakings were not even provided.

526 On 23 October 1998, the lawyers representing Hoechst and Nutrinova contacted the Commission by telephone in order to request a meeting.

527 On 29 October 1998, during the meeting with the Commission, the lawyers representing Hoechst and Nutrinova formally requested that the undertakings which they represented be treated as principle witnesses of the cooperation. In that context, they described the essential aspects of the sorbates cartel, namely the relevant products, the undertakings involved, the anti-competitive conduct and the period in question. That oral description of the essential facts was then accepted by the Commission as an act of cooperation. A comparison with the subsequent findings of the Decision shows that the information provided by Hoechst on that date had been used without restriction in the Decision. In particular, the Commission made no findings in the Decision concerning the structure of the cartel that were fundamentally different from the information provided by Hoechst on 29 October 1998.

528 On 13 November 1998, Chisso's lawyers gave, for the first time, an oral account of the sorbates cartel. It was only on that date that Chisso's identity was disclosed.

529 Hoechst subsequently sent a number of written communications to the Commission, namely in December 1998, March and April 1999 and till later on various occasions. Hoechst's contribution of 19 March 1999 was the first written contribution confirming, in the form of a 'company statement', the constituent elements of the cartel.

530 The first company statement from Chisso was not made until 20 April 1999. None of the other undertakings which participated in the infringement contacted the Commission during that first stage of the procedure.

531 Those facts show that Hoechst was the first to provide the Commission with 'decisive evidence' within the meaning of the 1996 Leniency Notice, and it did so orally.

532 Hoechst adds that it is consistent with the Commission's practice for an undertaking to be regarded as being the first to cooperate, even if it initially provides oral evidence, provided that that evidence satisfies the 'decisive evidence' criterion and that it is then confirmed in writing and supplemented. That oral evidence already enables the Commission to carry out an inquiry and to undertake inspections or send requests for information. The written form of cooperation is not required either by the 1996 Leniency Notice or by the 2002 Leniency Notice.

533 Hoechst contends at this point that the Commission has been obstructive in so far as, first, it promised to warn Chisso if any other undertakings should overtake it and, second, it abruptly refused to recognise the oral contributions as acts of cooperation, thus going back on its earlier approach. Hoechst refers, on the latter point, to the Commission's letter of 19 January 1999 in which it considered that Hoechst had ceased to cooperate, to Hoechst's letter of 28 January 1999 expressing its incomprehension on that matter, to the telephone interview of 5 March 1999 during which the Commission indicated that the time for 'inconclusive' meetings was over, and also to the Commission's letter of 29 March 1999 in which it refused to receive oral testimony from Hoechst. That approach constitutes a breach of the right to a fair hearing and of the principle of sound administration. Hoechst also observes that since then the Commission's practice has been to accept undertakings' requests and acts of cooperation in oral form. The Commission's approach also gives an impression of unfairness in so far as, on the contrary, Chisso's oral testimony was accepted.

534 In any event, even if the Commission – contrary to its then practice and to its more recent practice – were to consider only the written information, Hoechst's written communication of 19 March 1999 was the first written document submitted on behalf of an undertaking and confirming information given orally.

535 The production of minutes of meetings by Chisso on 13 November 1998 cannot be characterised as

the first written cooperation, since those documents are incomprehensible and make sense only by reference to the account of the facts first provided by Hoechst on 29 October 1998. The lack of probative force of the documents provided by Chisso is also apparent from the fact that the Commission considered it necessary to conduct a further hearing of Chisso's employees on 9 December 1998. Furthermore, the minutes provided by Chisso refer to only some meetings in 1995 and 1996. For the longer period from 1978 to 1994, Chisso did not submit any written document on 13 November 1998. In addition, that 'evidence' is not used in the Decision to establish the activity of the cartel and is therefore not 'decisive'.

536 Hoechst emphasises, in that regard, that in a Commission internal memo of 9 November 1998, communicated in the context of access to the file, it is stated that Chisso's lawyers 'were the first to offer their cooperation and were then overtaken by subsequent events in which other undertakings provided useful information before them'.

537 Hoechst further submits that the Commission cannot criticise it on the ground that the explanations provided on the agreements differ on certain points from those used in the Decision and at the same time accept that the information provided by Chisso, which thereby obtained immunity, does not cover the entire infringement period or all the details of the cartel.

b) Arguments of the Commission

538 The Commission emphasises primarily, as regards its internal memo of 9 November 1998 on which Hoechst relies, that the Commission officials' informal assessment at an early stage of the proceedings cannot prejudge the decision adopted by the Commission itself.

539 For the remainder, the Commission takes pains to correct the way in which Hoechst describes the course of the events in this case.

540 First, as regards the meeting of 29 September 1998 – which concerned two cases, including the sorbates case, and which was held between 16.30 and 18.30 –, the Commission asserts that the lawyers were acting on behalf of Chisso, as may be seen from recital 4 to the Decision.

541 The Commission observes, in that regard, that there are two internal memos relating to that meeting.

542 As regards, the internal memo dated 2 October 1998, relating to a meeting on sorbic acid, the Commission states that the Commission's then Deputy Director-General for Competition met Chisso's lawyers between 16.30 and 17.30. The Commission also observes that that internal memo mentions the 'company Chisso'. That proves that Chisso's lawyers referred to their client by name. Had they not done so, the author of the memo would not have been made aware of the identity of that undertaking. The fact that the internal memo of 2 October 1998 makes reference to an 'undertaking unknown' is not inconsistent. That indicates solely the reference under which the meeting with the lawyers had been agreed. Furthermore, the fact that that memo mentions another undertaking involved in the context of another procedure is a mere typographical error. The undertaking referred to was really Chisso.

543 As regards the internal memo dated 1 October 1998 (which covers two cases, including the sorbic acid case), the Commission emphasises that two officials joined the meeting from 17.30. The explanation for the fact that that internal memo mentions that the undertaking wishing to provide information on a cartel in the sorbates sector was not identified lies in the fact that Chisso was not named before the two officials concerned, one of whom is the author of the internal memo.

544 Second, it is incorrect to assert that Hoechst described the main aspects of the sorbates cartel at the meeting of 29 October 1998. Hoechst itself stated in a letter of 27 October 1998, moreover, that it proposed a 'first discussion designed to clarify the other details'. According to the Commission's internal memo of 6 November 1998, Hoechst stated at the beginning of the meeting that it needed more time to obtain information in sufficient detail, in order to supply full information.

545 The information provided by Hoechst at that meeting of 29 October 1998 was very general and the facts were described in very vague terms. Furthermore, Hoechst mentioned half-yearly meetings at which no specific agreement had been concluded. It also referred to the informal and social nature of the meetings (recital 456 to the Decision).

546 In the relevant part of the section of the Decision devoted to the description of the events (recitals 79 to 251), the Commission did not refer once to the statements made by Hoechst on 29 October 1998. Hoechst's comments concerning the agreements also differed considerably from the facts indicated in the Decision.

547 Third, the Commission contends that Hoechst was not ready to cooperate fully until 19 March 1999. That is clear from the letters of 21 December 1998 and 28 January 1999 in which Hoechst informed the Commission that, owing to the criminal and civil proceedings pending in the United States, it had decided not to provide all the useful information at that time, or the documents or evidence of the cartel available to it. In the letter of 19 January 1999, the Commission stated however that that attitude constituted a refusal to cooperate within the meaning of the 1996 Leniency Notice. In acting as it did, Hoechst assumed the risk of being fined.

548 Contrary to what Hoechst appears to contend, the Commission emphasises that the failure to take the oral contributions into account was not inconsistent with the practice observed at the time. That practice changed only after the adoption of the 2002 Leniency Notice.

549 Furthermore, as regards the objection relating to obstruction during the proceedings, the Commission emphasises that, in its letter of 29 March 1999, on which Hoechst relies, it stated that if Hoechst wished to benefit from the 1996 Leniency Notice it must at least provide information, documents or other evidence contributing to establishing the existence of the cartel. Those words are the words of Section D, paragraph 2, first indent, of the 1996 Leniency Notice. The letter of 29 March 1999 therefore indicates that, in the Commission officials' view, Hoechst did not thus far even fulfil the conditions of that first indent. The minute drawn up by Hoechst's lawyers of certain parts of the telephone conversation of 5 March 1999 with the Commission official responsible for the case does not indicate otherwise. That does not constitute obstruction, but provides a true account of the situation in accordance with the 1996 Leniency Notice.

550 Fourth, the Commission submits that it is incorrect to assert that Chisso handed over a small number of documents at the meeting of 13 November 1998. In the internal memo of 19 November 1998, the Commission refers to several documents relating to contacts between competitors in 1995 and 1996. Those documents are agenda of meetings and personal notes. Furthermore, Chisso submitted tables with the target prices agreed for the entire period of the cartel. That written evidence, which was also explained orally, assumed decisive importance for the Commission in the adoption of the Decision (recital 440 to the Decision), since, for the first time during the administrative procedure, they made it possible to prove the infringement, even though that evidence did not cover all the period found or all the details of the cartel. It cannot be inferred from the promise given to Chisso at that meeting to warn it that that undertaking did not yet satisfy the conditions to benefit from immunity. The very most that can be inferred is that it was not certain that Chisso would obtain immunity on the basis of its acts of cooperation at that time.

551 On the other hand, it was not until 19 March 1999 that Hoechst provided the Commission with information that might be regarded as the beginning of effective cooperation. However, the written communication of 19 March 1999 does not contain a detailed description of the meetings and procedures of the cartel. Hoechst did not provide those details until 28 April 1999, in answer to specific questions from the Commission.

3. Findings of the Court

552 It must be borne in mind that Section B of the 1996 Leniency Notice provides, among other conditions, that the undertaking which 'is the first to adduce decisive evidence of the cartel's existence' (Section B(b) of the 1996 Leniency Notice) will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if it had not cooperated.

553 It follows from the very wording of Section B(b) of the 1996 Leniency Notice that the 'first' undertaking is not required to have provided all the evidence proving all the details of the functioning of the cartel, but that it is sufficient for it to adduce 'decisive evidence'. That text does not require that the evidence adduced is in itself 'sufficient' for the purpose of drafting a statement of objections, or indeed for the adoption of a final decision finding an infringement (judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 362). However, although the evidence referred to in Section B(b) of the 1996 Leniency Notice need not necessarily be sufficient in itself to establish the existence of the cartel, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the

Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement (*BASF* v *Commission*, paragraph 120 above, paragraph 493).

554 It must be further emphasised that decisive evidence within the meaning of Section B(b) of the 1996 Leniency Notice may also be adduced orally (*BASF* v *Commission*, paragraph 120 above, paragraph 506).

555 Last, it must be borne in mind that the Commission has a certain discretion in determining whether the cooperation in question was 'decisive' in facilitating its task of finding the existence of an infringement and putting an end to it and it is only where it manifestly exceeds that discretion that it may be criticised (judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 362).

556 It is in the light of the foregoing considerations that the Court must examine whether, in this case, the Commission made a manifest error of assessment in finding that Chisso had been the first undertaking to adduce decisive evidence of the cartel's existence.

557 In that regard, it must be borne in mind that, at recital 440 to the Decision, the Commission states that '[a]t a meeting held on 13 November 1998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence' and that it 'considers that on that occasion Chisso was the first undertaking to adduce decisive evidence [of] the existence of the cartel which is found in this Decision'. It follows that the Commission relied solely on the oral description of the cartel's activities and on the documentary evidence provided at the meeting of 13 November 1998, and not later, in order to find that Chisso had been the first undertaking to adduce decisive evidence of the cartel's existence.

558 Second, it must be observed that, at the meeting of 13 November 1998, Chisso provided a detailed oral description of the cartel's activities. It follows from the minute of that meeting, drawn up by the Commission, that Chisso stated who were the participants in the cartel, the duration of the cartel, 19 dates of meetings and the places at which they were held, the object and the functioning of the cartel. On the last two points, Chisso stated, in particular, that the undertakings concerned had concluded agreements on prices and volumes of sorbates and that, while the cartel was in force, they were aware that their activities were unlawful. Chisso also described the method of fixing quotas and any problems encountered, the conduct of the meetings and the preparatory meetings between the Japanese producers, the names of Chisso's employees who had participated in the meetings and the names of certain employees of the other undertakings concerned, the terms of the contacts between Hoechst and Daicel and the system of monitoring the meetings and the method of setting target prices.

559 Third, it must be emphasised that, in addition to a detailed oral description of the cartel's activities, Chisso also provided at the meeting of 13 November 1998 documentary evidence which is found in the case-file (156 pages in all). More particularly, Chisso sent detailed notes (handwritten in Japanese with a translation into English) taken at the cartel meetings in spring and autumn 1995 and 1996 (which reflected the level of target prices fixed between the members of the cartel), the agenda of those meetings, the visiting cards of the persons who participated in the meetings and the sales quota volumes agreed for 1992 to 1995.

560 Contrary to Hoechst's contention, those documents were used by the Commission, since a number of pages are referred to in the Decision, in connection, in particular, with the conduct of and the actual results of the joint meetings (see, in particular, footnotes 82, 140, 141, 144 and 150 to the Decision). Accordingly, those documents were relevant for the purpose of proving, for the purposes of the 1996 Leniency Notice, the 'cartel's existence'.

561 In addition, contrary to Hoechst's contention, those documents were sufficiently clear, in spite of the fact that an employee of Chisso who had participated in the joint meetings provided further information about them at a meeting held with the Commission's services on 9 December 1998. As shown in the minute of that meeting drawn up by the Commission, the information relating to those documents was provided not with a view to their general comprehension but in order to explain certain details connected, in particular, with the use of abbreviations.

562 Fourth, it must be observed that Hoechst met the Commission's services on 29 October 1998, that is to say before Chisso, to provide an oral description of the meetings in question. In particular, Hoechst mentioned the participants in the meetings, the approximate duration of the meetings

(from the end of the 1970s/beginning of the 1980s until 1995/1996), the frequency of the meetings and their object.

563 However, it must be emphasised that at that meeting Hoechst provided no written document to support its statements. In that regard, according to the minute drawn up by the Commission and not contested by Hoechst, Hoechst's representative mentioned 'the great difficulties which Nutrinova had in finding all the relevant details of those meetings'.

564 In the same minute, moreover, it is stated that 'the object of those meetings was to share customers or fix prices, within the strict meaning of the word' and that 'no monitoring system existed' or again that Hoechst's lawyer 'was categoric about the fact that the level of the agreements at those meetings was moderate and not typical of a price-fixing or market-sharing cartel'.

565 Likewise, in the minute of the meeting of 29 October 1998 drawn up by Hoechst, it is stated that 'the discussions between Hoechst/Nutrinova and the Japanese were not about customer-sharing, agreements on calls for tenders or price-fixing in the strict sense of the term'.

566 At no time during the meeting of 29 October 1998 did Hoechst state that the joint meetings had the object of allocating sales volume quotas for Europe to the undertakings concerned, or that a system for monitoring the meetings had been set up, as was concluded in the Decision, in Article 1 of the operative part, on the basis of the statement of objections, without those elements being disputed by Hoechst. As regards the sales quotas, Hoechst mentioned only in the minute referred to above, under the heading 'rate of increase', that 'competitors had discussions on the way in which they see market growth and which would be capable of supplying increased demand'.

567 Last, Hoechst stated in its minute of the meeting of 29 October 1998 that 'the meetings were not organised systematically and that the agenda were very similar'.

568 It follows from all of those factors that, first, at the meeting of 13 November 1998 Chisso provided a detailed description of the activities and functioning of the cartel. Second, Chisso's description was supported by documentary evidence which was relevant for the purpose of proving the cartel's existence. Third, it follows from the meeting of 29 October 1998 that Hoechst did indeed give an account of the meetings in question, but that that account was less detailed than Chisso's, it did not accurately reflect the object and the functioning of the cartel in issue and, last, it was not supported by any documentary evidence.

569 In the light of the foregoing, it must be concluded that the Commission did not make a manifest error of assessment when it considered that Chisso had been the first undertaking to adduce decisive evidence of the existence of the cartel.

570 None of the arguments put forward by Hoechst can upset that conclusion.

571 As regards the fact that the Commission promised Chisso at the meeting of 13 November 1998 that it would warn it if any other undertakings were overtaking it, and as already stated in the context of the analysis of the first plea, that fact cannot affect the finding of fact that Chisso was, on the occasion of that meeting, the first undertaking to adduce decisive evidence of the existence of the cartel.

572 As regards the fact that the Commission bluntly refused to recognise Hoechst's oral contributions as acts of cooperation, in particular the evidence provided by Hoechst during the meeting of 29 October 1998, it must be observed that, at recital 5 to the Decision, the Commission expressly states that at a meeting on 29 October 1998 between the legal representatives of Hoechst and Nutrinova and the Commission services, an oral description of the product market, the producers, market shares, the proceedings in the United States and the cartel's activity was provided. At no point in the Decision is it stated that Hoechst's oral contribution at the meeting of 29 October 1998 was not taken into account. The fact that the Commission was able to take the view, at a particular time during the proceedings, that Hoechst's cooperation did not satisfy the requirements of the 1996 Leniency Notice does not alter the finding that Hoechst's oral contribution at the meeting of 29 October 1998 was ultimately taken into account in the context of the Decision.

573 In any event, it must be observed that Hoechst refers in its written submissions to a letter from the Commission dated 19 January 1999 in which the Commission stated:

‘The Commission services can only take note that your position has been reversed and that Nutrinova does not now intend to cooperate in the terms of [the 1996 Leniency Notice] … Such information on sorbates as has been delivered by Nutrinova to date cannot be considered to have been provided within the framework of this Notice.’

574 It must be observed in that regard that at the meeting with the Commission’s services on 29 October 1998 Hoechst hoped to be able to provide a written contribution by the end of 1998. However, in a letter of 21 December 1998, to which the Commission specifically responds in the letter of 19 January 1999, Hoechst stated, in addition to the fact that cooperation by means of oral testimony could not be contemplated, the following:

‘Unfortunately, we cannot keep our promise of providing you with a full report of the facts by the end of this year … With the proceedings in the [United States] remaining open, we have been advised by [United States] counsel that a full disclosure to the Commission as initially contemplated in our discussions in October would seriously compromise the interests of Nutrinova (and certain individuals) in the [United States].’

575 It follows that Hoechst clearly indicated that at that stage of the proceedings it was unable to cooperate further with the Commission, whether in the form of written cooperation or by oral testimony. In those circumstances, the Commission cannot be criticised for having taken the view, at that stage of the proceedings, that Hoechst was not fully cooperating and that, accordingly, the previous acts of cooperation could, where appropriate, be considered insufficient in the context of the 1996 Leniency Notice.

576 Hoechst’s position was subsequently reiterated in a letter of 28 January 1999, in which it stated:

‘Nutrinova whilst wishing to cooperate fully and immediately with the Commission cannot do so at present without creating serious and unbearable risks for itself and its current and/or former employees under [United States] law.’

577 The fact that the Commission, in a telephone conversation on 5 March 1999 or by letter dated 29 March 1999, stated that a new oral contribution would not be sufficient was the result of uncertainty as to Hoechst’s cooperation at that stage of the proceedings and was intended to draw Hoechst’s attention to the fact that, in order to benefit from the 1996 Leniency Notice, it must adduce further probative evidence of the existence of the cartel.

578 It follows from those considerations that, in the Decision, the Commission ultimately accepts Hoechst’s oral contributions as acts of cooperation and that, in any event, the Commission’s position during the administrative procedure was the result of uncertainty as to Hoechst’s effective cooperation at the beginning of the proceedings, Hoechst having stated, initially, that it could not be contemplated that its employees would provide testimony before the Commission.

579 For all of those reasons, the arguments put forward in the context of the eighth plea must be rejected.

580 In those circumstances, there is no need to examine Hoechst’s ninth plea, since, as it was not the first undertaking to adduce decisive evidence of the existence of the cartel, Hoechst could not expect to obtain a greater reduction in its fine than that granted under Section D of the 1996 Leniency Notice, namely 50% of the amount of the fine that would have been imposed if it had not cooperated.

581 However, it must be observed that certain procedural irregularities can sometimes justify a reduction in the fine even though they cannot lead to the annulment of the contested decision (see, to that effect, *Baustahlgewebe* v *Commission*, paragraph 211 above, paragraphs 26 to 48, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraphs 436 to 438).

582 In this case, it is necessary to take account of the breach of the principles of sound administration and equal treatment in the application of the 1996 Leniency Notice, established at paragraph 137 above, and on which Hoechst also relied in the eighth and ninth pleas. Accordingly, in light of the importance of the observance by the Commission of those principles in administrative procedures, and in the exercise of its unlimited jurisdiction, the Court decides to reduce the fine imposed on Hoechst by 10%.

583 The specific consequences of that adjustment will be determined below.

H – The 11th plea, alleging breach of the principle non bis in idem

1. Summary of the Decision

584 At recitals 314 to 316 to the Decision, the Commission states, in substance, that the exercise by the United States (or any non-member country) of its jurisdiction against a cartel can in no way limit or exclude the Commission's jurisdiction under Community competition law. More importantly, the Commission has no intention in any event of imposing penalties on the undertakings concerned for the same facts as the United States and Canadian authorities. Likewise, the proceedings conducted and the sanctions imposed by the Commission, on the one hand, and the United States and Canadian authorities, on the other hand, clearly do not pursue the same objectives.

2. Arguments of the parties

a) Arguments of Hoechst

585 Hoechst contends that the Commission breached the principle *non bis in idem* when, at recital 315 to the Decision, it considered that it was not required to deduct the penalty imposed in the United States in the same case. Hoechst asserts that the Commission expressed the view that, in any event, the principle *non bis in idem* cannot be applied in the context of the relationship between Community law and United States law on cartels. In Hoechst's submission, no judgment to date has stated that the principle *non bis in idem* could never be applied in such circumstances.

586 More specifically, Hoechst infers from the grounds of the judgment in Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281 that the principle *non bis in idem* is applicable in the context of the relationship between Community law and United States law on cartels. Furthermore, the second sentence of the summary of the judgment in that case states that '[t]he fact that the Commission takes into account a penalty imposed by the authorities of a third State presupposes that the facts established against the undertaking accused by the Commission, on the one hand, and the authorities of the third State in question, on the other, are identical'.

587 In the present case, the Commission does not dispute that the penalties imposed on Hoechst in the United States concerned a situation of fact identical to that forming the basis of the Decision. In that regard, in the Decision, the Commission makes no comment on the elements of the joint meetings and the agreements which related to non-European markets. However, at recitals 4, 65 to 72, 81, 90, 92, 100, 107, 120, 121, 138, 217, 232, 246, 349, 352, 397 and 450 to the Decision the Commission clearly indicates that the infringement was a single infringement.

588 If the Commission should dispute the existence of an '*idem*' in the present case, Hoechst offers, as proof, the agreement concluded with the United States Department of Justice on 3 May 1999 and requests that the prosecutor responsible for the case in the United States and another individual who could be called by Hoechst's intermediary be called as witnesses.

589 In any event, Hoechst maintains that the penalty imposed in the United States must be deducted on grounds of fairness, in application of the principle of 'natural justice' which has applied since the *Wilhelm* decision (Case 14/68 *Wilhelmand Others* [1969] ECR 1).

b) Arguments of the Commission

590 First of all, the Commission observes that Hoechst no longer appears to wish to raise the issue of the penalty imposed by Canada, but only that imposed by the United States.

591 Next, referring in particular to *Aalborg Portland and Others* v *Commission*, paragraph 145 above (paragraph 338), the Commission states that the application of the principle *non bis in idem* is subject to a threefold condition, namely identity of the facts, identity of the offender and identity of the protected legal asset. That principle therefore precludes the same person being penalised more than once for the same unlawful conduct in order to protect the same legal asset.

592 In the present case, neither the facts nor the protected legal asset are identical.

593 As regards the facts, paragraph 4(d) of the plea agreement concluded with the United States Department of Justice on 3 May 1999 states expressly that the sorbates affected by that cartel were sold by Hoechst or its subsidiaries, and by other members of the cartel, to customers in the Northern District of California. It follows that the act penalised by the plea agreement is not the collusive agreement per se but its implementation in the United States. The Commission observes in that regard that the principle of territoriality applies both in United States law and in European law on cartels. It does not follow from the plea agreement between Hoechst and the United States that it also covers the implementing measures and the effects of the collusive agreement outside the country, and in particular in the EEA. The finding made at recital 315 to the Decision is therefore correct. Furthermore, *Boehringer Mannheim* v *Commission*, paragraph 586 above, also establishes that there is no breach of the principle *non bis in idem* when there is no identity of the facts in such a situation.

594 As regards the protected legal asset, the Commission refers to recital 316 to the Decision and to Case T‑224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II‑2597 (paragraph 90), and submits that the procedures and penalties of the Community authorities and those of the United States authorities do not have the same objective. While in the former case the aim is to protect undistorted competition on the territory of the European Union or in the EEA, in the latter case the protection sought concerns the United States market.

595 The Commission observes, moreover, that in the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above (paragraphs 130 to 148), the Court expressly stated that it was permissible for the Commission to impose a fine within the limits set by Article 15(2) of Regulation No 17 without being required to take account of the corresponding United States penalties when determining those limits. Those considerations apply to the present case.

596 The Commission adds, in the interest of completeness, that no consideration of fairness argues in favour of the deduction of the United States penalty. A situation such as that which led the Court of Justice, in *Wilhelmand Others*, paragraph 589 above (paragraph 11), to take account, in Community law, of the first penalties imposed by taking guidance from Article 90(2) CS, in light of the close interdependence between the national markets of the Member States and the common market, does not exist in relations between the European Union and the United States (the Commission refers, in that regard, to *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 594, paragraph 99).

3. Findings of the Court

597 As a preliminary point, it should be noted that the present plea was raised solely with respect to the fact that the fine imposed in the United States was not deducted from the fine imposed in the Community. It must therefore be considered that the present plea does not concern the fine imposed in Canada.

598 The principle *non bis in idem*, which is also enshrined in Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, is a fundamental principle of Community law, compliance with which the Courts ensure (Case C‑308/04 P *SGL Carbon* v *Commission* [2006] ECR I‑5977, paragraph 26).

599 Furthermore, far from having decided the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member State where the facts with which the Commission charges an undertaking are the same as those alleged by those authorities, the Court regarded the identity of the facts alleged by the Commission and the authorities of the non-member State as a precondition of that question (see, to that effect, Case C‑397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I‑4429, paragraphs 48 and 49, and *SGL Carbon* v *Commission*, paragraph 598 above, paragraph 27).

600 More specifically, the Court of Justice recalled that the application of the principle *non bis in idem* was subject to a threefold condition of identity of the facts, unity of the offender and unity of the protected legal interest. That principle therefore precludes a penalty being imposed on the same person more than once for the same unlawful conduct for the purpose of protecting the same legal asset (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 338).

601 In that regard, it must be emphasised that the principle *non bis in idem* does not apply to situations

in which the legal orders and the competition authorities of non-member States intervened in the exercise of their own powers (see, to that effect, *SGL Carbon* v *Commission*, paragraph 598 above, paragraph 32).

602 In the present case, even though at certain recitals to the Decision highlighted by Hoechst the Commission states that the facts in question have their origin in the same set of agreements and that the sorbates market could be assessed at worldwide level, first, it must be observed that the application of Community law on cartels presupposes the existence of an agreement, decision or concerted practice 'capable of affecting trade between Member States' or 'between the Contracting Parties' to the EEA Agreement and of 'preventing, restricting or distorting competition within the common market' or within the 'territory' covered by the EEA Agreement (Article 81(1) EC and Article 53(1) of the EEA Agreement). The Commission's action is thus intended to safeguard free competition within the common market, which, under Article 3(1)(g) EC, is a fundamental objective of the Community (see, to that effect, *SGL Carbon* v *Commission*, paragraph 598 above, paragraph 31). The Commission concludes, in that regard, that the anti-competitive conduct at issue had the object and the effect of restricting competition within the Community and the EEA (recitals 280 to 288 to the Decision) and on that basis, in Article 1 of the operative part of the Decision, the Commission finds that the undertakings concerned infringed Article 81(1) EC and, from 1 January 1994, Article 53(1) of the EEA Agreement.

603 Furthermore, although it is clear from the plea agreement concluded on 3 May 1999 between Hoechst and the United States Department of Justice that the facts concerned an agreement covering sorbates sold 'in the United States and elsewhere', it must be borne in mind, first, that the plea agreement also states that the sorbates concerned were sold by Hoechst or its subsidiaries to customers in the Northern District of California and, second, that it has in no way been shown that the proceedings in the United States related to the application of the cartel or its effects other than in the United States, and in the EEA in particular, which, moreover, would have clearly encroached on the territorial jurisdiction of the Commission (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 594 above, paragraph 103, and judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, paragraph 143).

604 Accordingly, the decisions of the United States and the Community competition authorities differ, in this case, as to the legal interest protected.

605 In those circumstances, the principle *non bis in idem* is not applicable. For the same reasons, considerations relating to fairness, which in Hoechst's submission mean that the fine imposed in the United States must be taken into account in the determination of the fine imposed by the Commission, must be rejected. Furthermore, as the Court considers that it has sufficient information from the documents in the file, there is no need to grant Hoechst's request to call witnesses.

606 For all of those reasons, the 11th plea must be rejected.

IV – The final amount of the fine imposed on Hoechst

607 As follows from paragraphs 420 to 439 above, the Decision must be varied in that it takes Hoechst's role as a leader into account as an aggravating circumstance.

608 Furthermore, as follows from paragraph 582 above, and in order to take account of the breach of the principles of sound administration and equal treatment in the context of the application of the 1996 Leniency Notice set out at paragraph 137 above, Hoechst's fine should be reduced by 10%.

609 For the remainder, the Commission's considerations in the Decision, and the calculation method which it applied, remain unaltered.

610 The final amount of the fine imposed on the applicant is therefore calculated as follows: the starting amount of the fine (EUR 20 million) is increased by 100% to reflect Hoechst's size and overall resources in 1995 and 2002, giving a total of EUR 40 million. In order to take account of the duration of the infringement, that amount is increased by 175%. The basic amount of the fine is therefore EUR 110 million. That basic amount of the fine is increased by 50% to take account of Hoechst's repeated infringement, giving a total amount of EUR 165 million. Last, that total amount is reduced by 50% under the 1996 Leniency Notice, that is to say, by EUR 82.5 million, and then by 10% to take account of the breach of the principles of sound administration and equal treatment in the context of the application of the 1996 Leniency Notice established at paragraph 137 above,

which brings the final amount of the fine to EUR 74.25 million.

Costs

611 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs. In the circumstances of the present case, the Court decides that each party must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Hoechst GmbH at EUR 74.25 million;**

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

3. **Orders the parties to bear their own costs.**

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 18 June 2008.

E. Coulon M. Vilaras

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* Language of the case: German.

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

8 July 2008 (*)

(Competition – Agreements, decisions and concerted practices – Organic peroxides – Fines – Article 81 EC – Rights of the defence – Right to a fair hearing – Meaning of perpetrator of an infringement – Principle of nullum crimen, nulla poena sine lege – Principle of legal certainty – Legitimate expectations)

In Case T‑99/04,

AC-Treuhand AG, established in Zurich (Switzerland), represented by M. Karl, C. Steinle and J. Drolshammer, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet, acting as Agent, and by A. Böhlke, lawyer,

defendant,

ACTION for annulment of Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44),

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

composed of M. Jaeger, President, J. Azizi and O. Czúcz, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2007,

gives the following

Judgment

Background to the dispute

1 Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44; 'the contested decision') concerns a cartel formed and implemented on the European market for organic peroxides – chemicals used in the plastics and rubber industry – by the AKZO group ('AKZO'), Atofina SA, successor to Atochem ('Atochem/Atofina'), and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc, now Degussa UK Holdings Ltd ('PC/Degussa'), inter alia.

2 It is apparent from the contested decision that the cartel was founded in 1971 by a written agreement ('the 1971 agreement'), amended in 1975 ('the 1975 agreement'), between three producers of organic peroxides, namely AKZO, Luperox GmbH, which later became Atochem/Atofina, and PC/Degussa ('the cartel'). The aim of that cartel was, inter alia, to preserve the market shares of those producers and to coordinate their price increases. Meetings were held

regularly to ensure the proper functioning of the cartel. Under the cartel, Fides Trust AG ('Fides'), and subsequently, from 1993, the applicant, AC-Treuhand AG, were entrusted, on the basis of agency agreements with AKZO, Atochem/Atofina and PC/Degussa, with, inter alia, storing certain secret documents relating to the cartel, such as the 1971 agreement, on their premises; collecting and treating certain information concerning the commercial activity of the three organic peroxide producers; communicating to them the data thus treated; and completing logistical and clerical-administrative tasks associated with the organisation of meetings between those producers, particularly in Zurich (Switzerland), such as the reservation of rooms and the reimbursement of their representatives' travel costs. However, certain factual elements relating to the applicant's activities in relation to the cartel are contested between the parties.

3 The Commission had initiated an investigation into the cartel following a meeting on 7 April 2000 with AKZO's representatives, who informed it of an infringement of the Community competition rules in order to gain immunity under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). Subsequently, Atochem/Atofina and PC/Degussa also decided to cooperate with the Commission and provided it with additional information (recitals 56 to 63 in the preamble to the contested decision).

4 On 3 February 2003 the Commission sent a request for information to the applicant. In that request, the Commission essentially stated that it was in the process of investigating a putative infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) by the European organic peroxide producers. It also requested the applicant to provide an organigram of its undertaking, to describe its activity and its development, including its takeover of the activity of Fides, its activity as the 'secretariat' for the organic peroxide producers and its turnover for 1991 to 2001. The applicant responded to that request for information by letter of 5 March 2003 (recital 73 of the contested decision).

5 On 20 March 2003 a meeting was held between the representatives of the applicant and the Commission's staff in charge of the case-file, at the end of which the latter stated that the applicant was also concerned by the proceedings initiated by the Commission, without however specifying the offences alleged against it.

6 On 27 March 2003 the Commission initiated the formal examination procedure and adopted a statement of objections which was subsequently served on the applicant, among others. The applicant submitted its observations on the objections on 16 June 2003 and attended the hearing on 26 June 2003. The Commission finally adopted the contested decision on 10 December 2003, which it served on the applicant on 9 January 2004, and by which it imposed a fine on it of EUR 1 000 (recital 454 and Article 2(e) of the contested decision).

7 The adoption and the notification of the contested decision were accompanied by a press release in which the Commission stated, inter alia, that, as a consultancy firm, the applicant had played, from the end of 1993, an essential role in the cartel by organising meetings and covering up evidence of the infringement. Therefore, the Commission concluded that the applicant had also infringed the competition rules and stated:

'The sanction taken [against the applicant] is of a limited amount due to the novelty of the policy followed in that area. The message is clear however: those who organise or facilitate cartels, thus not only their members, must henceforth fear being caught and having very heavy sanctions imposed on them'.

Procedure and forms of order sought by the parties

8 By application lodged at the Registry at the Court of First Instance on 16 March 2004, the applicant brought the present action.

9 By letter lodged at the Court Registry on 30 November 2005, the applicant requested, as regards the publication of the judgment of the Court of First Instance bringing the proceedings to an end, confidential treatment of the entire agreement which it had concluded with Fides, which forms part of the annex to the application, and of the name of Fides and of the applicant's former employee, Mr S.

10 By letter lodged at the Court Registry on 1 February 2006, the applicant stated that it wished to maintain its request for confidentiality and, in the alternative, requested that confidential treatment

be granted to certain passages, rendered unreadable, of the text of the agreement cited in paragraph 9 above, of which it produced a non-confidential version at the Court's request.

11 Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance and on the proposal of the Third Chamber, the Court decided, after hearing the parties in accordance with Article 51 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

12 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure.

13 At the hearing, which took place on 12 September 2007, the parties presented oral argument and answered the oral questions put by the Court.

14 The oral procedure was closed at the end of the hearing on 12 September 2007. Pursuant to Article 32 of the Rules of Procedure, since a member of the Chamber was prevented from taking part in the judicial deliberations, the most junior judge within the meaning of Article 6 of the Rules of Procedure accordingly abstained from taking part in the deliberations and the Court's deliberations were conducted by the three judges whose signatures the present judgment bears.

15 At the hearing, the applicant withdrew its request for confidential treatment in so far as it concerned mention of the name of Fides; formal note of this was taken in the minutes of the hearing.

16 The applicant claims that the Court should:

– annul the contested decision in so far as it concerns the applicant;

– order the Commission to pay the costs.

17 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

A – Preliminary observations

18 The Court of First Instance considers it necessary to address, first, the applicant's request for confidential treatment since it did not withdraw that request at the hearing (see paragraphs 9, 10 and 15 above).

19 As regards the name of the applicant's former employee, the Court took account of that request in accordance with its practice regarding publication in relation to the identity of natural persons in other cases (see, to that effect, Case T‑120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II‑4441, paragraphs 31 and 33). However, the Court considers that the existence as such of the agreement between Fides and the applicant has, in any event, lost its potentially confidential character in the light of the identification of that agreement in the extract from the – publicly accessible – companies register of the canton of Zurich regarding the applicant's establishment, as produced in the annex to the application and in recitals 20 and 91 of the version of the contested decision published provisionally on the internet site of the Directorate-General for Competition of the Commission (see, to that effect, the order of the President of the Third Chamber, Extended Composition, of the Court of First Instance in Case T‑289/03 *BUPA and Others* v *Commission* [2005] ECR II‑741, paragraphs 34 and 35), no objection to that publication having been made by the applicant in accordance with the procedure laid down in Article 9 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21).

20 Consequently, the request for confidential treatment must be rejected in so far as it concerns the

existence of the agreement between Fides and the applicant.

21 Next, the Court points out that, in support of its action, the applicant relies on five pleas in law: (i) infringement of the rights of the defence and of the right to a fair hearing; (ii) infringement of the principle of *nullum crimen,nulla poena sine lege*; (iii) infringement of the principle of the protection of legitimate expectations; (iv) in the alternative, infringement of the principle of legal certainty and the principle of *nulla poena sine lege certa*; and (v) infringement of the principle of legal certainty and the principle of *nulla poena sine lege certa* as regards the second paragraph of Article 3 of the contested decision.

B – The first plea, alleging infringement of the rights of the defence and of the right to a fair hearing

1. Arguments of the parties

a) Arguments of the applicant

22 The applicant maintains that the Commission was late in informing it – three years after the start of the investigation – of the proceeding which had been initiated and the complaints made against it. It first learned of this when the formal investigation procedure was initiated and the statement of objections of 27 March 2003 adopted. Before that, the applicant had received only the request for information dated 3 February 2003, to which it had duly responded by letter of 5 March 2003. It was not until 20 March 2003, at the meeting with the Commission, that the applicant learned that it was also concerned by the investigation, without, however, receiving any precise information on the extent of the accusations made against it.

23 In the applicant's view, under Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed at Rome on 4 November 1950, anyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. That right is a corollary of the fundamental right to a fair hearing laid down in Article 6(1) of the ECHR and is an integral part of the rights of the defence, as recognised by the case–law as general principles of Community law applicable to the penalty-based administrative procedures laid down in Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) (Cases 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 172 to 176; C–7/98 *Krombach* [2000] ECR I–1935, paragraphs 25 and 26; C–274/99 P *Connolly* v *Commission* [2001] ECR I–1611, paragraphs 37 and 38; and 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, paragraphs 63 and 64; see also Case T–15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II–1613, paragraphs 109 and 122, and Case T–23/99 *LR AF 1998* v *Commission* [2002] ECR II–1705, paragraph 220), and is confirmed by Article 6(2) EU and by Article 48(2) of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 at Nice (OJ 2000 C 364, p. 1).

24 Under Article 15(2) of Regulation No 17, the fines which may be imposed on undertakings do, in fact – notwithstanding what is stated in Article 15(4) of that regulation – have a 'criminal law character' given their deterrent and punitive objective (Opinion of Judge Vesterdorf, acting as Advocate General in Case T–1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II–867; see also the Opinion of Advocate General Roemer in Case 14/68 *Wilhelm* [1969] ECR 1, points 17 and 24; Opinion of Advocate General Mayras in 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; Opinion of Advocate General Léger in Case C–185/95 P *Baustahlgewerbe* v *Commission* [1998] ECR I–8417, I–8422, point 31; and the Opinions of Advocate General Ruiz–Jarabo Colomer in Case C–204/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I–133, point 26; Case C–205/00 P *Irish Cement* v *Commission* [2004] ECR I–171, point 32; Case C–213/00 P *Italcementi* v *Commission* [2004] ECR I–230, point 26; Case C–217/00 P *Buzzi Unicem SpA* v *Commission* [2004] ECR I–267, point 29; and in Case C–219/00 P *Cementir* v *Commission* [2004] ECR I–342, point 25). That conclusion is also to be inferred from the case–law of the European Court of Human Rights ('Eur. Court H. R.') (*Engel and others* v. *the Netherlands*, judgment of 8 June 1976, Series A no. 22 (1977), § 82; *Oztürk* v *Germany*, judgment of 21 February 1984, Series A no. 73, § 53; and *Lutz* v

Germany, judgment of 25 August 1987, Series A no. 123, § 54).

25 In that regard, the applicant disputes the Commission's statement that no offence is imputed to undertakings during the investigation stage of the administrative proceedings. On the contrary, according to the applicant, the Commission takes measures during that stage which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (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 Maatschappijand Others* v *Commission* [2002] ECR I–8375, paragraph 182). The fact that, under the procedure laid down in Regulation No 17, the persons concerned are not the subject of any formal accusation until they receive the statement of objections (Joined Cases T–5/00 and T–6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II–5761, paragraph 79) is not decisive and does not rule out the possibility that, during the investigation stage, the applicant may already have become 'a person charged' for the purposes of Article 6(3) of the ECHR, as interpreted by the Eur. Court H. R. In the light of that case–law, a formal indictment is not necessary but the initiation of an investigation procedure of criminal law character is sufficient (Eur. Court H. R. *Delcourt* v *Belgium*, judgment of 17 January 1970, Series A no. 11, p. 13, § 25; *Ringeisen* v *Austria*, judgment of 17 July 1971, Series A no. 13, p. 45, § 110; *Deweer* v *Belgium*, judgment of 27 February 1980, Series A no. 35, p. 22, § 42; *Viezzer* v *Italy*, judgment of 19 February 1991, Series A no. 196-B, p. 21, § 17; *Adolf* v *Austria*, judgment of 26 March 1982, Series A no. 49, p. 15, § 30; and *Imbrioscia* v *Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36).

26 The applicant submits that it is apparent from the objective of Article 6(3)(a) of the ECHR that, in the context of criminal proceedings, a person charged with an offence must be informed immediately of the initiation and purpose of the investigation concerning him, so that he is not left in a state of uncertainty for longer than necessary. By contrast, a notification only at the formal indictment stage, which often does not take place until after a series of long investigations, is not sufficient and risks seriously compromising the fairness of the remainder of the proceedings and depriving the right guaranteed by Article 6(3)(c) of the ECHR of its useful effect. Where, as in the present case, the Commission carries out the investigation secretly for approximately three years before adopting the statement of objections, it gains an unfair start in terms of collecting evidence which is incompatible with Article 6 of the ECHR. That stems from the fact that, in view of the time which has elapsed, it is difficult – or even virtually impossible – for the undertakings concerned to reconstruct the facts and to provide evidence to the contrary.

27 In addition, the obligation to notify immediately the undertakings concerned stems from the importance, or decisive nature, of the investigation procedure for the Commission's future decision (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 63). After a long investigation, carried out with the support of the applicants for immunity or clemency, which precedes the adoption of the statement of objections, the Commission has a tendency to believe that the facts have already been established and is subsequently not very inclined to review the conclusions which it has drawn from that investigation. The risk of the forthcoming decision being biased is all the greater given that the Commission alone acts as investigator, prosecutor and judge. In the circumstances of the present case, the Commission was no longer an impartial judge and the applicant no longer had an adequate and sufficient opportunity (see Eur. Court H. R., *Delta* v *France*, judgment of 19 December 1990, Series A no. 191-A, p. 16, § 36) to contest the false allegations made by AKZO, the main witness for 'the prosecution'. Thus, at the stage of notification of the statement of objections, the undertaking concerned finds itself in a situation in which its chances of convincing the Commission of the erroneous nature of the presentation of the facts in that statement are significantly reduced, which seriously impairs the effectiveness of its defence.

28 The applicant points out that, in the present case, the Commission based its complaints almost exclusively on the witness statement of the applicant for immunity, AKZO, with which it has had close contact since the year 2000. Accordingly, the applicant maintains that, in the eyes of the Commission, AKZO was more credible than any undertaking, such as the applicant, which did not undertake to cooperate under point B(d) of the Leniency Notice and which the staff in charge of the case-file did not know personally. Consequently, the Commission attributed more weight to AKZO's false statements concerning the applicant's role than to the information provided by the applicant, without giving the applicant the opportunity to defend itself in an effective manner against AKZO's statements and to rectify them.

29 In the present case the Commission should have informed the applicant of the nature and the reasons for the suspicions against it when, on 27 June 2000, AKZO sent it a description of the applicant's alleged role in the cartel – given that, as of that moment, the Commission's future decision risked being biased as a result of AKZO's false allegations – and, at the latest, on 18 June 2001, when AKZO submitted its final witness statement to the Commission. The contested decision was based, as far as concerns the applicant, almost exclusively on that witness statement. Consequently, by not informing the applicant as soon as the inquiry was launched against it, the Commission infringed the applicant's right to a fair hearing and its rights of defence under Article 6 (1) and (3)(a) of the ECHR.

30 In the applicant's view, that illegality must lead to the annulment of the contested decision (Opinion of Advocate General Mischo in Case C‑250/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, ECR I‑8503, point 80). In order to ensure the useful effect of the right guaranteed under Article 6(3)(a) of the ECHR, which is an elementary procedural guarantee in a society governed by the rule of law, the undertaking concerned cannot be required to show that the Commission's decision would have been different if it had been informed in good time. The act of informing the accused in good time and in an exhaustive manner constitutes the *condicio sine qua non* of a fair hearing and is mandatory. Accordingly, any decision imposing a fine which has been adopted in infringement of that procedural guarantee must be annulled.

31 In the alternative, the applicant claims that, if the Commission had respected the right guaranteed under Article 6(3)(a) of the ECHR and had informed it without delay of the nature and purpose of the investigation against it, it could have reconstructed the relevant facts more easily and more exhaustively than it had been able to in 2003. In particular, it could have drawn the Commission's attention to the erroneous nature of AKZO's witness statement concerning its role in the cartel. That challenge to the evidence would have led the Commission to seek further information from AKZO and, where necessary, to carry out an investigation under Article 14 of Regulation No 17.

32 However, in the absence of timely information, the applicant was deprived of the possibility of exercising decisive influence over the conduct of the investigation or over the Commission's internal decision-making process. Otherwise, the Commission would have concluded that the applicant had not actually committed an infringement and that its relationship to the organic peroxide producers involved in the cartel was one of non-punishable complicity. Thus, at that decisive stage of the procedure, the Commission deprived the applicant of the opportunity to defend itself quickly and effectively against AKZO's allegations.

33 Accordingly, the contested decision should be annulled for infringement of the rights of the defence and of Article 6(3)(a) of the ECHR.

34 In that regard, the applicant none the less acknowledged at the hearing, in response to a specific question put by the Court, that, in its view, even if it had been informed at the stage of the request for information of 3 February 2003 and had thus had the opportunity to defend itself more effectively, that would not have changed the Commission's findings concerning the applicant in the contested decision. Formal note to that effect was taken in the minutes of the hearing.

(b) Arguments of the Commission

35 The Commission disputes that it is required, prior to notifying the statement of objections, to inform the applicant of the nature of and the reasons for the investigation concerning it.

36 First, as is expressly confirmed in Article 15(4) of Regulation No 17, neither the administrative procedure nor the possibility of imposing fines under that regulation is of a criminal law nature. Second, that procedure is divided into two stages, namely a preliminary investigation stage and an inter partes stage which covers the period from notification of the statement of objections to adoption of the final decision. Although the inter partes stage enables the Commission to give a final decision on the infringement concerned (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 182 to 184), no offence is imputed to the undertakings concerned during the investigation stage. That stage enables a search to be made for the factual evidence which enables the Commission to determine whether or not it is appropriate to take action against an undertaking. To that end, the Commission can require information and the undertakings are under an obligation to cooperate actively in providing all information relating to the subject-matter of the inquiry (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 27).

37 At the time when such measures of inquiry are adopted, the Commission is not yet in a position to impute offences to undertakings because it is still seeking the evidence which might lead a statement of objections to be adopted. Accordingly, the mere fact that an undertaking is the subject of measures of inquiry on the part of the Commission cannot be assimilated to an accusation of that undertaking (Opinion of Advocate General Mischo in Case C–250/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 41 to 46). Consequently, the applicant's argument that it should already have been informed at the investigation stage in order to be able to draw up its defence cannot be upheld.

38 The Commission acknowledges that the rights of the defence, as fundamental rights, form an integral part of the general principles of law, whose observance the Community judicature must ensure (*Krombach*, cited in paragraph 23 above, paragraphs 25 and 26, and *Connolly* v *Commission*, cited in paragraph 23 above, paragraphs 37 and 38). In addition, it is true that the Commission has to ensure that those rights are not impaired during the investigation stage, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings such that they may incur liability (*Hoechst* v *Commission*, cited in paragraph 27 above, paragraph 15, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 63). However, that obligation relates only to certain rights of the defence, such as the right to legal representation and the privileged nature of correspondence between lawyer and client, whereas other rights relate only to the inter partes proceedings initiated following the adoption of a statement of objections (*Hoechst* v *Commission*, cited in paragraph 27 above, paragraph 16).

39 In any event, the alleged right to be informed immediately of the nature of and the reasons for the investigation does not exist, nor does it result from Article 6(3)(a) of the ECHR, because there is no element of 'accusation' during the investigation stage. Such formal 'accusation' occurs only at the stage of the notification of the statement of objections (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 25 above, paragraph 79). That statement implies the initiation of the procedure under Article 3 of Regulation No 17 and demonstrates the Commission's intention to adopt a decision finding an infringement (see, to that effect, Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 16). At the same time, that statement serves as a means of informing the undertaking of the subject-matter of the procedure which is initiated against it and of the conduct imputed to it by the Commission (Joined Cases T-305/94, T-306/94, T-307/94, T–313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T–335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II–931, paragraph 132, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 25 above, paragraph 80).

40 That is confirmed in the case–law according to which there is no right under Community competition law to be informed of the state of the administrative procedure before the statement of objections is formally issued; an interpretation to the contrary would give rise to a right to be informed of an investigation in circumstances where suspicions exist in respect of an undertaking, which would seriously hamper the work of the Commission (Case T–50/00 *Dalmine* v *Commission* [2004] ECR II–2395, paragraph 110).

41 The Commission adds that, although the case–law of the Eur. Court H. R. in relation to Article 6 of the ECHR may, where necessary, play a role in the context of investigation procedures which have a criminal law character – as regards, for example, the calculation of a 'reasonable time' within the meaning of Article 6(1) of the ECHR – there is nothing to suggest that that is also the case for Article 6(3)(a) of the ECHR. In order to be taken into account, failure to respect the guarantees under Article 6(3)(a) of the ECHR at the investigation stage must seriously compromise the fair nature of the proceedings (Eur. Court H. R. *Imbroscia* v *Switzerland*, judgment of 24 November 1993, Series A no. 275, § 36, and the case–law cited therein), account being taken of the implementation of the procedure as a whole.

42 In the present case, the inter partes stage of the administrative procedure laid down in Regulation No 17 is particularly important in that regard since it aims precisely to inform the person concerned of the nature and grounds of the accusation made against him. However, the applicant has not brought any complaint regarding the proper conduct of that stage of the procedure. Thus, the applicant cannot assert for the first time in its reply that it was not given the opportunity, during the inter partes stage of that procedure, to voice its point of view, in an appropriate and sufficient manner, on the version of the facts adopted by the Commission. In any event, the applicant's false allegation cannot call into question either the inter partes nature of that stage of the administrative

procedure, or its fairness.

43 Consequently, the present plea must be rejected as unfounded.

2. Findings of the Court

44 By its first plea, the applicant claims in essence that the Commission infringed its rights of defence and, in particular, its right to a fair hearing, as recognised by Article 6(3)(a) of the ECHR, by failing to inform it, very early on in the investigation procedure, of the nature of and the reasons for the accusation made against it and, in particular, by failing to send it AKZO's witness statements earlier.

45 It should be pointed out, at the outset, that the Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not as such form part of Community law. That said, the fact remains that the Community judicature is called upon to ensure the observance of the fundamental rights which form an integral part of the general principles of law and, for that purpose, it draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights, on which the Member States have collaborated and to which they are signatories. In that regard, the ECHR has special significance, as confirmed by Article 6(2) EU (see, to that effect, Case T‑112/98 *Mannesmannröhren‑Werke* v *Commission* [2001] ECR II‑729, paragraphs 59 and 60 and the case‑law cited therein). That has also been reaffirmed in the fifth recital in the preamble to the Charter of Fundamental Rights of the European Union, and Articles 52(3) and 53 thereof.

46 In that regard, it is settled case‑law that the rights of the defence in any proceedings in which penalties, especially fines or penalty payments, may be imposed, such as those provided for in Regulation No 17, are fundamental rights forming an integral part of the general principles of law, whose observance the Community judicature ensures (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 64, and Case C‑3/06 P *Groupe Danone* v *Commission* [2007] ECR I‑1331, paragraph 68).

47 It should also be pointed out that the administrative procedure under Regulation No 17, which takes place before the Commission, is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary investigation stage and an inter partes stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 17 and which covers the period up until the notification of the statement of objections, is intended to enable the Commission to gather all the relevant information confirming or not the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the inter partes stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 181 to 183, and Case C‑105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I‑8725, paragraph 38).

48 First, as regards the preliminary investigation stage, the Court has stated that the starting point of that stage is the date on which the Commission, in exercise of the powers conferred on it by Articles 11 and 14 of Regulation No 17, takes measures which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraph 182, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraph 38). Second, it is apparent from the case‑law of the Court of Justice that it is not until the beginning of the inter partes administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 315 and 316; *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 66 and 67; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraph 47; and Case

C‑407/04 P *Dalmine* v *Commission* [2007] ECR I‑829, paragraph 59). If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it (*Dalmine* v *Commission*, cited in paragraph 40 above, paragraph 60).

49 Accordingly, the applicant's argument that respect for the rights of the defence and the right to a fair hearing implies that it be granted access to AKZO's witness statements during the preliminary investigation stage must be rejected.

50 The fact nevertheless remains that, as is apparent from the case‑law cited in paragraph 48 above, the measures of inquiry adopted by the Commission during the preliminary investigation stage – in particular, the measures of investigation and requests for information under Articles 11 and 14 of Regulation No 17 – suggest, by their very nature, that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected.

51 Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (see, to that effect, *Hoechst* v *Commission*, paragraph 27 above, paragraph 15). As regards the observance of a reasonable period of time, the Court has thus held, in essence, that an excessively lengthy preliminary investigation may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence where those rights are relied on during the inter partes stage. The more time that elapses between a measure of investigation and the notification of the statement of objections, the greater the likelihood that exculpatory evidence can no longer be obtained or only obtained with difficulty. For that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights produce their full effects, that is to say, the inter partes stage of the administrative procedure, but must extend to the entire procedure and be carried out by reference to its total duration (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraphs 49 and 50).

52 The Court considers that those considerations apply by analogy to the question whether and, if so, to what extent the Commission is required to provide the undertaking concerned, as of the preliminary investigation stage, with certain information on the subject-matter and purpose of the investigation, which enable its defence in the inter partes stage to be effective. Even though, in formal terms, the undertaking concerned does not have the status of 'a person charged' during the preliminary investigation stage, the initiation of the investigation in its regard, by the adoption of a measure of inquiry concerning it, cannot generally be dissociated, in substantive terms, from the existence of suspicion, hence from an implied imputation of misconduct for the purposes of the case‑law cited in paragraph 48 above, which justifies the adoption of that measure (see also, to that effect, Eur. Court H. R., *Casse* v *Luxembourg*, no. 40327/02, § 29 to 33, 71 and 72, 27 April 2006).

53 As regards the scope of that duty to inform, it should be noted that, in a request for information – whether informal for the purposes of Article 11(2) of Regulation No 17 or in the form of a decision under Article 11(5) thereof – the Commission is required, under Article 11(3) and in order, inter alia, to respect the rights of defence of the undertakings concerned, to state the legal basis and the purpose of that request. Thus, the necessity, for the purposes of Article 11(1) of Regulation No 17, of the information requested by the Commission must be assessed by reference to the purpose of the inquiry, as compulsorily stated in the request for information itself. In that regard, the Court has pointed out that the Commission is entitled to require only the disclosure of information which may enable it to investigate putative infringements which justify the investigation and which are set out in the request for information as such (see, to that effect, Case T‑39/90 *SEP* v *Commission* [1991] ECR II‑1497, paragraph 25, and Case T‑34/93 *Société générale* v *Commission* [1995] ECR II‑545, paragraphs 39, 40, 62 and 63).

54 Next, it should be noted that the Commission is required to point out in a decision ordering investigation, under Article 14(3) of Regulation No 17, the subject-matter and purpose of that investigation. That requirement constitutes a fundamental guarantee of the rights of defence of the undertakings concerned, with the result that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations

concerning the effectiveness of the investigation. In that regard, it is apparent from the case-law that, although it is true that the Commission is not required to communicate to the addressee of a decision ordering investigation all the information at its disposal concerning the putative infringements or to make a precise legal analysis of those infringements, it must nevertheless clearly indicate the presumed facts which it intends to investigate (see, to that effect, *Hoechst* v *Commission*, cited in paragraph 27 above, paragraph 41; Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraphs 8 and 9; judgment of 12 July 2007 in Case T-266/03 *CB* v *Commission,* not published in the ECR, paragraph 36; see, by analogy, *Société générale* v *Commission*, cited in paragraph 53 above, paragraphs 62 and 63). By the same token, in the context of an investigation based on Article 14(2) of Regulation No 17, the Commission's inspectors must produce written authorisation specifying the subject-matter and purpose of the investigation.

55 The Court considers that the requirements set out in paragraphs 53 and 54 above apply independently of the question whether the request for information, which is sent to an undertaking suspected of having committed an infringement, is a formal decision for the purposes of Article 11 (5) of Regulation No 17, or an informal letter for the purposes of Article 11(2) thereof. In addition, in the context of the preliminary investigation stage, the opportunity for the undertaking concerned to prepare its defence effectively cannot vary depending on whether the Commission adopts a measure of inquiry under Article 11 or Article 14 of Regulation No 17, since all those measures suggest that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraph 182, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraph 38).

56 It follows that, when the first measure is taken in respect of an undertaking, including in requests for information under Article 11 of Regulation No 17, the Commission is required to inform the undertaking concerned, inter alia, of the subject-matter and purpose of the investigation underway. In that regard, the reasoning does not need to be so extensive as that required for decisions ordering investigation, owing to the more restrictive nature of the latter and the particular intensity of their impact on the legal situation of the undertaking concerned (see, in relation to the Commission's powers of investigation, *CB* v *Commission*, cited in paragraph 54 above, paragraph 71). That reasoning must, however, enable the undertaking to understand the purpose and the subject-matter of that investigation, which means that the putative infringements must be specified and, in that context, the fact that the undertaking may be faced with allegations related to that possible infringement, so that it can take the measures which it deems useful for its exoneration and, thus, prepare its defence at the inter partes stage of the administrative procedure.

57 Consequently, in the present case, the Commission was required, when it sent the request for information of 3 February 2003, to inform the applicant, inter alia, of the putative infringements concerned by the investigation and of the fact that, in that context, the Commission might have to impute to it unlawful conduct. It is apparent solely from that request that the Commission was in the process of investigating a putative infringement of Article 81 EC committed by European organic peroxide producers as a result of certain conduct, mentioned therein by way of example and in a general manner, but without any indication that the investigation also concerned a possible infringement attributed to the applicant. It appears that it was not until the meeting of 20 March 2003 – that is to say, several weeks before initiation of the formal investigation procedure – that the officials of the Commission in charge of the case-file pointed out that the applicant was also covered by the investigation. As matters stood, the need to give prior notice to the applicant was all the greater since, as the Commission itself stated, its decision to investigate a consultancy firm constituted a reorientation of its former decision-making practice and, consequently, the applicant could not necessarily expect to be directly concerned by the statement of objections.

58 However, that circumstance cannot, in itself, lead to the annulment of the contested decision. It is also necessary to establish whether the irregularity committed by the Commission was capable of actually compromising the applicant's rights of defence in the procedure in question (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 71 et seq., and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraphs 55 and seq.).

59 In the present case, the applicant has not produced any concrete evidence to establish that the irregularity in question adversely affected the efficiency of its defence during the inter partes stage of the administrative procedure and that the progress of that procedure, as a whole, and the content of the Commission's decision could have been influenced by a more efficient defence. On

the contrary, at the hearing, the applicant admitted that prior information regarding the allegations against it, in particular at the stage of the request for information of 3 February 2003, would not have had any influence on the conclusions reached by the Commission in its regard in the contested decision, and formal note of that acknowledgement was taken in the minutes of the hearing. The possibility of any such influence is even less likely since there was a gap of only seven weeks or thereabouts between the request for information, on the one hand, and the notification of the initiation of the formal investigation procedure and the notification of the statement of objections, on the other.

60 Consequently, the present plea must be rejected as unfounded.

C – The second plea, alleging infringement of the principle of nullum crimen, nulla poena sine lege

1. Arguments of the parties

a) Arguments of the applicant

General part

61 The applicant maintains that it has not infringed Article 81 EC since its relationship to the cartel members – AKZO, Atochem/Atofina and PC/Degussa – was merely one of non-punishable complicity. It claims that the Commission itself acknowledged, in recital 339 of the contested decision, that the applicant was not a contracting party to the cartel concluded by those organic peroxide producers. None the less, the Commission reached the very vague conclusion, in recital 349 of the contested decision, that the applicant 'was party to the agreement and/or took decisions as an undertaking and/or as an association of undertakings'. Next, the Commission acknowledged, in recital 454 of that decision, that 'addressing a decision to an undertaking and/or association of undertakings having a role of this kind in a cartel is to a certain extent a novelty'. In the applicant's view, the Commission thus overstepped the limits of the power conferred on it by Article 15(2) of Regulation No 17, read in conjunction with Article 81(1) EC, and infringed the principle of *nullum crimen,nulla poena sine lege*. In addition, the Commission's imprecise legal assessment is based on erroneous findings of fact concerning the applicant's role in the cartel.

The challenge of the facts found in the contested decision

62 The applicant essentially disputes the importance attributed by the Commission, in the contested decision, to its activity in the cartel (recitals 95, 105, 332, 333 and 345 of the contested decision). In reality, the applicant, as a consultancy firm and an agent subject to the instructions of AKZO, Atochem/Atofina and PC/Degussa, merely provided those undertakings with clerical-administrative services, the vast majority of which had nothing to do with the cartel.

63 First, between the end of 1993 and the end of 1999, the applicant was linked, by virtue of the Swiss law of obligations and without any anti–competitive intention, to those three organic peroxide producers by service contracts termed 'agency agreements'. On the basis of those agency agreements and on the instructions of those producers, it (i) established market statistics; (ii) organised four official meetings of those producers in Zurich while attending the official part of those meetings; (iii) reserved a meeting room for four unofficial meetings of those producers in Zurich, but without attending – or only partly – those meetings or being aware of their content; (iv) reimbursed the representatives of those producers the travel costs incurred in attending those meetings; and (v) kept hold of certain documents – some of which were anti-competitive – on behalf of PC/Degussa and Atochem/Atofina.

64 In addition, contrary to the finding in recital 340 of the contested decision, those agency agreements did not restrict competition; only the agreements between the producers, in particular the 1971 agreement, to which the applicant was never a party (recital 339 of the contested decision), provided for restrictions of competition on the organic peroxide market. Thus, the statement in recital 335 of the contested decision that the applicant's activity 'formed the basis to realise the cartel' is also incorrect, since that cartel was created in 1971 by AKZO, Atochem/Atofina and PC/Degussa without the applicant's assistance. In essence, the applicant states that, in so far as those of its activities characterised as misconduct were linked to the cartel, such as the reservation of meeting rooms and the reimbursement of travel costs, for the three organic peroxide producers they were merely of a logistical and clerical-administrative nature.

65 Second, the applicant essentially claims that, in referring – in recitals 87, 109 et seq. and, in particular, in recital 209 of the contested decision – to 'Fides/AC-Treuhand' as a single unity, the Commission wrongly attributed to it the acts committed by Fides during the period from 1971 to 1993. In so doing, the Commission infringes the principles of culpability and individual liability and adversely affects the applicant's reputation (Case C‑49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I‑4125, paragraph 145). The applicant, which was founded in 1993, is not liable for Fides' conduct and there is no structural link, in terms of company law, between the two. At the end of 1993, the applicant acquired from Fides only the department in charge of providing management advice to associations, and then concluded new agency agreements with Fides' former clients. In addition, Fides' letter of November 1993, in which it advised its former clients to continue their commercial relations with the applicant, is not evidence which is relevant to show the alleged 'personal continuity' between Fides and the applicant. It is common practice in the context of company takeovers that, for marketing reasons, the seller sends such 'letters of recommendation' concerning the possible transfer of agency to the company which has taken over. The applicant concludes from this that it cannot be held liable for Fides' conduct, a fact which should have led the Commission to attribute significantly less importance to its role during the decisive period from 1994 to 1999.

66 In that regard, the applicant states that, unlike Fides, it did not participate in the anti-competitive exchange of information between the three organic peroxide producers. The description of the applicant's role in recitals 91 et seq. of the contested decision does not take account of the fact that, in 1993, those producers substantially modified the manner of operation of the cartel by abandoning thereafter the practice of communicating to one another, with the participation of Fides, sales and price figures in meetings. After 1993 that system was replaced by a system run by AKZO, in which the applicant did not participate and of which it was not even aware, under which information was exchanged by fax and in meetings referred to as 'working groups' (recital 136 of the contested decision). In that context, AKZO established detailed statistics to be presented at the meetings of the working group, ran those meetings, ensured that market shares were being respected and insisted that the other producers increase their prices.

67 Third, as regards the storage of the originals of the 1971 and 1975 agreements, the applicant asserts that it stored in its safe only the copies of Atochem/Atofina and PC/Degussa, which were free to take them away or consult them at any time. Furthermore, the applicant admits to having calculated until 1995 or 1996, on behalf of the organic peroxide producers, the deviations from the quotas agreed between them. The members of the cartel were also free to consult the documents relating to that calculation at any time. The conservation of documents of a third party by the applicant does not constitute, in itself, conduct which is prohibited under the competition rules.

68 Fourth, the applicant disputes the allegation that it collected information on the sale of organic peroxide and provided the 'relevant statistics' to the members of the cartel (recital 92 of the contested decision). The applicant claims that those statistics were lawful and had nothing to do with the cartel, as has been confirmed, according to the applicant, by AKZO, Atochem/Atofina and PC/Degussa. Following the implementation by Fides, at the request of those producers, of an official information system on the organic peroxide market, the applicant concluded tacitly, at the end of 1993, new agency agreements with them which concerned the drawing up of 'neutral' market statistics. Those statistics were based on past sales figures (in tons), as provided by those producers, and neither the prices charged by them nor the names of their clients were identified in those statistics. They were accompanied by a list of the categories of relevant goods which the Commission wrongly designated as 'code AC-Treuhand' (recital 105 of the contested decision). However, that list was merely a working tool for the applicant to enable it to establish the market statistics and for the company in charge of auditing the sales volumes communicated by the producers. The statistics established in that manner indicated, for the categories of organic peroxide concerned, merely the total volume of the market for the preceding year or the preceding quarter, the sales volume for each producer and its market share, but no information concerning competitors.

69 In that regard, the applicant points out that, between 1993 and 1999, the exchange between the organic peroxide producers of sales volumes and prices by country and by client and, consequently, the coordination of their conduct, no longer followed the rules agreed in 1971 and in 1975, but was made by fax or at separate meetings of the working group and, occasionally, following official meetings in Zurich, but without the applicant's participation (recitals 128 and 136 of the contested decision). The applicant concludes from this that, contrary to the impression created in recital 92 of the contested decision, the market statistics which the applicant established did not serve to coordinate the conduct of the producers. Nor did the preparation and the review of the data from the market information system constitute the basis of the infringement. From 1993 onwards, the

statistics established by the applicant were not related to its attendance at the meetings of the cartel or proposing of quotas. That link was broken, at the latest, in 1996 when the applicant stopped calculating the deviations from the agreed quotas.

70 The applicant states that the auditing of the sales figures of the organic peroxide producers had nothing to do with the cartel. The applicant neither 'undertook nor approved' the auditing in that regard (recital 333 of the contested decision); nor was it the cartel's 'accountant' (recital 404 of the contested decision). That erroneous assessment is a result of: (i) bracketing together the functioning of the lawful market information system and that of the cartel's system; and (ii) a confusion with the duties of the company acting as sub–agent for the applicant, which audited the sales volumes communicated to the applicant by the producers, every three to six months, concerning each category of products. On that basis, the applicant calculated the respective market shares in order to send the 'total market figures' back to the producers. Finally, the auditing of the sales volumes communicated to the applicant met the wishes of the three producers and is a common and lawful practice in the context of professionally competent market information systems which has nothing to do with the cartel.

71 Fifth, the applicant disputes the Commission's assertion that it attended 'at least at one instance' a working group meeting (recital 92 of the contested decision), or even a number of those meetings (recital 99 thereof). In reality, the applicant almost never attended the meetings of the three organic peroxide producers which were held for anti-competitive purposes. Out of the 63 meetings which took place from the end of December 1993, as set out in table 4 of the contested decision (p. 28 et seq.), of which only nine were held in Zurich, only five were partly attended by employees of the applicant, namely the meetings in Zurich on 25 October 1994, 16 February 1995, 16 January and 19 April 1996 and 23 November 1998. To that list it is appropriate to add the meeting in Amersfoort (Netherlands) on 19 October 1998, which was attended only by representatives of AKZO and a former employee of the applicant, Mr S. However, the applicant disputes, in a very detailed manner, the significance attributed by the Commission, in the contested decision, to the attendance of Mr S. In any event, it is for the Commission to prove that the applicant actually attended meetings which had an anti-competitive purpose (*Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 78).

72 The applicant states that, with the exception of the meeting of 16 January 1996, all the meetings were so-called 'summit' meetings consisting of an 'official' part and an 'unofficial' part. The applicant's employees attended only the official part of those meetings in the context of which only issues relating to official market statistics, product classification and product safety were addressed. In that context, the applicant's role was limited to clerical-administrative activities, such as sending out letters of invitation setting out the agenda, reserving meeting rooms and, where necessary, hotel rooms, welcoming participants and taking minutes of the official meetings. On instruction, the applicant also made a telephone booking to reserve a hotel conference room for the 'unofficial' meetings in Zurich on 23 October 1997, 17 April 1998 and 27 October 1998, but without attending those meetings itself.

73 Accordingly, AKZO's assertion, as reproduced in recital 127 of the contested decision, that the applicant was 'continuously' involved in the yearly meetings – for example, when market shares needed to be adapted – is manifestly erroneous. The applicant's attendance was not necessary for that purpose, since each of the organic peroxide producers knew the 'official' market shares owing to the exchange between them of their sales volumes by fax or at working group meetings (recital 128 of the contested decision).

74 Sixth, the applicant submits that it was neither the chairman nor the moderator of the cartel (recitals 92, 99, 102 and 336 of the contested decision). Firstly, there was no 'chairperson' at the few meetings of the three organic peroxide producers which the applicant attended between 1994 and 1999 and during which its role was limited to welcoming the participants and taking minutes of the official part of the meeting. Secondly, the applicant neither acted as 'moderator' in the case of tension between the members of the cartel nor encouraged the latter to reach a compromise: the participants always came to the conclusion by themselves that abandoning the discussions would only make the situation worse. Furthermore, in view of the fact that the applicant did not attend the unofficial meetings (see paragraph 72 above), it could not have acted as moderator in the case of tension between the members of the cartel.

75 In that regard, the applicant disputes having declared in its response to the statement of objections that it had 'acted as an intermediary' (recitals 92, 94 and 99 of the contested decision). In reality, the applicant had stated that, as secretary, Mr S had merely played an 'organisational role in the

meetings', which means, inter alia, that he opened with a few words of welcome the four official and lawful 'summit' meetings held between 1994 and 1999 (see paragraph 72 above) and that he announced the lunch break. However, Mr S never or almost never attended, during that same period, the unofficial meetings of the three organic peroxide producers. Point 10 of the 1971 agreement, under the title 'Arbitration', shows that the producers themselves played the role of moderators, which was confirmed by Atochem/Atofina in relation to AKZO's role as moderator at numerous meetings. The applicant concludes from this that AKZO made false accusations against it in order to turn attention away from the role which AKZO itself played as moderator.

76 Seventh, the applicant reaffirms that it carried out the task of calculating the deviations from the agreed quotas and sending them to the organic peroxide producers, under the terms of its mandate and on instruction, only until 1995 or 1996. From 1997 at the latest the calculation of those deviations was made by the three producers themselves, under the supervision of AKZO, on the basis of their sales statistics which they exchanged at the meetings of the working group or by fax (see paragraph 69 above). AKZO then established, on that basis, the overall statistics consisting of the sales statistics of all the organic peroxide producers and presented them at the next meeting of the working group. In addition, the documents produced by AKZO with the intention of proving that, in 1996 or in 1997, the applicant continued to calculate the deviations from the agreed quotas originated from AKZO itself and not from the applicant.

77 Finally, the applicant submits that the Commission's assessment of the evidence is unlawful because it fails to have regard to the presumption of innocence (*Baustahlgewerbe* v *Commission*, cited in paragraph 24 above, paragraph 58) or the fundamental right to a fair hearing, as laid down in Article 6(1) of the ECHR and Article 47(2) of the Charter of Fundamental Rights of the European Union. The Commission endorsed AKZO's erroneous witness statement without investigating whether it was well founded in the light of the witness statements provided by Atochem/Atofina, PC/Degussa and the applicant contradicting that statement. It is apparent from Article 6(1) of the ECHR that statements made by a cooperating party can be regarded as credible only when they are supported by additional and independent evidence (Eur. Commission H. R., *X* v *United Kingdom*, no 7306/75, decision of 6 October 1976, *Decisions and Reports*, no 7, p. 119, 122). In addition, credibility is the sole relevant criterion for assessing the evidence produced (Case T‑44/00 *Mannesmannröhren‑Werke* v *Commission* [2004] ECR II‑2223, referring to the Opinion of Judge Vesterdorf, acting as Advocate General in *Rhône-Poulenc* v *Commission*, cited in paragraph 24 above, ECR II‑869; see also, to that effect, Joined Cases C‑310/98 and C‑406/98 *Met‑Trans and Sagpol* [2000] ECR I‑1797, paragraph 29, and Joined Cases T‑141/99, T‑142/99, T‑150/99 and T‑151/99 *Vela and Tecnagrind* v *Commission* [2002] ECR II‑4547, paragraph 223).

78 A cooperating party has every reason not to tell the truth and the Commission is required, of its own motion, to call its statement into question, especially if it is decisive for the final decision and is contradicted by another statement (see also recital 85 in the preamble to Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article [81 EC] (IV/31.371 – Roofing felt) (OJ 1986 L 232, p. 15), and recital 278 of the contested decision). In the present case, the Commission infringed those principles by accepting numerous false accusations made by AKZO against the applicant without producing other independent evidence to that effect (see also, to that effect, judgment of 14 October 1994 in Case T‑44/02 *Dresdner Bank* v *Commission,* not published in the ECR, paragraph 74). As it is, a particularly critical examination of AKZO's statements was necessary in the light, first, of the danger that AKZO was exaggerating the role and importance of the applicant in order to turn attention away from its own decisive role in the implementation of the cartel and, second, of the fact that AKZO was late in making some of its unfounded accusations against the applicant.

79 If AKZO had admitted in its letter of 17 February 2003 that it was itself responsible for the proposal of new quotas and not the applicant, the Commission would have had no choice but to take note of AKZO's decisive role in the cartel, which – pursuant to point B(e) of the Leniency Notice – would have prohibited it from exempting AKZO from a fine. According to the applicant, the risk of being refused immunity from the fine and the scale of the fine with which AKZO was faced confirm the fact that AKZO had an incentive to testify against the applicant. Consequently, in basing its decision on AKZO's erroneous statements in the absence of additional and independent evidence in support of its complaints and without questioning the credibility of those statements or taking account of all the facts exculpating the applicant, the Commission failed to have regard to the requirements of the fundamental right to a fair hearing and to the presumption of innocence.

The infringement of the principle of *nullum crimen*, *nulla poena sine lege*

– The effects of the principle of *nullum crimen*, *nulla poena sine lege* on the distinction in Community competition law between perpetration and complicity

80 The applicant points out that, under Article 15(2)(a) of Regulation No 17, the Commission may impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81(1) EC. However, undertakings which, without participating in the cartel within the meaning of that latter provision, merely facilitate the infringement of Community law committed by the members of the cartel or encourage such an infringement to be committed do not infringe Article 81(1) EC and are not liable to a fine under Article 15(2) of Regulation No 17. Consequently, by finding, in the contested decision, that the applicant had infringed Article 81(1) EC and by imposing a fine on it, the Commission infringed the principle of *nullum crimen*, *nulla poena sine lege* as laid down in Article 7(1) of the ECHR. In addition, according to the applicant, the broad interpretation of Article 81(1) EC adopted by the Commission means that the constituent element of the infringement laid down in Article 81(1) EC may be discerned in all manner of conduct and thus fails to have regard for the principle of *nulla poena sine lege certa*.

81 The applicant submits that, under Community competition law, a distinction must be made between, on the one hand, perpetration of an infringement and, on the other, instigation of or complicity in an infringement. That distinction forms part of the general principles of Community law, in view of the similarity between the rules to that effect contained in the national legal orders, such as those laid down in Article 27(1) of the *Strafgesetzbuch* (German penal code), Article 48 of the *Wetboek van Strafrecht* (Netherlands penal code), Article 67 of the *code pénal belge* (Belgian penal code), Article 121-7 of the *code pénal français* (French penal code), Section 8 of the Accessories and Abettors Act 1861 (United Kingdom penal code), Article 28(2)(b) and Article 29 of the *Código penal* (Spanish penal code) relating to complicity, Articles 46 and 47 of the *Poinikos Kodikas* (Greek penal code), Articles 66 and 67 of the *code pénal luxembourgeois* (Luxembourg penal code), Articles 26 et seq. of the *Código penal* (Portuguese penal code), Chapter 23, section 4, of the *Brottsbalk* (Swedish penal code) and Chapter 5 of the *Rikoslaki* (Finish penal code). It is also confirmed by Article 2(1) of the Convention on the protection of the European Communities' financial interests of 26 July 1995 (OJ 1995 C 316, p. 49), and by Article 11 of the Corpus Juris introducing penal provisions for the purpose of protecting the financial interests of the European Union (established under the responsibility of Mireille Delmas-Marty, Economica, 1997).

82 Consequently, where penalties are imposed under Regulation No 17, it is also necessary to distinguish perpetration of an infringement from instigation of the infringement or complicity therein. According to the applicant, in Community competition law there is no legislative provision making it possible to penalise instigation of or complicity in an infringement. Thus, only a person who, as the perpetrator of an infringement, satisfies the condition laid down in Article 81(1) EC concerning the constitution of the infringement may be penalised. Instigation of an infringement or complicity therein is not punishable.

83 A contrary and broad interpretation of Article 81(1) EC, such as that adopted by the Commission in the present case, infringes the principle of *nullum crimen*, *nulla poena sine lege* within the meaning of Article 7(1) of the ECHR and Article 49(1) of the Charter of Fundamental Rights of the European Union. The Eur. Court H. R. has acknowledged that Article 7 of the ECHR enshrines both that principle and the principle that the criminal law may not be applied broadly, in particular by analogy, to the detriment of the defendant. It follows that an infringement must be clearly defined by the law itself (*Streletz and Others* v *Germany*, judgment of 22 March 2001, *Reports of Judgments and Decisions*, no 34044/96 inter alia, ECHR 2001–II, § 50 and the case–law cited therein).

84 The applicant maintains that the principle of *nullum crimen*, *nulla poena sine lege*, as a general principle of Community law, also applies to the penalty-based administrative procedure under Regulation No 17 and, in particular, to the fines provided for in Article 15(2) of that regulation. That follows clearly from both Article 6(2) EU and the case–law (Joined Cases C–74/95 and C–129/95 *X* [1996] ECR I–6609, paragraph 25; *Brugg Rohrsysteme* v *Commission*, cited in paragraph 23 above, paragraphs 109 and 122; and *LR AF 1998* v *Commission*, cited in paragraph 23 above, paragraphs 209 and 210). In addition, it is a principle intrinsic to the rule of law which ensures effective protection against arbitrary prosecution and punishment (Eur. Court H.R. *Streletz and Others* v *Germany*, cited in paragraph 83 above, § 50 and the case–law cited therein).

– The concept of perpetrator for the purposes of Article 81 EC

85 The applicant states that the principle *nulla poena sine lege certa*, laid down in Article 7(1) of the

ECHR (see paragraph 80 above), requires that a restrictive approach be adopted to the concept of perpetrator of an infringement for the purposes of Article 81(1) EC (see also, *X*, cited in paragraph 84 above, paragraph 25, and Case C‑195/99 P *Krupp Hoesch* v *Commission* [2003] ECR I‑10937, paragraph 86). That principle seeks to ensure that the penalty incurred for the infringement of a legal provision, such as the penalty provided for in Article 15(2) of Regulation No 17, is foreseeable for the person to whom that provision applies and that the decision-making power of the competent authority is delimited in such a way as to rule out the possibility of 'surprise' decisions. The Court of Justice has held that a penalty provided for under Community law, even where it is not a criminal penalty, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11, and Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15).

86 Moreover, according to the applicant, the greater the adverse effects for the individual, the more precise the terms in which the act of Community law must be framed. The Court has ruled to that effect in stating that the requirement of legal clarity is imperative in a sector in which any uncertainty may well lead to the application of particularly serious penalties (Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 46). In view of the particularly heavy fines which may be imposed under Article 15(2) of Regulation No 17, which is confirmed by the Commission's recent practice, the principle that penalties must have a proper legal basis justifies the application of a restrictive approach to the concept of perpetrator in the context of Article 81(1) EC. By the same token, the broad interpretation of Article 81(1) EC adopted by the Commission goes well beyond the mere gradual clarification, by means of judicial interpretation, of the rules governing criminal liability, since it is incompatible both with the generally recognised definition of the notion of 'agreement' and with the fundamental idea of autonomy which underlies the provisions in the field of competition.

87 The applicant submits that, in the present case, it was not the perpetrator of an infringement since it was neither a party to the cartel nor an association of undertakings. In reality, it merely colluded with AKZO, Atochem/Atofina and PC/Degussa, and such conduct does not constitute an infringement for the purposes of Article 81(1) EC. In the light of the national legislation referred to in paragraph 81 above, the distinction between the perpetrators of an infringement and the participants must be drawn on the basis of objective criteria. In order to be subject to punishment as the perpetrator of an infringement under Article 81(1) EC, it is necessary to belong to the categories of persons referred to in Article 81(1) EC and to commit the act referred to therein. By contrast, a person who, without satisfying the conditions relating to the constitution of an infringement for the purposes of Article 81(1) EC, knowingly facilitates, by either helping or assisting, the preparation or the commission of the infringement is merely complicit in the infringement and not subject to punishment.

88 The infringements specified in Articles 81 EC and 82 EC fall within a category known as 'special' offences since those articles restrict the circle of undertakings capable of being perpetrators of such infringements to those which satisfy specific requirements, namely, in the case of Article 81 EC, the undertakings which are contracting parties to the agreement restricting competition. That follows from the formulation 'agreements between undertakings' used in Article 81(1) EC and is confirmed by the case‑law (*Krupp Hoesch* v *Commission*, cited in paragraph 85 above, paragraph 86). Accordingly, only undertakings which are contracting parties to the agreement restricting competition are liable to a fine under Article 15(2) of Regulation No 17.

89 The applicant claims that the wording and purpose of Article 81(1) EC, which seeks to safeguard competition, make the status of perpetrator dependent on the question whether the undertaking in question is a competitor, hence exposed to competition and required to adopt certain competitive conduct. That provision applies only to undertakings which are subject to that specific obligation related to the objective of free competition. An agreement restricting competition can be concluded only between undertakings which have the status, on the market concerned, of competitors, or sources of supply or demand.

90 Consequently, an undertaking may be classed as the perpetrator of an infringement only where the agreement restricting competition comes into being in the context of its own sector of activity. The restriction of the circle of perpetrators of the infringement is also clear from the case‑law relating to the requirement of 'autonomy' which underlies the Treaty competition rules, according to which each economic operator must determine autonomously the policy which it intends to follow on the common market. That requirement of autonomy thus strictly precludes any direct or indirect contact between operators, the purpose or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which

they themselves have decided to adopt or which they contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, cited in paragraph 24 above, paragraph 174, and Case C‑199/92 P *Hüls* v *Commission* [1999] ECR I‑4287, paragraph 160).

– The applicant's complicit and non-punishable status

91 The applicant maintains that it was not a party to the agreement restricting competition entered into by the organic peroxide producers and that, in consequence, it did not infringe the requirement of autonomy which underlies competition law. It neither contacted its own competitors nor influenced or sought to influence their conduct on the market. Given that its economic activity is unrelated to the organic peroxide market, which was the subject of the infringement, the applicant does not satisfy the conditions laid down in Article 81(1) EC relating to the constitution of the infringement and cannot be considered to be a perpetrator of the infringement. Similarly, the Commission's submission that the 1971 agreement, together with the agency agreements between the applicant, on the one hand, and AKZO, Atochem/Atofina and PC/Degussa, on the other, form an alleged 'general and single agreement' implying the applicant's participation, is erroneous. The preamble to the 1971 agreement refers exclusively to the organic peroxide producers as the parties to that agreement (recital 80 of the contested decision).

92 As it is, the applicant has never been a party to that agreement (recital 339 of the contested decision), which formed the framework for the activities of the cartel between 1971 and 1999 (recitals 89, 90 and 316 of the contested decision); nor was it ever likely to become one since its economic activity is unrelated to the market concerned. However, by classing the applicant's participation in relation to certain aspects of the cartel as an infringement of Article 81(1) EC, the Commission fails to have regard to the wording of that provision. In addition, even supposing that the applicant had actually carried out the role which the Commission wrongly attributes to it (recital 334 of the contested decision), that role, in the absence of direct participation in the agreement which was restrictive of competition on the market concerned, is not capable of infringing Article 81 (1) EC but is one of non-punishable complicity.

– The Commission's former and contrasting decision-making practice

93 In addition, the applicant submits that the Commission's approach in the contested decision is at odds with its former decision-making practice, as followed since 1983, in accordance with which consultancy firms, which are not present on the market concerned by the infringement, are not considered to be parties to the agreement restricting competition or, consequently, as perpetrators of an infringement under Article 81(1) EC. The opposite approach, which was defended by the Commission in Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article [81 EC] (IV/29.869 – Italian cast glass) (OJ 1980 L 383, p. 19; 'the Italian cast glass decision'), fails to have regard to the principle of *nullum crimen*, *nulla poena sine lege*, since the consultancy firm concerned was not a party to the agreement restricting competition, but merely complicit in that agreement. For that reason, the Commission was right to abandon that approach implicitly as of 1983. In Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article [81 EC] (IV/30.064 – Cast iron and steel rolls) (OJ 1983 L 317, p. 1; 'the cast iron and steel rolls decision'), the Commission classed only the undertakings which were present on the market concerned by the infringement and which were parties to the agreement restricting competition as perpetrators of an infringement for the purposes of Article 81(1) EC, and not the consultancy firm entrusted with managing, inter alia, the system for the exchange of information between the members of the cartel (recitals 10 et seq.). That approach was also followed by the Commission in Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 – Polypropylene) (OJ 1986 L 230, p. 1; 'the polypropylene decision'), (see recital 66); Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81 EC] (IV/31.866, LdPE) (OJ 1989 L 74, p. 21; 'the LdPE decision') (see recitals 11 and 19); and Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article [81 EC] (IV/C/33.833 – Cartonboard) (OJ 1994 L 243, p. 1; 'the cartonboard decision') (see recitals 2, 27 et seq., 33, 37, 61 et seq., 134 and 162).

94 The Commission cannot claim that the applicant played a more important role, in the present case, than the consultancy firms in the decisions cited above. On the contrary, unlike the consultancy firms involved in the cases which gave rise to the cast iron and steel rolls decision and the cartonboard decision, the applicant almost never attended the meetings with an anti‑competitive purpose (see paragraph 72 et seq. above). In addition, the other facts complained of in respect of the applicant lack relevance and have nothing to do with the cartel. Thus, the market information system based on official statistics did not infringe Article 81(1) EC (Case C‑179/99 P *Eurofer* v

Commission [2003] ECR I–10725, paragraph 44, and Case T–136/94 *Eurofer* v *Commission* [1999] ECR II–263, publication by extracts, paragraph 186) since it did not involve the transfer between competitors of information covered by business secrets. In the light of the Commission's settled decision-making practice, that applies a fortiori where a consultancy firm merely uses the sales figures sent to it without itself participating in the exchange as such of sensitive information (recital 12 to Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (IV/31.865 – PVC) (OJ 1994 L 239, p. 14); recital 11 to the LdPE decision; and recital 66 to the polypropylene decision). Finally, the auditing by independent expert accountants of the sales figures sent by the cartel members is not restrictive of competition for the purposes of Article 81(1) EC. Accordingly, the applicant's 'secretarial' activities, referred to above, which are related to the cartel, amount merely to acts of complicity.

– The absence of any control over the cartel on the part of the applicant and of a causal link between the applicant's activity and the restriction of competition

95 The applicant states that it had no control over the infringement. The decisions relating to the implementation, the management and the orientation of the cartel were taken exclusively by the three organic peroxide producers. Consequently, there is no causal link between the applicant's activity and the restriction of competition on the organic peroxide market. As an agent under the Swiss law of obligations, subject to the instructions of those producers and to an obligation of confidentiality, the applicant was merely a tool of the cartel members. However, even that is not sufficient reason for the applicant to be regarded as a co–perpetrator of the infringement on the same level as the organic peroxide producers. The applicant's lack of control over the infringement is also evident from the fact that it did not participate in the collusive activity proper, namely the exchange of information between the producers by fax, by mobile telephone and at meetings of the working group at which the applicant was not present (see paragraph 72 et seq. above).

96 In addition, the applicant claims that, contrary to the finding in recital 345 of the contested decision, as regards the services which it provided in the context of the cartel, such as the reimbursement of travel expenses, it could have been replaced at any moment by either the organic peroxide producers themselves or by another consultancy firm, without the functioning of the cartel being disrupted as it would have been if one of the producers had withdrawn.

97 In the light of all the foregoing, the applicant maintains that its relationship with the three organic peroxide producers involved in the cartel should be classed as one of non-punishable complicity. In that regard, it is irrelevant that the applicant had some knowledge of the cartel, since that knowledge is not sufficient to justify the conclusion that the applicant itself committed an infringement (Case C–286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I–9925, paragraph 39, and the Opinion of Advocate General Mischo in that case, ECR I–9928, paragraph 80).

– The erroneous classification of the applicant as an 'association of undertakings'

98 Finally, the applicant disputes its classification as an 'association of undertakings' in Article 1 and recitals 347, 373 and 464 of the contested decision. By adopting a broad interpretation of that concept, the Commission infringed the prohibition against reasoning by analogy which is a corollary of the principle of *nullum crimen*, *nulla poena sine lege* laid down in Article 7(1) of the ECHR (see paragraph 83 above) and which also applies in the penalty-based administrative procedure laid down in Regulation No 17. A consultancy firm such as the applicant is not generally regarded as constituting an 'association of undertakings', that is to say, an organisational structure made up of member undertakings. Since it is not made up of member undertakings, the applicant is an independent undertaking controlled exclusively by natural persons as shareholders. Similarly, it is not linked to its clients by a structural link but by agency agreements which are purely contractual in nature.

99 The Commission's approach also runs counter to the meaning and purpose of the concept of 'association of undertakings'. The purpose of that concept is not to make it possible to penalise persons who are complicit in the conduct of cartel members, but merely to prevent undertakings from being able to circumvent the rules on competition simply by virtue of the form they adopt in order to coordinate their conduct on the market; and, consequently, to encompass also institutionalised forms of cooperation through a collective structure or a common body (Opinion of Advocate General Léger in Case C–309/99 *Wouters and Others* [2002] ECR I–1577, paragraph 62). By contrast, in the present case, the organic peroxide producers did not act through a collective

structure or a common body, but coordinated their conduct directly by fax, by telephone and through the meetings of the working group. In that regard, the applicant merely provided administrative or logistical assistance, which does not mean that it represents the 'collective structure' or the 'common body' of those producers.

100 The applicant concludes from this that, having played a role of non-punishable complicity in relation to AKZO, Atochem/Atofina and PC/Degussa, it is not guilty of infringing Article 81(1) EC and that the fact that the Commission imputed to it such an infringement is contrary to the principle of *nullum crimen*, *nulla poena sine lege*.

b) Arguments of the Commission

The factual context of the contested decision

101 As regards the relevant facts, the Commission essentially submits that the applicant does not question the fact that it stored in its safe, inter alia, copies of the 1971 and 1975 agreements belonging to Atochem/Atofina and PC/Degussa. In addition, the Commission disputes the fact that the applicant classed the official market information system as a separate issue and maintains that that system must be placed back in the context of the cartel. The collecting, preparing and monitoring of figures, and the establishing of statistics, in the framework of that system, in full knowledge of the reasons why and of the anticompetitive aims, constituted – together with the attending of meetings, the proposing of quotas and the calculating of the deviations from the agreed quotas – a *condicio sine qua non* for the functioning of the cartel.

102 In addition, it is not disputed that the applicant attended five meetings in Zurich between 1994 and 1998, of which four were 'summit' meetings, as well as the meeting with the AKZO representatives in Amersfoort. The applicant also admitted to having reserved meeting rooms for three 'unofficial' meetings in Zurich between 1997 and 1998. In the light of those facts, which are not disputed, the applicant cannot minimise its participation by using words such as 'rarely' or 'almost never'. The applicant also does not dispute that it calculated the deviations from the agreed quotas until at least 1995 or 1996. It also acted as a clearing house in order to ensure that the anticompetitive meetings were not traceable from the accounts of the participating undertakings. Thus, the applicant itself ensured, when making reimbursements, that no mention was made thereof in the internal payment orders filled in and signed by Mr S. Finally, the Commission disputes the applicant's argument that the contested decision is based on statements made by AKZO to which no credibility should be attributed. In that regard, the Commission points out that the various statements regarding the relevant facts, even those whose credibility is necessarily tenuous, may be regarded as mutually supportive (*Mannesmannröhren‑Werke* v *Commission*, cited in paragraph 77 above, paragraph 86).

Infringement of the principle of *nullum crimen*, *nulla poena sine lege*

103 The Commission denies that the contested decision infringes the principle of *nullum crimen*, *nulla poena sine lege*. It rejects the applicant's premisses that, under Community competition law, following the example of the criminal laws of a number of Member States, a formal distinction must be made between perpetration, on the one hand, and instigation or complicity, on the other. Neither the relevant primary nor secondary legislation makes such a distinction. In addition, as confirmed by Article 15(4) of Regulation No 17, the administrative procedure laid down in that regulation is not of a criminal-law nature (Case T‑83/91 *Tetra Pak* v *Commission* [1994] ECR II‑755, paragraph 235). Furthermore, it is not necessary to make such a formal distinction in Community competition law since, in determining the amount of the fine, account may be taken of the existence of different forms of participation and of the gravity of the contribution to the infringement (Opinion of Advocate General Stix‑Hackl in *Krupp Hoesch* v *Commission*, cited in paragraph 85 above, ECR I‑10941, footnote 15).

104 In the absence of a rule distinguishing the perpetrator from the participant, any person satisfying the conditions relating to the constitution of the infringement specified in Article 81(1) EC may be fined under Article 15(2) of Regulation No 17. The Commission adds that the imperative requirement, resulting from the principle of legal certainty, that Community legal acts be clear and that their application be sufficiently predictable for the persons concerned does not mean that it is never necessary to interpret those acts. The Eur. Court H. R. also recognises the need to strike a balance between, on the one hand, the obligation to be precise and the prohibition under Article 7 (1) of the ECHR against reasoning by analogy in criminal law matters and, on the other, interpretation by the courts which is intended, in particular, to clarify the rules on criminal liability

gradually, from one case to another (Eur. Court H. R., *S.W.* v *United Kingdom*, judgment of 22 November 1995, Series A no 335-B, § 36). Consequently, any person who satisfies the conditions laid down in Article 81(1) EC is a perpetrator of an infringement.

105 The Commission objects to the applicant's claim that it was not a party to the cartel and could not be one. The 1971 agreement, concluded between the organic peroxide producers, and the agency agreements, concluded between the applicant and those producers, should be regarded as essential elements of one and the same cartel. Given that the agency agreements served for the implementation of the 1971 agreement, they should be assessed together with that agreement as complementary and accessory agreements (recitals 339 and 340 of the contested decision; see also the Italian cast glass decision).

106 In that regard, it is not necessary, in the light of the wording of Article 81(1) EC, for the applicant, in its capacity as a consultancy firm, to be active on the market at issue as a competitor or on the side of supply or demand. Nor is it a requirement that the commercial autonomy of the undertakings concerned, and the competition between them, be restricted: rather, any restriction of competition within the common market is sufficient. That is consistent with the objective of Article 81 EC which, in accordance with Article 3(1)(g) EC, forms part of a system ensuring that competition in the internal market is not distorted (see also recital 9 to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)).

107 Article 81(1) EC is applicable not only to 'horizontal' agreements but also to 'vertical' agreements restrictive of competition, concluded between undertakings situated at different stages of the distribution chain (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299), or concluded between undertakings active on different markets. In that regard, the notion of agreement seeks merely to enable a distinction to be made between coordination which is prohibited, and parallel conduct which is permitted (see, also, Case T‑61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II‑5349, paragraph 89). Moreover, an infringement under Article 81(1) EC is in the nature of an *abstraktes Gefährdungsdelikt* (an offence consisting in the creation of a state of affairs which is dangerous, where no specific danger need be statutorily defined) since that provision also concerns the restriction of competition, that is to say, the cartel poses a danger for competition, generally speaking and quite apart from the individual case.

108 Next, the Commission refers to case‑law to the effect that, where an undertaking merely attends meetings with an anticompetitive purpose and tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, it thereby engages in a passive form of participation in the infringement which is capable of rendering that undertaking liable in the context of a single agreement (*Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 83 and 84; Case T‑7/89 *Hercules Chemicals* v *Commission* [1991] ECR II‑1711, paragraph 232; Case T‑12/89 *Solvay* v *Commission* [1992] ECR II‑907, paragraph 98; and Case T‑141/89 *Tréfileurope* v *Commission* [1995] ECR II‑791, paragraphs 85 and 86). That is a fortiori the case where an undertaking actively participates in a cartel, whether or not that undertaking is active on the market at issue.

109 In the present case, the applicant's role in the cartel was not one of passive complicity: it participated actively in that cartel as an organiser and by fostering its proper implementation (recital 343 of the contested decision). Through its activities, the applicant was of considerable assistance in keeping the cartel alive and in concealing its existence; thus it contributed considerably to the serious and long-term restriction of competition on the organic peroxide market. According to the Commission, those are both necessary and sufficient elements on which to base the applicant's liability under Article 81(1) EC. In that regard, it is irrelevant whether or not a participant in an infringement derives a profit from it (*Krupp Hoesch* v *Commission*, cited in paragraph 85 above), since Article 81(1) EC is not based on the criterion of enrichment but on that of jeopardising competition.

110 In any event, the applicant directly benefited from the success of the cartel (recital 342 of the contested decision). According to the Commission, another factor which is not decisive is whether or not a participant is in a position to exert a direct influence on the prices and quantities which indicate the parameters of competition (see, by analogy, *Brugg Rohrsysteme* v *Commission*, cited in paragraph 23 above, paragraph 61). Otherwise, the useful effect of the prohibition laid down in Article 81(1) EC would be frustrated, as it would be possible to circumvent that prohibition by engaging 'specialists in the provision of collusive services', who could be entrusted with organising

the cartel, keeping it alive and concealing its existence.

111 The Commission therefore contends that the present plea should be rejected.

2. Findings of the Court

a) Preliminary observations

112 It should be pointed out, first, that the applicant does not dispute as such the amount of the fine imposed on it in the contested decision. By the present plea, the applicant essentially submits that, by holding it liable for an infringement of Article 81(1) EC and by imposing a fine on it, the Commission oversteps the limits of the decision-making power conferred on it under Article 15(2) of Regulation No 17 and infringes the principle of *nullum crimen*, *nulla poena sine lege* for the purposes of Article 7(1) of the ECHR. In that regard, according to the applicant, the Commission should have taken account of the fact that the applicant merely played a role of non-punishable complicity in the cartel, and cannot therefore be classed as an undertaking or association of undertakings which is the ‘perpetrator’ of an infringement, as referred to in Article 81(1) EC.

113 Next, it should be pointed out that the procedure before the Commission under Regulation 17 is merely administrative in nature (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 200; Joined Cases T-25/95, T-26/95, T-30/95, T–31/95, T-32/95, T-34/95, T-35/95, T–36/95, T-37/95, T-38/95, T–39/95, T-42/95, T-43/95, T-44/95, T-45/95, T–46/95, T-48/95, T–50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T–56/95, T–57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T–64/95, T-65/95, T-68/95, T-69/95, T-70/95, 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 717 and 718) and that, consequently, the general principles of Community law and, in particular, the principle of *nullum crimen*, *nulla poena sine lege*, as applicable to Community competition law (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I–5425, paragraphs 215 to 223) need not necessarily have the same scope as when they apply to a situation covered by criminal law in the strict sense.

114 In order to determine whether it is necessary to draw a distinction, in the light of the prohibition laid down in Article 81(1) EC and the principle of *nullum crimen*, *nulla poena sine lege*, between an undertaking which is a ‘perpetrator’ of an infringement and an undertaking whose role is one of non-punishable ‘complicity’, it is necessary to make a literal, contextual and teleological interpretation of Article 81(1) EC (see, as regards the methodology, Case T–251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II–4825, paragraphs 72 et seq., and Joined Cases T–22/02 and T–23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II–4065, paragraphs 41 et seq.).

b) The literal interpretation of Article 81(1) EC

115 Article 81(1) EC states that ‘[t]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market’.

116 It is appropriate to consider the full implications of the term ‘agreements between undertakings’.

117 In that regard, it should be noted, first, that the Community judicature has yet to give an explicit ruling on the question whether the notions of agreement and undertaking as used in Article 81(1) EC are conceived in accordance with a ‘unitary’ perspective, so as to cover any undertaking which has contributed to the committing of an infringement, irrespective of the economic sector in which that undertaking is normally active or – as the applicant submits – in accordance with a ‘bipolar’ perspective, so that a distinction is drawn between undertakings which ‘perpetrate’ an infringement and those whose role is one of ‘complicity’ in the infringement. It should also be noted that, according to the applicant, there is a lacuna in the wording of Article 81(1) EC, in that, in referring to the ‘undertaking’ which is the perpetrator of the infringement and to its participation in the ‘agreement’, that provision covers only certain undertakings with particular characteristics and refers only to certain forms of participation. Consequently, it is only on the assumption that the

notions of undertaking and agreement fall to be so narrowly construed, and that the scope of Article 81(1) EC is accordingly so limited, that the principle of *nullum crimen*, *nulla poena sine lege* could be applied in such a way as to preclude a broad interpretation of the wording of that provision.

118 As regards the term 'agreement', it should be noted, first of all, that that term is merely another way of indicating coordinated/collusive conduct which is restrictive of competition, or a cartel in the wider sense, in which at least two distinct undertakings participate after expressing their joint intention of conducting themselves on the market in a specific way (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 79 and 112; Case T–41/96 *Bayer* v *Commission* [2000] ECR II–3383, paragraphs 67 and 173; and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T–60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II–3567, paragraphs 53 to 55). Furthermore, in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct, albeit apparently unilateral, be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (Case C–74/04 P *Commission* v *Volkswagen* [2006] ECR I–6585, paragraph 37). That broad notion of agreement is confirmed by the fact that the prohibition laid down in Article 81(1) EC also covers concerted practice whereby there is a form of coordination between undertakings which does not lead to the conclusion of an agreement as such (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraph 115 and the case–law cited therein).

119 In the present case, the question arises whether, as claimed by the applicant, the cartel must concern a specific sector of activity, or even the same market for goods or services, so that only undertakings which are active in such a sector or market as competitors, or on the side of supply or demand, are capable of coordinating their conduct as undertakings which are the (co–)perpetrators of an infringement.

120 In that regard, it should be noted that Article 81(1) EC applies not only to 'horizontal' agreements between undertakings exercising a commercial activity on the same market for the relevant goods and services, but also to 'vertical' agreements which entail the coordination of conduct between undertakings active at different stages of the production and/or distribution chain, and, consequently, operating on markets for different goods or services (see, in that regard, *Cour Consten and Grundig* v *Commission*, cited in paragraph 107 above, pp. 339 and 340; Joined Cases C–2/01 P and C–3/01 P *BAI and Commission* v *Bayer* [2004] ECR I–23; Case C–551/03 P *General Motors* v *Commission* [2006] ECR I–3173; *Commission* v *Volkswagen*, cited in paragraph 118 above; order of the Court of Justice in Case C–552/03 P *Unilever Bestfoods* v *Commission* [2006] ECR I–9091; Case T–112/99 *M6 and Others* v *Commission* [2001] ECR II–2459, paragraph 72 et seq.; see, also, Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21) and Commission notice (2000/C 291/01) – Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1)).

121 Similarly, it is apparent from the case–law that, to fall within the ambit of the prohibition laid down in Article 81(1) EC it is sufficient that the agreement at issue restricts competition on the neighbouring and/or emerging markets on which at least one of the participating undertakings is not (yet) present (see, to that effect, Case T–328/03 *O2 (Germany)* v *Commission* [2006] ECR II–1231, paragraphs 65 et seq.; see also, as regards the application of Article 82 EC, Case C–333/94 P *Tetra Pak* v *Commission* [1996] ECR I–5951).

122 In that regard, the formulations used in the case–law – the 'joint intention of conducting themselves on the market in a specific way' (*Bayer* v *Commission*, cited in paragraph 118 above, paragraph 67) or 'expression of the joint intention of the parties to the agreement with regard to their conduct in the common market' (*ACF Chemiefarma* v *Commission*, cited in paragraph 23 above, paragraph 112) – stress the element of 'joint intention' and do not require the relevant market on which the undertaking which is the 'perpetrator' of the restriction of competition is active to be exactly the same as the one on which that restriction is deemed to materialise. It follows that any restriction of competition within the common market may be classed as an 'agreement between undertakings' within the meaning of Article 81(1) EC. That conclusion is confirmed by the criterion of the existence of an agreement whose object is to restrict competition within the common market. That criterion implies that an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict

competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself.

123 It is clear from the foregoing that a literal interpretation of the term 'agreements between undertakings' does not require a restrictive interpretation of the notion of perpetrator of the infringement as argued by the applicant.

c) The contextual and teleological interpretation of Article 81(1) EC

The requirement of restricted commercial autonomy

124 In support of its plea, the applicant also claims that the notion of perpetrator of the infringement necessarily implies that the latter restricts its own commercial autonomy vis-à-vis its competitors and thus contradicts the requirement of autonomy which underlies Article 81(1) EC, according to which each economic operator must determine autonomously the policy which it intends to follow on the common market.

125 As pointed out by the applicant by reference to the relevant case-law, the requirement of autonomy was developed, inter alia, in the context of the case-law on the distinction between prohibited concerted practices and parallel conduct which is permitted between competitors (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 115 to 117 and the case-law cited therein, and *Adriatica di Navigazione* v *Commission*, cited in paragraph 107 above, paragraph 89). In addition, it is apparent from the distinction made by the case-law between the existence of an agreement restricting competition for the purposes of Article 81(1) EC, on the one hand, and the presence of a simple unilateral measure adopted by an undertaking seeking to impose a certain form of conduct on other undertakings, on the other, that the restriction of competition must result from the manifestation, sufficiently established, of a concurrence of wills between the undertakings involved as regards the implementation of a particular line of conduct (see, to that effect, *BAI and Commission* v *Bayer*, cited in paragraph 120 above, paragraphs 96 to 102 and 141, and *Commission* v *Volkswagen*, cited in paragraph 118 above, paragraph 37). It follows that, contrary to the applicant's submissions, the requirement of autonomy is not directly linked to the question – which is not relevant in the present case (see paragraphs 120 to 123 above) – whether or not the undertakings restricting their commercial freedom are active in the same sector of activity or on the same relevant market, but rather to the notions of 'concerted practice' and 'agreement', since those notions require proof of a sufficiently clear and precise manifestation of a concurrence of wills between the undertakings involved.

126 Furthermore, the applicant overestimates the importance of the criterion of restriction of commercial freedom in the context of assessing whether there is a restriction of competition for the purposes of Article 81(1) EC. As is apparent from settled case-law, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the ambit of the prohibition laid down in Article 81(1) EC. For the purposes of applying that provision to a particular case, account must first be taken of the overall context in which that agreement or that decision was arrived at or produces its effects and, more specifically, of its objectives (*Wouters and Others*, cited in paragraph 99 above, paragraph 97, and Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraph 42). In that regard, the Court has made it clear that it was not necessary to hold, wholly abstractly and without drawing any distinctions, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 81(1) EC but that, in assessing the applicability of Article 81(1) to an agreement, account must be taken of the actual conditions in which it functioned, in particular the economic and legal context in which the undertakings operated, the products or services covered by the agreement and the actual structure and operating conditions of the market concerned (see *M6 and Others* v *Commission*, cited in paragraph 120 above, paragraph 76 and the case-law cited therein).

127 As regards that contextual notion of restriction of competition, it is not therefore to be ruled out that an undertaking may participate in the implementation of such a restriction even if it does not restrict its own freedom of action on the market on which it is primarily active. Any other interpretation might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, as read in the light of Article 3(1)(g) EC, which is to ensure that competition in the internal market is not distorted, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked simply on

the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise. It should be pointed out that, as submitted by the Commission, it is only by making all 'undertakings' within the meaning of Article 81(1) EC subject to liability that that useful effect can be fully guaranteed, since that makes it possible to penalise and to prevent the creation of new forms of collusion with the assistance of undertakings which are not active on the markets concerned by the restriction of competition, with the aim of circumventing the prohibition laid down in Article 81(1) EC.

128 The Court concludes from this that a reading of the term 'agreements between undertakings' in the light of the objectives pursued by Article 81(1) EC and by Article 3(1)(g) EC tends to confirm that the notions of a cartel and of an undertaking which is the perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.

The conditions in which the participation of an undertaking in a cartel constitutes an infringement of Article 81(1) EC

129 Next, it is necessary to note the case–law concerning the conditions which the participation of an undertaking in a cartel must satisfy for it to be possible to hold that undertaking liable as a co–perpetrator of the infringement.

130 In that regard, it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel. In order to establish that an undertaking participated in a single agreement, made up of a series of unlawful acts over time, the Commission must prove that that undertaking intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk. In that regard, where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its discovery. It thereby engages in a passive form of participation in the infringement which is therefore capable of rendering that undertaking liable in the context of a single agreement (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 83 and 87; *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 81 to 84; and *Dansk Rørindustri and Others* v *Commission*, cited in point 113 above, paragraphs 142 and 143; see also *Tréfileurope* v *Commission*, cited in paragraph 108 above, paragraph 85 and the case–law cited therein). It is also apparent from the case–law that those principles apply *mutatis mutandis* in respect of meetings which are attended not only by competing producers, but also by their clients (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II–2035, paragraphs 62 to 66).

131 In addition, as regards the determination of the individual liability of an undertaking whose participation in the cartel is not as extensive or intense as that of the other undertakings, it is apparent from the case–law that, although the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings, all of whom are co-perpetrators of the infringement but whose participation can take different forms – according to, inter alia, the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged – the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to rule out its liability for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti–competitive object or effect (*Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 78 to 80).

132 Accordingly, the fact that an undertaking did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate, is not material to the establishment of an infringement on its part. Although the limited importance, as the case may be, of the participation of the undertaking concerned cannot therefore call into question its individual liability for the infringement as a whole, it none the less has an influence on the assessment of the extent of that liability and thus on the severity of the penalty (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraph 90; *Aalborg Portland and*

Others v *Commission*, cited in paragraph 23 above, paragraph 86; and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 145).

133 It is clear from the above considerations that, as regards the relationship between competitors on the same relevant market and the relationship between such competitors and their clients, the case–law recognises the joint liability of the undertakings which are co–perpetrators of an infringement under Article 81(1) EC and/or which have played an accessory role in such an infringement, in so far as it has been held that the objective condition for the attribution of various anti–competitive acts constituting the cartel as a whole to the undertaking concerned is satisfied where that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role, for example by tacitly approving the cartel and by failing to report it to the administrative authorities, since the potentially limited importance of that contribution may be taken into consideration for the purposes of determining the level of the fine.

134 In addition, the attribution of the infringement as a whole to the participating undertaking depends on the manifestation of its own intention, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel. That subjective condition is inherent in the criteria relating to the tacit approval of the cartel and to the undertaking having publicly distanced itself from the content of the cartel (*Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 84; *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 143; and *Tréfileurope* v *Commission*, cited in paragraph 108 above, paragraph 85), in that those criteria imply a presumption that the undertaking concerned continues to endorse the objectives of the cartel and to support its implementation. That condition also constitutes the justification for holding the undertaking concerned to be liable together with the others, since it intended to contribute through its own conduct to the common objectives pursued by the participants as a whole and was aware of the anti–competitive conduct of the other participants, or could reasonably have foreseen that conduct, and was ready to accept the attendant risk (*Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 83 and 87, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 83).

135 If the attribution of the infringement as a whole to the undertaking concerned is to be in line with the requirements of the principle of individual liability, the conditions set out in paragraphs 133 and 134 above must be complied with (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraph 84).

136 In the light of the considerations set out in paragraphs 115 to 127 above, the Court considers that those principles apply mutatis mutandis to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti–competitive nature of the conduct at issue and enable it to make a significant contribution to the committing of the infringement. In those circumstances, the applicant's argument that a consultancy firm cannot be regarded as a co–perpetrator of an infringement – because it does not carry out an economic activity on the relevant market affected by the restriction of competition and because its contribution to the cartel is merely subordinate – cannot be upheld.

The interpretation of Article 81(1) EC in the light of the principle of *nullum crimen*, *nulla poena sine lege*

137 However, the applicant submits, in essence, that such a 'unitary' conception of the perpetrator of an infringement under Article 81(1) EC is incompatible with the requirements flowing from the principle of *nullum crimen*, *nulla poena sine lege* under Article 7(1) of the ECHR, as well as with those flowing from the rules common to the legal systems of the Member States, concerning the distinction between perpetration and complicity, which are applicable to both criminal law and competition law.

138 In that regard, the Court notes, first, as was pointed out in paragraph 45 above, that fundamental rights are an integral part of the general principles of law whose observance the Community judicature ensures by taking account, in particular, of the ECHR as a source of inspiration.

139 Next, the Community judicature has applied the principle of *nullum crimen*, *nulla poena sine lege* as a general principle of Community law in cases concerning competition law, in the light of the case–law of the Eur. Court H. R. (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraphs 215 et seq., and Case T–43/02 *Jungbunzlauer* v *Commission*

[2006] ECR II–3435, paragraphs 71 et seq. and the case–law cited therein). Generally speaking, that principle requires, inter alia, that any Community legislation, in particular where it imposes or permits the imposition of penalties, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly. By the same token, that principle must be observed in regard both to provisions of a criminal-law nature and to specific administrative instruments imposing or permitting the imposition of administrative penalties (see, to that effect, *Maizena*, cited in paragraph 85 above, paragraphs 14 and 15, and *X*, cited in paragraph 84 above, paragraph 25), such as penalties imposed under Regulation No 17.

140 In addition, it is apparent from the consistent interpretation which the Eur. Court H. R. has given to Article 7(1) of the ECHR that the principle of *nullum crimen*, *nulla poena sine lege*, which is laid down therein, requires, inter alia, that criminal law not be applied broadly, in particular by analogy, to the detriment of the defendant. It follows that an infringement must be clearly defined by the law, a condition which is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation – what acts or omissions would make him criminally liable. In that regard, the Eur. Court H. R. has stated that the concept of law used in Article 7 of the ECHR is the same as that to be found in other articles thereof and that it encompasses both law deriving from legislation and that deriving from case-law, and implies qualitative conditions, in particular those of accessibility and foreseeability (see Eur. Court H. R. *Kokkinakis* v *Greece*, judgment of 25 May 1993, Series A no. 260-A, § 40, 41 and 52; *S.W.* v *United Kingdom*, cited in paragraph 104 above, § 35; *Cantoni* v *France*, judgment of 15 November 1996, *Reports of Judgments and Decisions*, 1996-V, p. 1627, § 29; *Başkaya and Okçuoğlu* v *Turkey*, judgment of 8 July 1999, *Reports of Judgments and Decisions*, 1999-IV, p. 308, § 36; *Coëme and Others* v *Belgium*, judgment of 22 June 2000, *Reports of Judgments and Decisions*, 2000–VII, p. 1, § 145; *E.K.* v *Turkey*, no. 28496/95, § 51, 7 February 2002; see also *DanskRørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 216).

141 In the light of that case–law, the principle of *nullum crimen*, *nulla poena sine lege* cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability through interpretation by the courts (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 217). According to the case–law of the Eur. Court H. R., however clearly a legal provision is drafted, including a provision of criminal law, there is inevitably a need for interpretation by the courts and it will always be necessary to elucidate points of doubt and to adapt the wording to changing circumstances. Moreover, according to the Eur. Court H. R., it is well established in the legal traditions of the contracting parties to the ECHR that case–law, as a source of law, necessarily contributes to the progressive development of the criminal law (*S.W.* v *United Kingdom*, cited in paragraph 104 above, § 36). In that regard, the Eur. Court H. R. has recognised that even the wording of many statutes is not absolutely precise and that, because of the need to avoid excessive rigidity and to keep pace with changing circumstances, much legislation is inevitably couched in terms which, to a greater or lesser degree, are vague and their interpretation and application depend on practice (*Kokkinakis* v *Greece*, cited in paragraph 140 above, § 52, and *E.K.* v *Turkey*, cited in paragraph 140 above, § 52, and *Jungbunzlauer* v *Commission*, cited in paragraph 139 above, paragraph 80). Thus, in addition to the actual wording of the legislation, the Eur. Court H. R. also takes account of the settled and published case-law when deciding whether the concepts used are definite or not (*G.* v *France*, judgment of 27 September 1995, Series A no. 325-B, § 25).

142 Nevertheless, although the principle of *nullum crimen*, *nulla poena sine lege* in principle enables the rules governing criminal liability to be gradually clarified through interpretation by the courts, it may preclude the retroactive application of a new interpretation of a rule establishing an offence. That is particularly true if the result of that interpretation was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation attributed to the provision in the case-law at the material time. Furthermore, 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 applies, and does not preclude the person concerned from taking 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 the case of persons engaged in a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can thus be expected to take special care in assessing the risks that such an activity entails (*DanskRørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraphs 217 to 219, referring to *Cantoni* v *France*, cited in paragraph 140 above, paragraph 35).

143 It is apparent from the above considerations that the interpretation of the full implications of Article

81(1) EC and, in particular, of the terms 'agreement' and 'undertaking', according to which any undertaking which has contributed to the implementation of the cartel falls within its scope even if that undertaking is not active on the relevant market affected by the restriction of competition, must have been sufficiently foreseeable, at the time of the perpetration of the alleged misconduct, in the light of the wording of that provision, as interpreted by the case-law.

144 In that regard, it should be pointed out that the terms 'agreement' and 'undertaking', within the meaning of Article 81(1) EC, constitute legal concepts which have not been delimited, the full implications of which fall ultimately to be determined by the Community judicature, and the application of which by the administration is subject to full judicial review. In those circumstances, the gradual clarification of the notions of 'agreement' and 'undertaking' by the Community judicature is of decisive importance in assessing whether their application in practice is definite and foreseeable.

145 First, the Court considers that, in the light of the settled case-law referred to in paragraphs 115 to 128 above, the term 'agreements between undertakings' in Article 81(1) EC constitutes a sufficiently precise expression of the notions of cartel and perpetrator of the infringement, as described in paragraph 128 above – in that that term covers any undertaking which acts in a collusive manner, irrespective of the sector of activity or of the relevant market on which it is active – to ensure that such an undertaking cannot be unaware, or even fail to recognise, that it is exposing itself to legal action if it adopts such conduct.

146 Second, as has been pointed out in paragraphs 129 to 135 above, settled case-law exists in relation to the shared liability under Article 81(1) EC of undertakings which are co-perpetrators of an infringement and/or which are complicit in the overall infringement, to which the anti-competitive conduct of the other participating undertakings is also attributed. That case-law, which is also based on a 'unitary' conception of the notions of cartel and perpetrator of an infringement, states clearly and precisely the objective and subjective conditions which must be satisfied if it is to be possible to hold an undertaking liable in respect of an infringement committed by a number of co-perpetrators or complicit parties. In that regard, the mere fact that the Court of Justice did not define those principles of accountability until 1999 (*Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 78 et seq.) cannot, in itself, detract from their foreseeability at the time material to the applicant (between 1993 and 1999), since the elements determining individual liability already emerged, with sufficient precision, from the broad conception of cartel and undertaking for the purposes of Article 81(1) EC and the earlier case-law of the Court of First Instance (see *Tréfileurope* v *Commission*, cited in paragraph 108 above, paragraph 85 and the case-law cited therein). Furthermore, the fact that the Community judicature has not given a ruling on the specific question whether a consultancy firm which is not active on the same market as the main participants in the cartel can be attributed a share of the liability for an infringement is not sufficient to support the conclusion that an administrative and jurisprudential practice establishing that such an undertaking shares liability – or, at the very least, that such shared liability is possible – is not reasonably foreseeable by professionals in the light of both the wording of Article 81(1) EC and the case-law cited above.

147 On the contrary, as regards the penalty-based administrative practice in that connection, it should be pointed out that, as the applicant itself admits, the Commission had already decided in 1980 to attribute an infringement of Article 81(1) EC to a consultancy firm which had actively participated, in a manner comparable to the way in which the applicant participated in the present case, in the implementation of the cartel in question (the Italian cast glass decision; see, in particular, point II. A. 4. at the end of the recitals). In that regard, the fact that the Commission no longer adopted that approach in a number of subsequent decisions does not justify the conclusion that such an interpretation of the full implications of Article 81(1) EC is not reasonably foreseeable. That is especially true in the case of a consultancy firm, which must be presumed, given the Commission's decision-making practice since 1980, to manage its economic activities with a very high degree of caution and to seek informed advice, in particular from legal experts, in order to assess the risks associated with its conduct (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 219).

148 In that context, the applicant cannot legitimately claim that such an interpretation is contrary to the rules common to the Member States on the subject of individual liability, which draw a distinction between the perpetrators of an infringement and those whose role is one of complicity. The rules cited by the applicant (see paragraph 81 above) concern only national criminal law, and the applicant does not explain whether – and, if so, to what extent – those rules also apply, in the

respective national legal systems, in the context of penalty-based administrative procedures and, in particular, to procedures designed to punish anti–competitive practices.

149 Moreover, it is not apparent from either the case–law of the Eur. Court H. R. or the decision-making practice of the former European Human Rights Commission that the principle of *nullum crimen*, *nulla poena sine lege* requires a distinction to be drawn, both in criminal proceedings and in the context of penalty-based administrative procedures, between the perpetrator of the infringement and a party whose role is one of complicity, so that the latter is not punishable where the relevant legal rule does not expressly provide for a penalty to be imposed in such a case. That means, on the contrary, that for that principle to be complied with, the conduct of the person to whom the misconduct is imputed must be covered by the definition of perpetrator of the offence in question, such that it can be inferred from the wording of the provision at issue, where necessary in the light of the interpretation given in the case–law. If that definition is sufficiently broad to cover both the conduct of the main perpetrators of the infringement and that of the parties whose role is one of complicity, there can be no infringement of the principle of *nullum crimen*, *nulla poena sine lege* (see, for the reasoning a contrario, Eur. Court H. R. *E.K.* v *Turkey*, cited in paragraph 140 above, § 55 and 56, and Eur. Commission H. R., decision on admissibility *L.–G. R.* v *Sweden*, of 15 January 1997, application no 27032/95, p. 12).

150 In the light of all the above considerations, the Court concludes that any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community case–law, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

d) The applicant's classification as a co–perpetrator of the cartel

151 Next, it must be determined whether, in the present case, the objective and subjective conditions for establishing that the applicant shares liability, in that the anti–competitive conduct of the other participating undertakings can be attributed to it, are satisfied. In that regard, it should be pointed out, first of all, that in order to be able to attribute the whole of an infringement to an undertaking, that undertaking must have contributed, even in a subordinate manner, to the restriction of competition at issue, and the subjective condition relating to the manifestation of that undertaking's intention in that regard must be met.

152 Independently of the question whether the applicant was a 'contracting' party to the 1971 and 1975 agreements and whether the agency agreements concluded with the three organic peroxide producers were an integral part of the cartel in the wider sense, the Court notes that it has become apparent that the applicant actively contributed to the implementation of that cartel between 1993 and 1999.

153 First, it is common ground that the applicant stored and concealed on its premises the originals of the 1971 and 1975 agreements of Atochem/Atofina and PC/Degussa, and in the latter case, until as late as 2001 or 2002 (recitals 63 and 83 of the contested decision). Second, the applicant admits to having calculated and communicated to the members of the cartel the deviations of the respective market shares from the agreed quotas, until 1995 or 1996 at the very least, an activity which was expressly provided for in the 1971 and 1975 agreements, and to having stored secret documents on its premises, pursuant thereto. Third, as regards the meetings between the organic peroxide producers which had some anti–competitive content, the applicant admitted to having organised and partly attended five of those meetings, as well as the meeting held in Amersfoort on 19 October 1998 to prepare a proposal regarding the allocation of quotas among the producers. Fourth, it is common ground that the applicant regularly reimbursed the travel expenses which the representatives of the organic peroxide producers incurred in attending meetings with an anti–competitive purpose, and it did so with the manifest intention of covering up any traces of the implementation of the cartel in the books of those producers, or of not leaving any such traces (see paragraphs 63 and 102 above).

154 Without there being any need to assess in detail the points of dispute between the parties regarding

the actual extent of the applicant's participation in the cartel, the Court concludes from the information set out in paragraph 153 above that the applicant actively contributed to the implementation of the cartel and that, contrary to its submissions, there was a sufficiently definite and decisive causal link between that activity and the restriction of competition on the organic peroxide market. At the hearing, the applicant did not dispute the existence of that causal link but merely challenged the legal classification of its contribution as an act of a perpetrator of the infringement, maintaining that its contribution could be classed only as an act of complicity which could have been carried out by any consultancy firm.

155 Accordingly, it is not relevant that the applicant was not formally and directly a contracting party to the 1971 and 1975 agreements. First, for the purposes of applying Article 81(1) EC, the question whether or not there is an agreement which is in writing, or otherwise explicit, between the participating undertakings is not decisive so long as they act in collusion (see paragraphs 115 to 123 above). Second, the applicant itself acknowledges that, by tacit agreement with the organic peroxide producers, it undertook – in its own name and on its own account – some of Fides' activities as specifically provided for under those agreements, such as the calculation and communication of the deviations from the agreed quotas. It should be added that, given that the Commission merely imposed on the applicant a fine of a minimal amount of EUR 1 000 and that that amount as such has not been called into question by the applicant, the Court is not required to give a ruling on the exact extent of the applicant's participation for the purposes of its effect on the lawfulness of the level of the fine imposed.

156 Moreover, in the light of all the objective circumstances characterising the applicant's participation, the Court finds that the applicant acted in full knowledge of the facts and intentionally when it made its professional expertise and infrastructure available to the cartel, in order to benefit from it, at least indirectly, in the course of implementing the individual agency agreements which linked it to the three organic peroxide producers. Quite apart from the question whether the applicant thus also knowingly infringed the rules of professional ethics by which it is bound as a commercial consultant, it clearly could not have been unaware, or indeed it knew, that the objective of the cartel to which it contributed was anti-competitive and unlawful, that objective having become apparent, inter alia, in the context of the 1971 and 1975 agreements which the applicant stored on its premises, from the meetings which were held with an anti-competitive aim and from the exchange of sensitive information in which the applicant actively participated, at least until 1995 or 1996.

157 In the light of all of the above considerations, the Court finds that, in so far as the contested decision establishes that the applicant shares liability for the infringement committed primarily by AKZO, Atochem/Atofina and PC/Degussa, that decision does not exceed the limits of the prohibition laid down in Article 81(1) EC and that, consequently, by imposing on the applicant a fine of EUR 1 000, the Commission did not exceed the powers conferred on it under Article 15(2) of Regulation No 17.

158 In those circumstances, the Court considers it unnecessary to give a ruling on the question whether the Commission could also have legitimately based the applicant's liability on the notion of a decision by an association of undertakings. As the Commission acknowledged at the hearing, the present case involves a purely alternative or secondary assessment, which can neither confirm nor invalidate the legal legitimacy of the Commission's main approach, as based on the notions of 'cartel' and 'undertaking'. By the same token, it is unnecessary to assess whether the Commission correctly examined and evaluated certain evidence against the applicant which is not decisive for the outcome of the present dispute. In that regard, the applicant's arguments, as set out in paragraphs 77 to 79 above, seek merely to support the well-foundedness of the present plea and do not constitute a separate plea.

159 Consequently, the second plea must be rejected as unfounded.

D – The third plea, alleging infringement of the principle of the protection of legitimate expectations

1. Arguments of the parties

160 The applicant maintains that, in view of the established decision-making practice of the Commission since 1983, it could legitimately expect that the Commission would assess its conduct in the same way as it assessed comparable conduct on the part of other consultancy firms in previous cases. Accordingly, the contested decision runs counter to the principle of protection of legitimate interests. According to the applicant, although the decisions of the Commission are binding only on those to

whom they are addressed, they none the less constitute – particularly where they establish consistent decision-making practice – legal acts which are relevant to comparable situations. The possibility for the individual to rely on the continuance of a certain decision-making practice merits protection a fortiori because the application of Article 81 EC is dependent on a great number of undefined legal terms, the practical implications of which it is vital to specify through decision-making practice.

161 The applicant submits that the principle of protection of legitimate expectations, as recognised in the case–law (Case 112/77 *Töpfer and Others* [1978] ECR 1019, paragraph 19, and Case T–266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II–2329, paragraph 71) precludes the Commission from abandoning, without warning, its own decision-making practice in relation to Article 81 EC, or from retroactively classifying as an infringement, and imposing a fine for, conduct which has hitherto been regarded as falling outside the scope of that provision. Since 1983, contrary to its approach in the Italian case glass decision, the Commission has no longer regarded as an infringement assistance provided by consultancy firms which are not party to the agreement restricting competition (see, inter alia, the cast iron and steel rolls decision of 1983; the polypropylene decision of 1986; the LdPE decision of 1988; and the cartonboard decision of 1994). Thus, at the time of its establishment at the end of 1993, the applicant could legitimately expect that the assistance provided to the three organic peroxide producers was also not classed as an infringement of Article 81(1) EC. According to the applicant, its activity did not go beyond that of other consultancy firms in the cases which gave rise to the cast iron and steel rolls decision or the cartonboard decision. Consequently, the Commission should not have held the applicant liable for an infringement of Article 81(1) EC or imposed a fine on it.

162 The Commission contends that the present plea should be rejected.

2. Findings of the Court

163 The Court considers that, in the light of the recognition under Community competition law of the principle that a consultancy firm which has participated in a cartel shares liability for the infringement, the principle of the protection of legitimate expectations cannot stand in the way of the reorientation of the Commission's decision-making practice in the present case. As is apparent from paragraphs 112 to 150 above, that reorientation is based on a correct interpretation of the full implications of the prohibition laid down in Article 81(1) EC. Since the interpretation of the undefined legal concept of 'agreements between undertakings' ultimately falls to be determined by the Community judicature, the Commission does not have any leeway enabling it, where relevant, to forgo bringing an action against a consultancy firm which satisfies the criteria for shared liability. On the contrary, by virtue of its duty under Article 85(1) EC, the Commission is required to ensure the application of the principles laid down in Article 81 EC and to investigate, on its own initiative, all cases of suspected infringement of those principles, as interpreted by the Community judicature. Accordingly, since – notwithstanding the Italian cast glass decision – the Commission's decision-making practice prior to the contested decision could appear to conflict with the above interpretation of Article 81(1) EC, that practice was not capable of giving rise to legitimate expectations on the part of the undertakings concerned.

164 Furthermore, as is apparent from paragraphs 147 and 148 above, the current reorientation of the Commission's decision-making practice was even more foreseeable for the applicant given the existence of a precedent, namely the Italian cast glass decision of 1980. Also, as is apparent from paragraph 163 above, the Commission's post-1980 decision-making practice could not reasonably be construed as a definitive abandonment of the initial approach followed in the Italian case glass decision. Furthermore, although, in the polypropylene decision of 1986, the Commission did not class Fides Trust as a perpetrator of the infringement, it none the less clearly censured the information exchange system established and managed by that company as being incompatible with Article 81(1) EC (the polypropylene decision, recital 106 and Article 2; see also the cartonboard decision, recital 134). In those circumstances, the Commission's post-1980 decision-making practice – which does not censure or penalise the consultancy firms involved, but goes no further, that is to say, it does not disavow, as a matter of law, the approach initially followed in the Italian cast glass decision – was even less capable of giving rise to a legitimate expectation on the part of the applicant that the Commission would in future abstain from bringing actions against consultancy firms where they participate in a cartel.

165 The present plea must therefore be rejected as unfounded.

E – The fourth plea raised in the alternative, alleging infringement of the principle of legal certainty and of the principle of nulla poena sine lege certa

1. Arguments of the parties

166 The applicant submits that, in so far as it is concerned, the Commission's legal analysis is so vague and contradictory that it infringes the principle of legal certainty and the principle of *nulla poena sine lege certa*. The Commission refrains from indicating with the necessary clarity the parameters and limits of unlawful and punishable conduct on the part of a consultancy firm such as the applicant, and thus deprives the applicant of the legal certainty required in a society governed by the rule of law.

167 The applicant points out that the principle of *nulla poena sine lege certa*, as laid down in Article 7(1) of the ECHR and recognised as a general principle of Community law, is a corollary of the principle of legal certainty (*X*, cited in paragraph 84 above, paragraph 25). The latter is a fundamental principle of Community law (Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44; Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 10; and Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11), which requires, in particular, that Community legislation must be certain and its application foreseeable by those subject to it. The applicant states that the decisions of the Commission adopted under Article 81 EC, which may impose very heavy fines, must be particularly precise and certain (Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 46), so that the undertakings concerned can review and determine their conduct in the light of and in accordance with criteria which are sufficiently clear and concrete in terms of indicating the unlawful nature of certain conduct.

168 Contrary to those requirements, in the contested decision the Commission devoted almost five pages to setting out the reasons why it considers that the applicant infringed Article 81(1) EC (recitals 331 et seq. of that decision). Nevertheless, that reasoning does not clearly show which aspects of the applicant's conduct actually fall within the scope of Article 81(1) EC, and which do not (see, inter alia, recitals 339, 343, 344 and 349 of the contested decision). The applicant adds that the Commission mistakenly alleges that it gave legal advice (recital 339 of the contested decision). Even if that were to be established, the fact of dispensing legal advice cannot be regarded as an infringement of the competition rules. In any event, the Commission cannot maintain that legal advice and supportive action given by the applicant, as described in the contested decision, collectively constitute an infringement of Article 81(1) EC when such acts do not amount to an infringement when considered individually. Otherwise, it would be impossible to predict at what precise moment a lawful act slides into illegality. Next, the applicant criticises the Commission's mode of expression in recitals 332 et seq. of the contested decision as vague, incomprehensible and contradictory as regards the applicant's alleged participation in the cartel. As regards the Commission's contention that the present plea is not autonomous, the applicant objects that, even supposing that it were guilty of an infringement of competition law, the grounds of the contested decision do not show, with the requisite clarity and precision, which of the specific acts imputed to it constitute an infringement of Article 81(1) EC.

169 In the absence of a clear answer to the question why and how the applicant infringed Article 81(1) EC, the contested decision should be annulled for infringement of the principle of *nulla poena sine lege certa* and the principle of legal certainty.

170 The Commission contends that the present plea should be rejected in so far as it merely constitutes a repetition of the second plea.

2. Findings of the Court

171 It should be noted, first of all, that, in the context of the present plea, the applicant essentially raises the same arguments as in the context of the second and third pleas. It is thus sufficient to refer to the considerations set out in paragraphs 112 to 159 above in order to conclude that the contested decision contains sufficient information establishing the active and intentional participation of the applicant in the cartel, thus making it possible for the applicant to be held liable for an infringement of Article 81(1) EC, independently of the real extent of that participation in detail.

172 Even supposing that the present plea had also to be understood as alleging an infringement of the duty to give reasons under Article 253 EC, it is also apparent from those considerations that the contested decision contains all the relevant information for the purposes of making it possible for the applicant to dispute its well-foundedness and for the Court to review the lawfulness of the decision in accordance with the case-law established in that regard (see Case T-228/02

Organisation des Modjahedines du peuple d'Iran v *Council* [2006] ECR II–4665, paragraph 138 and the case–law cited therein).

173 Accordingly, the present plea must also be rejected as unfounded.

F – The fifth plea, alleging that the second paragraph of Article 3 of the contested decision infringes the principle of legal certainty and the principle of nulla poena sine lege certa

1. Arguments of the parties

174 According to the applicant, in the absence of a clear and precise indication of the unlawful acts imputed to it, both the legal analysis and the second paragraph of Article 3 of the contested decision are contrary to the principle of legal certainty and the principle of *nulla poena sine lege certa*. The grounds of the contested decision do not show, in a precise manner, the specific acts by virtue of which the applicant is deemed to have infringed Article 81(1) EC. Consequently, it is also impossible for the applicant to know which of its acts are concerned by the obligation laid down in Article 3 of that decision. It follows that Article 3 infringes the 'requirement of certainty and predictability' of Community legislation, which must be observed all the more strictly in the case of rules liable to entail financial consequences, so that those concerned may know precisely the extent of the obligations thereby imposed on them (Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraphs 17 and 18; Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18; Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24; Joined Cases 92/87 and 93/87 *Commission* v *France and United Kingdom* [1989] ECR 405, paragraph 22; Case C–30/89 *Commission* v *France* [1990] ECR I–691, paragraph 23; Case C–354/95 *National Farmers' Union and Others* [1997] ECR I–4559, paragraph 57; and Case C–177/96 *Banque Indosuez and Others* [1997] ECR I–5659, paragraph 27).

175 The lack of precision in the legal analysis and in the obligation laid down in Article 3 of the contested decision is exacerbated by the fact that, under that article, the applicant is also required to refrain from any agreement or any concerted practice with a 'similar' object or effect, and any infringement of that article may lead to the imposition of a fine, which may be very heavy by virtue of Article 15(2) of Regulation No 17. Moreover, the Commission admitted that it had addressed a 'new aspect' of law (recital 454 of the contested decision). That being so, the precision of the requirement to refrain from repeating the infringement should have to satisfy particularly strict requirements in order to enable interested undertakings to assess the true and full implications of the prohibition laid down in Article 81 EC. The ensuing legal uncertainty poses a threat to the commercial activity of consultancy firms such as the applicant, as regards the drawing up of market statistics and administering federations.

176 As regards the Commission's contention that the present plea is directed against the requirement that the infringement be brought to an end (first paragraph of Article 3 of the contested decision), the applicant states that its action concerns only the requirement to refrain from repeating the infringement (second paragraph of Article 3 of the contested decision). The first requirement does not affect it adversely since the infringement had already ceased by the end of 1999 or the beginning of 2000 (recital 91 of the contested decision).

177 The applicant maintains that Article 3 of the contested decision should therefore be annulled in so far as it concerns the applicant.

178 The Commission contends that the present plea is unfounded and should be rejected.

2. Findings of the Court

179 The Court considers that the present plea constitutes merely a reformulation of the fourth plea – which also alleges infringement of the principle of legal certainty and of the principle of *nulla poena sine lege certa* – and cannot therefore be assessed differently.

180 In so far as the present plea refers to the second paragraph of Article 3 of the contested decision, it is sufficient to point out that the Commission is empowered, on the basis of Article 3(1) of Regulation No 17, to impose on the addressees of a decision taken pursuant to Article 81(1) EC a binding instruction to put an end to the unlawful conduct and to refrain in future from practices which may have the same object or effect, or a similar object or effect (*Limburgse Vinyl*

Maatschappij and Others v *Commission*, cited in paragraph 39 above, paragraphs 1252 and 1253).

181 Accordingly, the present plea must also be rejected as unfounded.

182 It follows that the action must be dismissed as unfounded in its entirety.

Costs

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

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders AC-Treuhand AG to pay the costs.

Jaeger	Azizi	Czúcz

Delivered in open court in Luxembourg on 8 July 2008.

E. Coulon	M. Jaeger
Registrar	President

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* Language of the case: German.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

8 July 2008 (*)

(Competition – Cartels – Plasterboard market – Decision finding an infringement of Article 81 EC – Single and continuous infringement – Repeated infringement – Fine – Guidelines on the method of setting fines – Leniency Notice)

In Case T‑53/03,

BPB plc, established in Slough (United Kingdom), represented by T. Sharpe QC, and A. Nourry, Solicitor,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre, acting as Agent, J. Flynn QC, and C. Kilroy, Barrister,

defendant,

APPLICATION for the annulment in part of Commission Decision 2005/471/EC of 27 November 2002 relating to a proceeding under Article 81 [EC] against BPB plc, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 – Plasterboard) (OJ 2005 L 166, p. 8), or, in the alternative, annulment or reduction of the fine imposed on the applicant,

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2007,

gives the following

Judgment

Facts

1 BPB plc manufactures and markets plasterboard-based building materials.

2 On the basis of information received, on 25 November 1998 the Commission carried out unannounced inspections at the premises of eight undertakings operating in the plasterboard sector, including the applicant. On 1 July 1999, it pursued its investigations at the premises of two other undertakings.

3 The Commission then sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959–1962, p. 87) to the various undertakings concerned. It sent four such requests to the applicant. BPB replied to them on 17 March 1999, 28 October 1999, 18 May 2000 and 6 September 2002.

4 On 18 April 2001, the Commission initiated the procedure in this case and adopted a statement of objections which it addressed to the applicant and to Gebrüder Knauf Westdeutsche Gipswerke KG ('Knauf'), Société Lafarge SA ('Lafarge'), Etex SA and Gyproc Benelux NV ('Gyproc'). The undertakings concerned submitted their written observations and were given access to the Commission's investigation file in the form of a copy on CD-Rom which was sent to them on 17 May 2001.

5 The applicant replied to the statement of objections on 8 July 2001.

6 On 27 November 2002, the Commission adopted Decision 2005/471/EC relating to a proceeding under Article 81 [EC] against BPB, Knauf, Lafarge and Gyproc (Case No COMP/E-1/37.152 – Plasterboard) (OJ 2005 L 166, p. 8; 'the contested decision').

7 The operative part of the contested decision states:

'Article 1

BPB … , the Knauf Group, … Lafarge … and Gyproc … have infringed Article 81(1) [EC] by participating in a set of agreements and concerted practices in the plasterboard business.

The duration of the infringement was as follows:

(a) BPB …: from 31 March 1992, at the latest, to 25 November 1998

(b) [the] Knauf [Group]: from 31 March 1992, at the latest, to 25 November 1998

(c) … Lafarge …: from 31 August 1992, at the latest, to 25 November 1998

(d) Gyproc …: from 6 June 1996, at the latest, to 25 November 1998

…

Article 3

In respect of the infringement referred to in Article 1, the following fines are imposed on the following undertakings:

(a) BPB …: EUR 138.6 million

(b) … Knauf …: EUR 85.8 million

(c) … Lafarge …: EUR 249.6 million

(d) Gyproc …: EUR 4.32 million …

…'

8 The Commission found in the contested decision that the undertakings concerned participated in a single and continuous agreement which was manifested in the following conduct constituting agreements or concerted practices:

– the representatives of BPB and Knauf met in London (United Kingdom) in 1992 and expressed the common desire to stabilise the plasterboard markets in Germany, the United Kingdom, France and the Benelux;

– the representatives of BPB and Knauf established, as from 1992, information exchange arrangements, to which Lafarge and subsequently Gyproc acceded, relating to their sales volumes on the German, French, United Kingdom and Benelux plasterboard markets;

– the representatives of BPB, Knauf and Lafarge exchanged information, on various occasions, prior to price increases on the United Kingdom market;

– in view of particular developments on the German market, the representatives of BPB, Knauf, Lafarge and Gyproc met at Versailles (France) in 1996, Brussels (Belgium) in 1997 and The Hague (Netherlands) in 1998 with a view to sharing out or at least stabilising the German market;

– the representatives of BPB, Knauf, Lafarge and Gyproc exchanged information on various occasions and concerted their action on the application of price increases on the German market between 1996 and 1998.

9 For the purpose of calculating the amount of the fine, the Commission applied the methods set out in its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines').

10 In fixing the starting amount of the fines, determined according to the gravity of the infringement, the Commission initially considered that the undertakings concerned had committed an infringement which was very serious by its very nature in so far as the aim of the practices at issue was to put an end to the price war and to stabilise the market through exchanges of confidential information. The Commission also considered that the practices at issue had had an impact on the market, since the undertakings concerned represented almost all plasterboard supply and the various manifestations of the cartel had been put into practice in a highly concentrated and oligopolistic market. As regards the geographic extent of the relevant market, the Commission considered that the cartel had covered the four main European Community markets, namely Germany, the United Kingdom, France and the Benelux.

11 Considering, next, that there was a considerable disparity between the undertakings concerned, the Commission took a differentiated approach, relying for that purpose on the sales turnover for the product concerned on the relevant markets during the last complete year of the infringement. On that basis, the starting amount of the fines was set at EUR 80 million for BPB, EUR 52 million for Knauf and Lafarge and EUR 8 million for Gyproc.

12 In order to ensure that the fine had an adequate deterrent effect having regard to the size and aggregate resources of the undertakings, the starting amount of the fine imposed on Lafarge was increased by 100%, becoming EUR 104 million.

13 In order to take account of the duration of the infringement, the starting amount was then increased by 65% for BPB and Knauf, by 60% for Lafarge and by 20% for Gyproc, the infringement being classified by the Commission as of long duration in the case of Knauf, Lafarge and BPB and of medium duration in the case of Gyproc.

14 In respect of aggravating circumstances, the basic amount of the fines imposed on BPB and Lafarge was increased by 50% on account of recidivism.

15 Next, the Commission reduced by 25% the fine imposed on Gyproc on account of attenuating circumstances, in that it had acted as a destabilising element helping to limit the impact of the cartel on the German market and it was absent from the United Kingdom market.

16 Finally, the Commission reduced the amount of the fines by 30% for BPB and by 40% for Gyproc, pursuant to Section D.2 of the Commission Notice on the non–imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). Accordingly, the final amount of the fines imposed was EUR 138.6 million for BPB, EUR 85.8 million for Knauf, EUR 249.6 million for Lafarge and EUR 4.32 million for Gyproc.

Procedure and forms of order sought

17 By application lodged at the Registry of the Court of First Instance on 14 February 2003, the applicant brought the present action.

18 Following a change in the composition of the Chambers of the Court at the beginning of the new judicial year, the Judge-Rapporteur was assigned to the Third Chamber, and this case was therefore also assigned to it.

19 On hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of

Procedure of the Court of First Instance, requested the parties to lodge certain documents, and put questions in writing to which they replied within the prescribed period.

20 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 24 January 2007.

21 At the hearing, the Court requested the applicant to clarify its request for confidentiality before 7 February 2007. A period of time was also granted to the Commission for any observations it might have on the applicant's reply concerning the confidential information.

22 The oral procedure was closed on 27 March 2007.

23 The applicant claims that the Court of First Instance should:

– annul Articles 1 and 2 of the contested decision in so far as they relate to it;

– in the alternative, annul Article 3 of the contested decision in so far as it relates to it, or, in the further alternative, reduce appropriately the amount of the fine imposed on it by the Commission in the contested decision;

– subject to the annulment of Article 3 of the contested decision or reduction of the amount of the fine, order repayment of the principal sum paid by the applicant, together with such interest as the Court may determine in accordance with law;

– order the Commission to pay the costs.

24 The Commission contends that the Court of First Instance should:

– dismiss the application;

– order the applicant to pay the costs.

Law

1. The first plea: breach of the rights of the defence

Arguments of the parties

25 The applicant considers that the Commission has infringed the rights of the defence and the general principal of equality of arms by relying on evidence not provided to the applicant.

26 First, the applicant submits that the Commission did not grant it access to information provided by an anonymous informant. According to the applicant, that information was used by the Commission on 19 November 1998 in order to obtain a search warrant from a United Kingdom court. The applicant also considers that it appears from the affidavit attached as an annex to the application for a search warrant that the Commission considered that information to be convincing. The applicant maintains that the Commission's conviction that there was a complex cartel influenced its interpretation of all the facts and evidence.

27 Second, the applicant submits that the Commission should have granted access to the replies of the other addressees of the statement of objections. The Commission relied on those replies on several occasions in the contested decision for the factual and evidential findings.

28 The Commission considers that the obligation to observe the rights of the defence does not require it to disclose the entire contents of the file to the undertakings concerned and thereby compromise any confidentiality of elements of the file. It is under no obligation to disclose to an addressee of a statement of objections inculpatory documents on which the Commission does not propose to rely. In this case, the Commission drew its inferences only from the evidence before it which is described in the statement of objections and in the contested decision.

29 The Commission denies that the applicant's rights of defence have been infringed by its having been unable to examine the replies of the other addressees of the statement of objections. The Commission states that if, after adoption of the statement of objections, new matters come to light which it intends to use and regarding which the undertakings have not had the opportunity to submit their views, it must send a supplementary statement of objections or a letter asking the undertakings concerned for further observations on that new evidence. Its failure to do so would prevent it from relying on those matters as against the addressees of the initial statement of objections.

30 In this case, all the examples given by the applicant concerned admissions or denials of allegations which already appear in the statement of objections, on which therefore the applicant had the opportunity to comment. None of those statements introduces any new objection or new piece of factual information on which the Commission relied for its conclusions.

Findings of the Court

31 It must first be recalled that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (see Joined Cases T–191/98, T–212/98 to T–214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II–3275, paragraph 334 and the case-law cited).

32 With regard to inculpatory evidence, the obligation to allow access to the file relates merely to the evidence ultimately relied on in the decision and not to all the complaints which the Commission may have expressed at any stage of the administrative procedure (*Atlantic Container Line and Others* v *Commission*, paragraph 31 above, paragraph 337). A document can be regarded as a document that incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated (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 *Cementeries CBR and Others* v *Commission* [2000] ECR II–491, '*Cement*', paragraph 284).

33 Further, the applicant may not demand access, in a general and abstract way, to documents or information which have not been communicated to it without stating how the inculpatory evidence relied upon by the Commission in the contested decision was determined by those documents or that information. According to the case-law, an infringement of the rights of the defence cannot be founded on a general argument but must be examined in relation to the specific circumstances of each particular case (*Atlantic Container Line and Others* v *Commission*, paragraph 31 above, paragraphs 353 and 354).

34 In the present case, as regards the information provided by the anonymous informant, the Commission does not dispute that that information was a factor in triggering the investigations. However, as is apparent from the contested decision, that information was ultimately not referred to as such by the Commission and the objections upheld were proved by other evidence.

35 Similarly, the applicant has not indicated any objection maintained either in the statement of objections or in the contested decision which is based solely on the information provided by the anonymous informant and to which it did not have access.

36 Further, even if the Commission has an obligation to make available to the undertakings involved in proceedings under Article 81(1) EC all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, that obligation does not extend to business secrets of other undertakings, the internal documents of the Commission or other confidential information (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 68 and *Atlantic Container Line and Others* v *Commission*, paragraph 31 above, paragraph 335). Thus, as the Commission asserts, in the case of information supplied on a purely voluntary basis, accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition (Case 145/83 *Adams* v *Commission* [1985]

ECR 3539, paragraph 34). The Commission's ability to guarantee the anonymity of certain of its sources of information is of crucial importance with a view to ensuring the effective prevention of prohibited anti–competitive practices (Case C–94/00 *Roquette Frères* [2002] ECR I–9011, paragraph 64).

37 Consequently, proceedings initiated on the basis of information from an undisclosed source are lawful, provided that this does not affect the opportunity for the person concerned to make known his views on the truth or implication of the facts, on the documents communicated or on the conclusions drawn by the Commission from them (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 14).

38 In the light of the obligation to ensure the confidentiality of the information, and of the fact that the applicant has not referred to any objection maintained either in the statement of objections or in the contested decision which is based on evidence to which it did not have access, it cannot complain that the Commission infringed the rights of the defence and the general principle of equality of arms on the ground that the Commission did not give it access to the information provided by the anonymous informant.

39 As regards access to the replies of the other addressees of the statement of objections, it is common ground that the applicant did not have access to those replies during the administrative procedure.

40 As regards, first, the failure to communicate the alleged inculpatory evidence which was not in the investigation file, the Court notes that the observance of the rights of the defence constitutes a fundamental principle of Community law which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure. It requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (*Hoffmann-La Roche* v *Commission*, paragraph 37 above, paragraph 11, and Case T–11/89 *Shell* v *Commission* [1992] ECR II–757, paragraph 39).

41 Next, it should be borne in mind that, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes evidence against the various parties alleged to have participated in the infringement (see *Cement*, paragraph 32 above, paragraph 386, and Case T–314/01 *Avebe* v *Commission* [2006] ECR II–3085, paragraph 50 and the case-law cited).

42 A document cannot be regarded as an inculpatory document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of the rights of the defence, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as evidence of an infringement in which the undertaking participated (Joined Cases T–44/02 OP, T–54/02 OP, T–56/02 OP, T–60/02 OP and T–61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II–3567, paragraph 158).

43 Since documents that have not been communicated to the undertakings concerned during the administrative procedure are not admissible evidence, it will be necessary to exclude those documents as evidence if it should prove that the Commission relied in the Decision on documents that were not in the investigation file and were not communicated to the applicants (*Cement*, paragraph 32 above, paragraph 382).

44 If there is other documentary evidence of which the undertakings concerned were aware during the administrative procedure that specifically supports the Commission's findings, the fact that an incriminating document not communicated to the person concerned is inadmissible as evidence does not affect the validity of the objections upheld in the contested decision (*Aalborg Portland and Others* v *Commission,* paragraph 36 above, paragraph 72).

45 It is thus for the undertaking concerned to show that the result at which the Commission arrived in

its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 73).

46 In the present case, BPB refers only to recitals 130, 232, 393 and 524 of the contested decision in order to illustrate that the Commission relied on the replies of the other addresses of the statement of objections as inculpatory evidence.

47 Concerning those examples, it should be observed that, at recital 524 of the contested decision, the Commission merely cites Gyproc's statement, in its reply to the statement of objections, that its participation was of a different intensity. Thus, that evidence was in no way used against BPB.

48 As regards recital 130 of the contested decision, it is an extract from Lafarge's reply to the statement of objections claiming that BPB was the instigator of the information exchange system. However, at no point in the contested decision does the Commission use that statement of Lafarge in order to prove that BPB was the instigator of that system. Similarly, BPB's fine was not increased on the ground that it was the instigator of the cartel. Further, as is apparent from an examination of the second plea below, BPB admitted that it infringed competition law by participating in an exchange of information on sales volumes on the four markets concerned.

49 As regards recital 232 of the contested decision, namely the interpretation by Gyproc of the memorandum and the statements of Mr [E], managing director of Gyproc, in its reply to the statement of objections, reference should be made to Gyproc's words:

'Gyproc later backtracked on the memo and Mr [E]' explicit statement by arguing that "the so-called Versailles agreement was only an attempt and was never effectively implemented" and also that "there was never a proper meeting of minds among the participants, and definitely not as far as Gyproc was concerned, about all the details of how the German market should be shared. The [undertakings concerned] never agreed about the precise market share that Gyproc should have. … So Gyproc scuppered the attempt to conclude an agreement between the four".'

50 As the Commission noted at recital 233 of the contested decision, the statements by Gyproc, which in principle have less probative value than the abovementioned memorandum and the spontaneous statements of Mr [E], do not negate either the content or the purpose of the talks that were held but only, possibly, their result. Further, it should be recalled that BPB admitted that the Versailles meeting took place and that the purpose of the meeting was to discuss the situation on the German market.

51 Moreover, it should be noted that the Commission found only that the undertakings in question had met in Versailles in 1996, Brussels in 1997 and The Hague in 1998 with a view to sharing or at least stabilising the German market, but it did not claim that they had succeeded in concluding an agreement on allocating shares of the German market.

52 In those circumstances, even if Gyproc's interpretation of Mr [E]'s memorandum and statements set out at recital 232 of the contested decision were disregarded, that fact would not influence the assessments made by the Commission in that decision.

53 Accordingly, the result at which the Commission arrived in the contested decision would not have been different if the extracts from Gyproc's and Lafarge's replies to the statement of objections referred to by BPB had been removed from the file.

54 Lastly, it is apparent from recital 393 of the contested decision that Gyproc accepted the Commission's description of the facts regarding the price increases on the German market. This is indeed a factor that the Commission used to support its contention that there had been concerted action on price increases on the German market, a contention which BPB disputes. Thus, it is necessary to disregard that factor as evidence and then consider, so far as concerns BPB, whether the Commission demonstrated to the requisite legal standard that BPB, Knauf, Lafarge and Gyproc had exchanged information on various occasions and had concerted their action on the application of price increases on the German market between 1996 and 1998.

55 As regards, second, whether the replies of the other addresses of the statement of objections might have contained exculpatory evidence, the applicant has not put forward any arguments to that effect in the application.

56 In response to a written question of the Court requesting it to indicate the paragraphs of the application in which a plea alleging infringement of the rights of the defence relating to exculpatory evidence was raised, the applicant merely referred to paragraphs 75 to 120 of its application. Yet in those paragraphs the applicant does not submit that the replies of the other addressees of the statement of objections might have contained exculpatory evidence which it could have used for its defence. In those circumstances, the applicant's arguments that the replies of the other addressees of the statement of objections might have contained exculpatory evidence must be rejected.

57 It follows from the foregoing that the first plea must be rejected, without prejudice to the possible effect of the fact that Gyproc's statements in its reply to the statement of objections and referred to by the Commission in recital 393 of the contested decision are not to be taken into account. Consequently, it is necessary to examine the complaint in the second plea contesting the Commission's findings on the exchange of information on price increases in Germany.

58 Furthermore, and for the sake of completeness, the Court will examine the substance of the case, disregarding all the inculpatory evidence derived from the replies of the other addresses of the statement of objections, in order to ascertain whether the Commission's assessment as to the existence and effects of the infringement is demonstrated to the requisite legal standard even without that evidence.

2. The second plea: manifest errors and/or inadequacy of the statement of reasons concerning the application of Article 81(1)EC

The standard of proof

Arguments of the parties

59 The applicant takes the view that, in cases leading to the imposition of a heavy fine, the standard of evidence required is comparable to that in criminal proceedings. In that regard, the applicant submits that the burden of proof falls upon the Commission and that the infringement must be demonstrated to the requisite legal standard, a term which, according to the applicant, must be interpreted as requiring that convincing proof be adduced that the alleged infringements have been committed. It considers that, in such a situation, the ordinary application of the balance of probabilities is not sufficient. Moreover, in order to respect the presumption of innocence, any doubts about evidence must favour the defence.

60 The Commission disputes that the standard of proof to be applied in competition cases is the same as that required in criminal proceedings.

Findings of the Court

61 According to case-law, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. In doing this, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an undertaking participated in such an infringement and that it was responsible for the various aspects of it (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86).

62 When the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraph 61 above, paragraph 87).

63 It is normal, in the context of anti-competitive practices and agreements, for the activities to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a

number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraphs 55 to 57).

64 It is apparent from that case-law that the Court must reject the applicant's assertion that the Commission must adduce proof 'beyond reasonable doubt' of the existence of the infringement in cases where it imposes heavy fines.

The London meeting

Arguments of the parties

65 The applicant considers that the Commission has failed to prove that an agreement was entered into at the London meeting and that the subsequent information exchanges were a device to monitor the implementation of that agreement. The London meeting is the key to the Commission's case, since the other events are linked to it and it marks the inception of the infringement.

66 The applicant admits that that meeting took place but submits that the Commission's interpretation of that admission goes beyond what it actually said. Even though Mr [A] (its then Chief Executive Officer (CEO)) discussed with the cousins of the Knauf family the vigorous competition in the plasterboard market and even though both parties recognised the problem, it denies categorically having reached an agreement on a solution with the cousins of the Knauf family. Moreover, no common wish to stabilise the market was expressed at that meeting.

67 The applicant also admits that that meeting may have been a factor in accelerating the end of the price war. However, that meeting is not the only causal factor. The applicant claims that the economic situation on the relevant market was such that in 1992 the price war had ended in any event. That is confirmed by the expert economist retained by it, whose report was however not taken into account by the Commission in the contested decision.

68 The applicant considers that the fact that competition continued on the market concerned contradicts the Commission's interpretation of the London meeting. The Commission's assertions in recitals 212 and 395 of the contested decision are not supported by any evidence. In that regard, the applicant maintains that the Commission decided not to take account of numerous proven examples of price volatility which it had given to the Commission in its reply to the statement of objections. The applicant also contests the Commission's assertions regarding the stability of market shares. It claims that the Commission's own tables in the annex to the contested decision show the contrary. It also states that the Commission's allegations are devoid of probative value, since the Commission nowhere states in the contested decision what the pre-1992 market shares of the undertakings concerned were and, therefore, a comparison of market shares was impossible.

69 As regards the Commission's assertion that there is no need to take account of the concrete effects of an infringement, the applicant claims that, where the existence of an agreement is merely asserted by the Commission and is not supported by any evidence, it is necessary to take account of evidence of what took place in the market. The applicant is of the opinion that, if that evidence tends to establish the absence of any anti-competitive agreement and no other evidence to the contrary has been adduced by the Commission, the latter must consider that no agreement was made. The applicant states that it is not merely a question of determining whether the agreement was implemented but rather of determining whether the Commission has established the existence of the alleged agreement.

70 The Commission states that the applicant's argument that no agreement existed is based on the misapprehension that the agreement has to be finite, detailed and legally binding. It adds that the object of Article 81 EC is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The elaboration of an actual plan is not therefore required. The Commission maintains that even if the discussions that took place at the 1992 meeting can not be classified as an agreement, they can be classified as a concerted practice, which is just as serious an infringement.

71 The Commission considers that the London meeting and the agreement concluded there constitute the first practical manifestation of the complex and continuous infringement on which the contested decision is based. In view of the observations set out in recitals 56 to 69 of the contested decision

and in particular of the fact that the information exchanges commenced at the London meeting or shortly afterwards, that conclusion is fully justified. It adds that it is unnecessary to prove that all the elements of the infringement were present or foreseen at the initial stage to establish that that agreement formed part of a single, complex and continuous infringement.

72 As regards BPB's statement that the Commission failed to take account of the economic evidence, the Commission contends that it simply explained in recitals 329 to 402 of the contested decision that, in view of the circumstances of the case, the attempt by BPB and the other undertakings concerned to show, on the basis of economic analyses, that the competitive situation on the plasterboard market between 1992 and 1998 excluded any possibility of a restrictive agreement during that period was beside the point. The Commission states that it does not rely on mere similarity of observed conduct, nor does it use economic evidence to establish the infringement of Article 81(1) EC. Its conclusions are based on direct evidence of the anti-competitive agreement, which the economic analyses do nothing to explain away. Where the Commission makes reference, in the contested decision, to improved stability in the market concerned or price increases (as in recitals 289 and 539), the aim was to demonstrate the effects of the anti-competitive activity, not its existence. The Commission adds that the existence of an agreement can be established without the complete elimination thereby of all competition from the plasterboard market. Moreover, since the infringement established by the Commission pursued an anti-competitive purpose, it is settled case-law that there is no requirement for it to take account of the agreement's concrete effects.

73 The Commission takes the view, in response to the applicant's argument that 'fierce' competition or the 'price war' was bound to end for economic reasons, that that argument is not relevant in determining the reasons for which and the conditions under which the 'price war' actually ended and in particular whether or not anti-competitive conduct by certain operators was the reason for that development. It considers that, having demonstrated that the cartel participants' aim was to put an end to the price war and stabilise market shares and thereby restrict competition at least in the German, French, United Kingdom and Benelux plasterboard markets, it was fully entitled to conclude, as it did in recitals 72, 196, 212, 289 and 395 of the contested decision, that that objective was largely achieved. It contends that the market instability before 1992 was described in paragraph 28 of the statement of objections and was never contested. Moreover, as is clear from recitals 212 and 395 of the contested decision, the Commission found that prices on the United Kingdom and German markets tended to rise or at least be stable, in contrast to the position prior to 1992.

Findings of the Court

74 BPB admits that the London meeting took place and that Mr [A] and the cousins of the Knauf family each expressed the view that it would be in the interests of the industry as a whole to put an end to the destructive price war. It also admits that, at that meeting or at the latest in 1992, the undertakings began to exchange overall market volume data for each principal market.

75 However, BPB disputes that an express agreement to stabilise European markets destined to last for six years was concluded at that meeting.

76 It is therefore necessary to examine whether the London meeting had an anti–competitive object.

77 In this respect, according to recital 55 of the contested decision, BPB stated in its second reply to the request for information that, at that meeting, its representatives and those of Knauf '[had] reached an understanding that it was in [its] interest, [that of] Knauf['s] and [that of] the industry as a whole (including, ultimately, the interests of consumers) for the ruinous price war to end and for producers to attempt to compete at more sustainable economic levels'.

78 BPB subsequently argued that the term 'understanding' used by it should be interpreted in its most general sense as meaning a 'consensus of views'.

79 It is settled case-law that in order for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T–9/99 *HFB and Others* v *Commission* [2002] ECR II–1487, paragraph 199; Case T–61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II–5349, paragraph 88; and Joined Cases T–49/02 to T–51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II–3033, paragraph 118). As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the intention of the

undertakings concerned to behave on the market in accordance with its terms (Case T–56/02 *Bayerische Hypo- und Vereinsbank* v *Commission* [2004] ECR II–3495, paragraph 60).

80 It follows that, in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (Case C–74/04 P *Commission* v *Volkswagen* [2006] ECR I–6585, paragraph 37).

81 The criteria of coordination, convergence and cooperation, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, namely that each economic operator must determine independently the policy which it intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (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, paragraphs 173 and 174, and *Adriatica di Navigazione* v *Commission*, paragraph 79 above, paragraph 89).

82 That is the case where there is a gentlemen's agreement between a number of undertakings representing the faithful expression of such a joint intention concerning a restriction of competition. In those circumstances, the question whether the undertakings in question considered themselves bound – in law, in fact or morally – to adopt the agreed conduct is irrelevant (*HFB and Others* v *Commission*, paragraph 79 above, paragraph 200).

83 As regards, in particular, agreements of an anti-competitive nature which are reached at meetings of competing undertakings, the Court of Justice has held that Article 81(1) EC was infringed where those meetings had as their object the restriction, prevention or distortion of competition and were thus intended to organise artificially the operation of the market (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 and 509).

84 The Court considers that BPB's explanation regarding the object of the London meeting satisfies the criterion laid down by the case–law referred to above. BPB's statements suffice to show that Knauf and BPB both expressed their intention to put an end to a price war and therefore to restrict competition.

85 Furthermore, it must be recalled that, where an undertaking participates, even without taking an active part, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at those meetings, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be considered as established that it participates in the cartel resulting from those meetings (*HFB and Others* v *Commission*, paragraph 79 above, paragraph 137).

86 Furthermore, the anti–competitive object of the London meeting is confirmed by the exchange of information which the undertakings carried out after that meeting. According to recital 58 of the contested decision, BPB stated, in its reply to the second request for information, the following:

'[A]t that meeting [Mr [A] and the cousins of the Knauf family] agreed to exchange sales volume information for 1991, to give themselves a reliable basis going forward to monitor whether this understanding was effective (i.e. simply to give each other a more accurate picture of the overall size of the market and thus their own market share). This was necessary because there were no reliable industry statistics.'

87 BPB's arguments that it was at most a mere attempt at an agreement must fail. The fact that BPB and Knauf expressed their common intention to put an end to the price war and to stabilise the markets in question constitutes an agreement for the purposes of Article 81(1) EC.

88 Further, as the quotation at paragraph 86 above demonstrates, BPB and Knauf executed their plan by implementing that agreement through the exchange of information on sales volumes on the four

markets concerned. If those undertakings did not consider that they had concluded an agreement to put an end to the price war and to stabilise the markets concerned, they would not have needed to monitor the markets by exchanging information on sales volumes.

89 The applicant's arguments that the Commission has not shown that there had been stability of prices or market shares cannot invalidate that conclusion.

90 In this respect, for the purposes of applying Article 81(1) EC, 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 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 (Joined Cases C‑189/02 P, C‑202/02 P, C‑205/02 P to C‑208/02 P and C‑213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I‑5425, paragraph 145). Undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement was not intended to have an appreciable effect on competition.

91 Moreover, BPB's assertion that the London meeting did not have any effects is contradicted by its reply to the statement of objections, in which it stated that there had been a turning point in prices in 1992. BPB also admits that the London meeting may have been a factor in accelerating the end of the price war. However, it submits that the commercial and economic reasons set out in the application show that it was not the only cause.

92 The Court considers that the applicant's admission that the London meeting was a factor in accelerating the end of the price war supports the interpretation that the object of the London meeting was anti‑competitive. Even if there were other economic reasons which prompted the end of the price war, that does not call in question the anti‑competitive object of the London meeting, which was to raise prices and to reduce the intensity of the competition between the undertakings concerned.

93 Lastly, account must be taken of the fact that the applicant stated, in its reply to the statement of objections, that it did not object to the Commission's categorising that meeting as an infringement of Article 81(1) EC. It also admitted, in its reply to an oral question put by the Court, that the London meeting constituted an infringement of Article 81(1) EC.

94 It follows that the Commission was right to find that, at the London meeting, BPB and Knauf had expressed their common intention to put an end to the price war and to stabilise the market concerned. This complaint cannot therefore be upheld.

Exchanges of information concerning quantities sold in Germany, France, the Benelux and the United Kingdom

Arguments of the parties

95 The applicant admits that, either at the London meeting or some time later in the same year, Mr [A] and the cousins of the Knauf family agreed to exchange highly aggregated sales volume data for 1991. However, Mr [A] said that that had been done to enable him to assess whether there was any 'new mood' in the industry, by giving him a more accurate picture of the size of the market and thus of the applicant's own market share. The applicant also admits that those information exchanges may have contributed to ending the price war. However, the applicant denies that the exchanges decided upon by Mr [D] – director of Gyproc and CEO of BPB from 1994 to 1999 – as from 1993 had any bearing on the first two annual information exchanges. The applicant also denies that those exchanges were a method of monitoring any agreement or understanding between producers. In this respect, the applicant claims that the Commission produced no evidence of any command and control structure in relation to the implementation of the cartel. The applicant states that it would have been informed by customers if it was being undercut on price by its competitors and would not have waited months to learn, by the exchange of information, of developments in market shares.

96 The applicant states that the Commission ignores the evidence concerning the nature of the data which was actually exchanged. In that connection, the applicant states that exchanges were initially annual, then half-yearly, but never more than quarterly. Moreover, the data were highly aggregated, being the total square metre surface area of all plasterboard products sold in the period in question, of all thicknesses, dimensions and specifications, expressed as a single figure. It also observes that there are enormous price variations between products. Moreover, the information related to national markets and, in the case of the Benelux, was wider than that. Furthermore, the information was not exchanged at regular intervals. For those reasons, the applicant considers that the exchanges could not constitute a mechanism for close surveillance of the market.

97 The applicant considers that the Commission's argument is also undermined by the fact that market shares developed considerably over the period in question. In addition, it states that price cutting had taken place. Moreover, the Commission has produced no evidence of any systematic attempt to adjust market shares or prices. The applicant takes the view that all these factors are solid evidence of the lack of any cartel in this case.

98 The Commission states that the applicant does not deny the existence of those exchanges, but contests their purpose. It considers that it responded in detail to those arguments in recitals 104 to 170 of the contested decision.

99 The Commission states that the argument relating to the absence of any 'command and control' structure is irrelevant. The case-law shows that the fact that no measures are taken to force undertakings to adhere to agreements does not mean that there is no infringement. The absence of evidence of such measures simply shows that no retaliatory measures were necessary.

100 The Commission repeats that it has never asserted that the cartel completely excluded all competition or that there were fixed quotas or fixed market shares. The important achievement of the cartel was overall market equilibrium and stability, not necessarily static market shares in particular markets.

Findings of the Court

101 It should be noted that the applicant stated, in its reply to the statement of objections, that it did not object to the Commission's categorising those exchanges of information as an infringement of Article 81(1) EC. It also admitted, in its reply to a written question put by the Court, that the exchanges of information concerning quantities sold in Germany, France, the Benelux and the United Kingdom constituted an infringement of Article 81(1) EC. The applicant none the less disputes certain assessments made by the Commission in the contested decision.

102 BPB admits that, either at the London meeting or some time later in the same year, Mr [A] and the cousins of the Knauf family agreed to exchange aggregated sales volume data for 1991. Mr [A] said that that was done to enable him to assess whether there was any 'new mood' in the industry, by giving him a more accurate picture of the size of the market and thus of BPB's own market share.

103 BPB also admitted that the information exchanges effected by Mr [A] in 1992 and 1993 in relation to the 1991 and 1992 data may have contributed to ending the price war. However, BPB denies that those information exchanges were a monitoring mechanism for a wider anti-competitive purpose.

104 BPB also admits that, under Mr [D]'s direction, the information exchanges on sales volumes on the four markets concerned became half–yearly from 1993 and quarterly from 1995. None the less, it claims that the exchanges organised by Mr [D] were unrelated to the first two annual exchanges of information effected by Mr [A].

105 Thus, since the applicant has admitted the existence of the information exchange in question, its arguments seek only to call in question the Commission's legal assessment of undisputed facts.

106 According to the case-law, agreements on the exchange of information are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (Case C–238/05 *ASNEF-EQUIFAX and Administración del Estado* [2006] ECR I–11125, paragraph 51).

107 It is inherent in the Treaty provisions on competition that every economic operator must determine

autonomously the policy which it intends to pursue on the common market. Thus, according to that case-law, such a requirement of autonomy precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and also the volume of the market (*ASNEF-EQUIFAX and Administración del Estado*, paragraph 106 above, paragraph 52).

108 As regards the lawfulness of the exchange of information, it is apparent from the case–law that, on a truly competitive market, the fact that an economic operator takes into account information on the operation of the market, made available to it under the information exchange system, in order to adjust its conduct on the market, is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other operators all uncertainty about the foreseeable nature of its competitors' conduct. However, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between the operators (Case C–7/95 P *Deere* v *Commission* [1998] ECR I–3111, paragraphs 88 and 90).

109 Subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period (*HFB and Others* v *Commission*, paragraph 79 above, paragraph 216).

110 In the present case, the plasterboard market was oligopolostic and the applicant does not dispute that this was the case. It is therefore necessary to ascertain whether, in the light of that market characteristic, the exchanges of information reduced or removed the degree of uncertainty of the undertakings concerned as to the operation of the market in question and thus restricted competition on that market.

111 The applicant takes the view that, as organised, the exchange of information made it possible to achieve only one objective, namely to check in broad terms the individual estimates of the market conditions and, in particular, the volume of that market.

112 Such an explanation is not convincing. It is apparent from the explanation given by Mr [D] in his statement of 9 July 2001 in order to justify the exchanges of information that, whilst the data were useful to see the size of the market, they also made it possible to determine market trends and competitors' market shares so that 'one was not operating completely in the dark'.

113 For the same reasons, the applicant's argument that the market was transparent and the data could be collected on the market must be rejected.

114 That finding is borne out by BPB's reply of 28 October 1999 to the second request for information, referred to in recital 58 of the contested decision, according to which:

'[The representatives of BPB and Knauf] agreed to exchange sales volume information for 1991, to give themselves a reliable basis going forward to monitor whether this understanding was effective (i.e. simply to give each other a more accurate picture of the overall size of the market and thus their own market share). This was necessary because there were no reliable industry statistics.'

115 In this respect, proof of the collusory nature of the exchange of information is even more cogent in the light of BPB's reply to the statement of objections. According to 106 of the contested decision:

'BPB subsequently specified that the objective of the agreement to exchange information with Knauf was to provide Mr [A] with "a basis to assess whether there was a new mood in the industry", i.e. that "the information exchange, at a high level, would provide the degree of mutual assurance that the price war was ending". BPB has moreover explicitly acknowledged that the purpose of the information exchanges effected by Mr [A] was to put an end to the fierce competition prevalent in the plasterboard industry in the early 1990s: "the subsequent two exchanges of historical data effected by Mr [A] may have served, and have been intended to serve, to assist the ending of the price war".'

116 The applicant's argument that there was no restriction of competition in the absence of any informative value of the sales data exchanged, given that the figures had been communicated in a very global and imprecise form without being broken down according to the different types of plasterboard, is irrelevant in so far as the information exchanges between the undertakings in question were intended to monitor that their respective market shares remained stable or, at the very least, did not diminish. Since the applicant and Knauf had expressed a common intention to put an end to the price war and to stabilise the markets in question at the London meeting, it sufficed, in order to attain that objective, that the undertakings in question knew that by terminating the price war they would not lose market shares. To that end, the general sales data, which made it possible to calculate market shares, were sufficient. That also explains why the figures did not need to be broken down according to the different types of plasterboard.

117 As regards the applicant's argument that the exchange of data was not effected at regular intervals and, for that reason, it was not a monitoring mechanism, it is clear that the anti-competitive nature of that exchange of information, the objective of which – as clearly described by the applicant itself in its reply to the statement of objections – was to put an end to the price war, can in no way be called in question.

118 As regards BPB's argument distinguishing Mr [A]'s information exchanges in 1991 and 1992 from those of Mr [D], it is a mere assertion which is devoid of any real foundation. In his statement, Mr [A] said that he had counselled Mr [D] in 1993 against making the exchanges too frequent, which shows that both were well aware that those exchanges were being made. The mere fact that the exchanges of information were effected by two different persons is thus explained by the change of person at the head of BPB. Moreover, the reason for those exchanges of information, in particular as regards their object, is identical. In his account of the exchanges which he effected from 1993, Mr [D] states that, even in highly aggregated form, the information was useful to see the size of the market and the trends and that knowledge of competitors' market shares meant that 'one was not operating completely in the dark'.

119 In conclusion, the collusive nature of the exchanges of information concerning quantities sold in Germany, France, the Benelux and the United Kingdom from 1992 to 1998 is sufficiently established.

The exchanges of information on sales volumes in the United Kingdom

Arguments of the parties

120 The applicant maintains that the purpose of the United Kingdom information exchange was to have a better view of the total size of the United Kingdom market for plasterboard and of its market share.

121 The applicant claims that, even if the data exchanged were monthly data on highly aggregated sales volumes, the exchanges were not monthly but were sporadic and related to information concerning several months.

122 The Commission replies that it does not claim that the exchanges occurred on a monthly basis but simply that they remained remarkably consistent over time (seven successive years) and that the assertions that the exchange was an irregular ad hoc exchange are contradicted by the content of the table kept by Mr [N], managing director of British Gypsum ('BG'), the subsidiary of BPB in the United Kingdom, from which the existence of a regular flow of information can be inferred.

Findings of the Court

123 It should first be noted that the applicant stated in its reply to the statement of objections that it did not object to the Commission's categorising the exchanges of data on sales volumes in the United Kingdom as an infringement of Article 81(1) EC. It also admitted in its reply to a written question put by the Court that those exchanges had taken place from 1992 until the beginning of 1998 and constituted an infringement of Article 81(1) EC.

124 Next, it should be noted that in response to a written question of the Court the Commission confirmed that the exchange of information on sales on the United Kingdom market and that on the

sales of the four markets concerned were both elements of the single and continuous infringement, even if their anti-competitive effects might have duplicated and mutually reinforced one another in so far as they related to the United Kingdom market. Given that the applicant disputes the object and the frequency of the exchanges of sales volume data on the United Kingdom market, it is necessary to consider whether the contested decision is vitiated by errors regarding that exchange.

125 As regards the object of the exchange of sales volume data on the United Kingdom market, the Commission found, at recital 171 of the contested decision, that it was identical to that of the exchange of information on sales volumes on the four markets concerned. However, the applicant asserts that its object was to have a better view of the total size of the United Kingdom market for plasterboard and of its market share.

126 The applicant's explanation does not alter the anti-competitive nature of the information exchange, having regard to the general context of the infringement in question, which was characterised by the pursuit of the objective, expressed at the London meeting, of putting an end to the price war.

127 The applicant's assertion that the fact that the data were compiled on a monthly basis in the tables does not show that the exchange of those data also took place with the same frequency is immaterial in the present case. Even if the sales volume data were exchanged less frequently, that would not invalidate the conclusion that such an exchange was anti-competitive for the same reasons as those set out regarding the exchange of data on the four markets concerned. In any event, the applicant has not adduced any evidence showing that, although the data were compiled monthly, the exchange did not take place monthly. In those circumstances, it must be concluded that the applicant has failed to show that the Commission's finding at recital 194 of the contested decision, that the systematic and detailed nature of Mr [N]'s table was based on a regular flow of information, is vitiated by error.

128 It follows that the Commission's assessment concerning the exchange of sales volume data on the United Kingdom market is not vitiated by any error.

Exchanges of information on price rises in the United Kingdom from 1992 to 1998

Arguments of the parties

129 The applicant claims that the Commission made no finding that the parallel price rises were other than independently arrived at.

130 The evidence relied on by the Commission consists, first, of a conversation in 1996 between the regional directors of Knauf and BG, second, a conversation in 1998 between Lafarge's sales director and a member of BG's sales staff and, third, one or two communications from Mr [N] to his opposite numbers to inform them of price rises.

131 The applicant maintains that the Commission attached unjustified importance to those isolated events. Moreover, the first two contacts were two years apart and the discussions took place in the course of social events. In addition, there were only one or two communications by Mr [N], and, contrary to the Commission's allegations, it was not a question of exchanges of information but of unilateral communications.

132 The applicant contests the Commission's conclusion that those contacts corroborate the existence of a single and continuous infringement. The applicant submits that they took place only between November 1996 and March 1998 and related only to the United Kingdom.

133 The Commission states that it never alleged that prices had been agreed or negotiated. It takes the view that the very fact that the contacts concerning certain price rises were reported internally indicates their importance.

134 The Commission considers, referring to recitals 471 to 477 of the contested decision, that exchange of information to be a concerted practice which was part of the particular manifestations of the complex and continuous agreement having as its object the restriction of competition at least in the four main European plasterboard markets.

Findings of the Court

135 As is apparent from the application and an examination of BPB's cooperation, it was BPB which informed the Commission of those exchanges on price rises in the United Kingdom. Moreover, the facts mentioned in the contested decision are not contested by BPB.

136 Account must also be taken of the fact that the applicant stated in its reply to the statement of objections that it did not object to the Commission's categorising those contacts as an infringement of Article 81(1) EC. In its reply to a written question of the Court, the applicant also admitted that the fact that Mr [N] had, once or twice, informed Knauf and Lafarge of the list price increases in the United Kingdom constituted an infringement of Article 81(1) EC.

137 However, BPB attempts to qualify the anti–competitive nature of those exchanges by stating that the conversations which took place at the golf days were just a report of industry gossip and that the memoranda recording them present this information as such. Further, the information was imparted unilaterally. Lastly, it submits that the price rises would have been known in any event through market intelligence and that the exchanges of information were merely the communication of decisions which had already been made. Moreover, the communication related only to list prices and did not reflect the 'net net' prices (net of discounts).

138 It is apparent from recitals 198 to 200 of the contested decision that, as regards the period prior to 7 September 1996, the price rise announcements were virtually simultaneous in four cases. Thus, BG's announcement on 21 July 1992 (with effect from the end of August 1992) was followed by Lafarge's (Redland's) announcement of 31 July 1992 (with effect from 31 August 1992). Knauf announced its new prices on 3 August 1992 (with a new price list for September 1992).

139 In November 1993 BPB announced a 12% rise with effect from January 1994. Lafarge followed this announced rise but Knauf did not follow it in full.

140 On 29 September 1994 Knauf announced a rise of approximately 6.5% with effect from 1 March 1995 and on 2 December 1994 BPB announced a 9% rise with effect from 27 February 1995. That rise was followed by the announcement of an identical rise by Lafarge on 6 January 1995, with effect from the same date.

141 On 22 September 1995, BG announced a 12% price rise for standard board to enter into force on 1 January 1996. This announcement was followed by Lafarge, which announced the same increase on 13 October 1995 with effect from 1 January 1996 and by Knauf, which announced the same increase on 27 October 1995 with effect from the same date.

142 Thus, as regards the period prior to 7 September 1996, the price rises of BPB, Lafarge and Knauf succeeded one another at very close intervals or were even simultaneous.

143 It must therefore be ascertained whether the near-simultaneity of the price rise announcements and the parallelism of the prices announced, as found, constitute a sound, precise and consistent body of evidence of prior concertation designed to inform the competing undertakings of the price rises. Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 81 EC prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (Joined Cases C–89/85, C–104/85, C–114/85, C–116/85, C–117/85 and C–125/85 to C–129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I–1307, paragraph 71).

144 In the present case, even if the intervals between the various price rise announcements may have enabled the undertakings to ascertain those price rises by information from the market and even if those rises were not always exactly of the same level, the near-simultaneity of the price rise announcements and the parallelism of the prices announced amount to strong evidence of concerted action prior to those announcements, since those rises were made in a context characterised by the fact that, as the Commission found in the contested decision, the applicant and Knauf agreed at the London meeting at the beginning of 1992 to put an end to the price war on the four European markets.

145 In any event, the fact remains that, as regards the exchange of data on price increases on the United Kingdom market, the Commission concluded, at recital 476 of the contested decision, only that there were contacts – acknowledged by BPB, Knauf and Lafarge – which accompanied certain

price increases, referring in this respect to recital 211 of the contested decision. Otherwise, as is apparent from recital 210 of that decision, the Commission stated that it could only note the parallel behaviour between undertakings which were also engaged in other collusive contacts, without inferring from this that that parallel behaviour had necessarily been preceded by concerted action. Further, by its use of the word 'nevertheless' in the English, French and Dutch versions of recital 211 of the contested decision, it clearly placed that mere parallelism in the context of the admitted existence of contacts preceding the price rise announcements.

146 As regards the period after 7 September 1996, the existence of contacts between the competitors on prices rises in the United Kingdom is demonstrated by the following documentary evidence.

147 First, it is apparent from an internal BG memorandum that, during the weekend of 7 and 8 September 1996, Knauf announced that it would follow the BG price increase initiative when BG's intentions were expressly stated. As is clear from recital 201 of the contested decision, that discussion took place before BG sent out announcements of a price rise on 9 September 1996.

148 Further, that increase was followed, on 20 September 1996, by that of Lafarge.

149 Second, the near-simultaneity of the price rise announcements and the parallelism of the prices announced continued. Thus the Commission found, at recitals 203 and 204 of the contested decision, that on 3 June 1997 BG had announced a rise of 3.8% for standard board with effect from 1 August 1997. Lafarge announced a rise of 3.7% with effect from 4 August 1997 and Knauf announced a rise of 3.7% with effect from the same date as Lafarge. Further, on 27 January 1998, BG announced a rise of 4.4% with effect from 1 April 1998. Lafarge announced a rise of 4.1% with effect from 6 April 1998 and Knauf announced an identical rise with effect from 1 April 1998.

150 Third, according to recital 205 of the contested decision, before the announcement on 8 September 1998 of BG's 5% price rise with effect from 1 November 1998, a Lafarge representative mentioned to a member of British Gypsum's staff that, for budgetary reasons, Lafarge had decided not to follow the price increase planned for the beginning of January of the following year. However, if the undertakings concerned had not agreed to exchange information on price rises, Lafarge would not have needed to inform the BG representative that it was not going to follow the planned increase.

151 Fourth, BPB acknowledged what it calls 'isolated instances' when Mr [N] had telephoned the managing directors of Lafarge and Knauf in the United Kingdom to inform them of BG's pricing intentions and the planned range of increases (recital 207 of the contested decision). Even though BPB does not indicate even the approximate date of these telephone calls, and even though it terms them 'pure courtesy calls', they show that the competing undertakings were in contact regarding price rises.

152 In those circumstances, the Commission was right to find, at recital 477 of the contested decision, that the contacts on price rises on the United Kingdom market constituted a concerted practice prohibited by Article 81(1) EC.

153 That finding cannot be invalidated by the argument that it was unilateral conduct. It is true that the concept of concerted practice does in fact imply the existence of reciprocal contacts. However, that condition is met where the disclosure by one competitor to another of its future intentions or conduct on the market is requested or, at the very least, accepted by the latter (*Cement*, paragraph 32 above, paragraph 1849).

154 As regards the applicant's claims that the price information transmitted was known by the customers of the undertaking concerned before it was transmitted to the competitors and that, therefore, the information disclosed could already have been collected on the market by those competitors, it should be recalled that the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti–competitive intention (Joined Cases T–204/98 and T–207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II–2035, paragraph 66). Moreover, the discussions for which the Commission found direct evidence or whose existence was acknowledged by the applicant occurred before the official price rise announcements.

155 In view of the circumstances of the present case, the Commission has shown to the requisite legal standard that the three undertakings informed one another of price rises on the United Kingdom market during the period 1992 to 1998.

The stabilisation of German market shares

Arguments of the parties

156 The applicant admits that the objective of the Versailles meeting was to arrive at an agreement to stabilise German market shares. However, that attempt was unsuccessful. It claims that Gyproc's subsequent statement supports its statement.

157 The applicant also admits that at the meetings in Brussels and The Hague the discussions continued to focus on the market shares of each undertaking in question in Germany. Further, the latter discussions were preceded by a further exchange of market share data for the first four months of 1998. However, those discussions likewise did not yield any results.

158 The applicant states that although the parties met and had a common interest in establishing stability in the German market, they did not make a common commitment. However, the applicable law requires such a commitment. The applicant claims that undertakings may share a common view of what they would like to see occur but unless an undertaking, by contact and conduct, acts in a manner which unmistakably conveys to the other that it proposes to act in a certain way and that it feels under an obligation to do so, that does not constitute an agreement in law. It contends that the Commission cannot consider that negotiations are equivalent to an agreement.

159 The applicant claims that the Commission's approach consists in asserting that a common objective is evidenced by 'manifestations' of an agreement within the meaning of Article 81(1) EC and that the 'manifestations' themselves are evidence of a common objective. According to the applicant, that argument is devoid of any legal merit.

160 The applicant submits that the Commission was wrong to consider that the information exchange system that the undertakings in question had organised in November 1996 with the assistance of an independent expert ('the information exchange system') was more sophisticated and that it supplied them with more accurate and verifiable information than the other exchanges. It states that the producers provided information to the independent expert, but that he did not carry out any verification of it. Moreover, the exchanges within the information exchange system were no more frequent than those between the CEOs of the undertakings in question, both having been quarterly in the period from 1996 to 1998. Moreover, the exchanges made within the information exchange system provided the undertakings in question with less information than those between the CEOs, given that the independent expert provided those undertakings only with a total market size figure.

161 It also claims that the fact that the information exchange system was launched after the Versailles meeting was a coincidence.

162 The Commission contends that even if the undertakings did not succeed in concluding an agreement as to how the German market could be shared between them, they expressed a common wish to restrict competition in the plasterboard market by sharing the German market or, at least, stabilising it. According to it, the mere disclosure by an undertaking of the fact that it does not want to increase its market share is sufficient to inform competitors of an essential element in its strategy and is manifestly anti-competitive. It submits that the undertakings did feel bound to act in a particular way, as demonstrated by the continuous discussions in that sense.

163 The Commission submits that the only plausible explanation for an information exchange which the participants wish to keep secret and which is based on figures allegedly of limited value for defining future strategy is that there is a tacit agreement between the undertakings in question to respect traditional flows.

164 The Commission considers that even if market shares in Germany continued to fluctuate after the Versailles meeting in 1996, those fluctuations were minimal and are consistent with its findings, in so far as it never maintained that there was a strict market sharing agreement.

165 The Commission states that even if the information exchange system itself is not contrary to Community law, it should not be examined in isolation but in the light of the fact that it was set up to supply more accurate and verifiable information. Moreover, BPB's assertion that the information provided was no more accurate than that already being exchanged does not explain why BPB and the other undertakings participated in the system. Furthermore, the explanation put forward by BPB, that the undertakings wanted an accurate measure of the size of the German market, merely

supports the Commission's interpretation.

Findings of the Court

166 It is apparent from the applicant's arguments that it does not dispute the existence of the Versailles, Brussels and The Hague meetings. Further, it admits that it participated in those meetings and discussed the situation on the German market. It also acknowledges that a proposal was made at the Versailles meeting in order to arrive at an agreement to stabilise German market shares at their 1995 levels.

167 However, it submits that the Commission has not shown that the undertakings in question made a common commitment. In its submission, the applicable law requires that there be such a commitment, but in the present case there were merely negotiations with a view to securing an agreement.

168 Consequently, the question on which the applicant and the Commission disagree concerns the legal classification of the Versailles, Brussels and The Hague meetings and the information exchange system.

169 As regards the applicant's argument seeking to demonstrate that there was no agreement on German market shares, it should be noted that in the contested decision the Commission found, at recital 469, *in fine*, that 'an agreement [had been] concluded between the [undertakings concerned], who aimed to divide up the German market between them or at least to stabilise it, this agreement being a particular manifestation of the complex, continuous agreement having as its object the restriction of competition on the plasterboard market at least in the four major European markets'. Moreover, it is apparent from recitals 462, 463, 465 and 469 of the contested decision that the Commission found that, irrespective of whether such an agreement had been concluded or not, the undertakings in question, by expressing their common intention to divide up the German market between them or at least to stabilise it, had concluded an agreement within the meaning of Article 81(1) EC.

170 Thus, even if the Commission had not succeeded in showing that the undertakings penalised had concluded an agreement, in the strict sense of the term, as to how the German market could be shared between them, it would suffice if it were clear from undisputed facts that the undertakings in question knowingly substituted for the risks of competition practical cooperation between them by remaining in direct contact with a view to stabilising the German market. Consequently, it is necessary to ascertain whether that is the case here.

171 The existence of the Versailles meeting of June 1996 is not disputed, nor the fact that, during that meeting, the undertakings in question disclosed their real sales figures for 1995, that they discussed the stabilisation of their German market shares and that Gyproc was not satisfied with the market share that the other undertakings were offering it.

172 BPB also admits the existence of the Brussels meeting of 4 December 1997, but states that it was also an opportunity to discuss the stabilisation of the German market.

173 Nor does BPB dispute that The Hague meeting of May 1998 took place. However, it submits that, even if the object of the talks was the situation in Germany, they did not yield any concrete results. In this respect, it is apparent from recital 257 of the contested decision that, according to Gyproc, the participants exchanged their figures on sales volumes in Germany for the first four months of 1998, that each participant mentioned the share of the German market he wished to have and that, since the total of those market shares represented 101%, the participants proposed that Gyproc limit its market share to 11%, but Gyproc refused.

174 Consequently, it follows from the foregoing that, even if a specific agreement on the sharing of the German market could not be concluded either at the Versailles meeting or at the subsequent Brussels and The Hague meetings, the four undertakings in question expressed a common intention to stabilise the German market, and therefore to restrict competition. Thus, the Versailles meeting proves the existence of an agreement on the principle of sharing the German market between BPB, Knauf, Lafarge and Gyproc, as the Commission asserted at recital 264 of the contested decision.

175 It is not contested by BPB that, at the Versailles meeting, notwithstanding the position adopted by Gyproc, the three other undertakings, Knauf and Lafarge and itself, informed each other of the

market shares they agreed to and that those market shares corresponded to the shares those undertakings actually held. In this respect, it should also be recalled that the undertakings do not dispute having exchanged their sales figures for 1995 at the Versailles meeting.

176 Account must also be taken of the information exchange system. The existence of that system supports the Commission's contention that those undertakings wished to stabilise the German market. Each producer gave its figures to the independent expert on a confidential basis and the results were compiled by it, giving an aggregate figure, which was then sent to the participants. This figure enabled each producer to calculate its own market share, but not that of the others. The figures were supplied every quarter and concerned the sales figures of each producer. In addition, the producers supplied the independent expert, on a confidential basis, with the figures for January to December 1995 and for January to September 1996.

177 The information exchange system thus enabled the undertakings in question to check whether their market shares on the German market were remaining relatively stable.

178 As regards the legal assessment of that situation, it must be recalled that the disclosure of information to one's competitors in preparation for a cartel suffices to prove the existence of a concerted practice within the meaning of Article 81 EC (see, to that effect, Case T‑148/89 *Tréfilunion* v *Commission* [1995] ECR II‑1063, paragraph 82).

179 The concept of a concerted practice within the meaning of Article 81(1) EC refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (*Suiker Unie and Others* v *Commission*, paragraph 81 above, paragraph 26, and *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 143 above, paragraph 63).

180 The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual 'plan' to have been worked out, are to be understood in the light of the concept inherent in the provisions of the EC Treaty on competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market and the conditions which it intends to offer to its customers (*Deere* v *Commission*, paragraph 108 above, paragraph 86, and Case C‑194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I‑10821, paragraph 82).

181 While it is true that this requirement of independence does not deprive operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between them, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (*Deere* v *Commission*, paragraph 108 above, paragraph 87, and *Thyssen Stahl* v *Commission*, paragraph 180 above, paragraph 83).

182 Further, as the Court of First Instance held in *Cement*, paragraph 32 above (paragraph 1852), in order to prove that there has been a concerted practice, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several other competitors, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect from it on the market.

183 In this respect, the Commission rightly took the view, at recital 466 of the contested decision, that the mere disclosure by an undertaking of the fact that it does not want a larger market share than the one it already holds is sufficient to inform competitors of an essential element of its strategy.

184 Moreover, it must be recalled that the market in question is a highly concentrated oligopolistic one. On such a market, the exchange of information is liable to enable undertakings to be aware of the market positions and business strategies of their competitors and thus to impair appreciably the competition which exists between economic operators (*Deere* v *Commission*, paragraph 106 above, paragraphs 88 to 90, and *Thyssen Stahl* v *Commission*, paragraph 180 above, paragraph 84).

185 Further, as regards the applicant's argument that the Commission's reasoning is circular, it must be recalled that all the elements of the case in question must be examined, not separately as isolated

infringements, but in the overall context, as possible elements of a single infringement having as its object the restriction of competition on the plasterboard market in the four European markets concerned. According to the case–law, the items of evidence on which the Commission relies in the Decision in order to prove the existence of an infringement of Article 81(1) EC by an undertaking must not be assessed separately, but as a whole (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 68).

186 Moreover, in the light of the general context, the objective of stabilising the markets concerned, the exchange of information on the German market enabled the undertakings in question to check that their competitors' market shares remained stable.

187 Lastly, as regards the applicant's argument that, in the absence of an agreement, the Commission ought at least to have proved the effects on the market, it must be recalled that, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition within the common market (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 261).

188 Likewise, a concerted practice falls within Article 81(1) EC even where there are no anti-competitive effects on the market. First of all, it follows from the very wording of that provision that, as in the case of agreements between undertakings and decisions of associations of undertakings, concerted practices are prohibited, independently of any effect, where they have an anti-competitive object (Case C–105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I–8725, paragraphs 137 and 138).

189 Next, although the very concept of a concerted practice presupposes certain conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 188 above, paragraph 139).

190 In the light of the overall context of the case, the Court finds that, on the basis of the undisputed facts, the Commission has demonstrated to the requisite legal standard that even if the undertakings in question did not succeed in concluding a specific agreement on sharing the German market between them, they did express their common intention to conduct themselves on that market in a specific manner, namely to restrict competition by stabilising that market.

Exchanges of information on price rises in Germany

Arguments of the parties

191 The applicant contests the Commission's allegation that the four producers kept each other informed of their intentions or that there was coordination concerning the dates and levels of the planned price increases in the period from the end of 1994 to September 1998. It considers that the Commission has not adequately proved its allegations. The fact that competition continued in the German market shows, on the contrary, that producers continued to operate independently. In any event, the contacts in question cannot prove the existence of a common wish or be evidence of an agreement concluded in 1992.

192 As regards the alleged direct contact that it had with competitors concerning price rises in Germany, BPB stated that it had not sent copies of its own price increases to its competitors. As regards the sending by Knauf of its price list to its competitors, such information cannot constitute collusion on prices because the letters concerned price rises which were already widely known or anticipated in the market. Moreover, list prices were frequently reduced by the granting of discounts.

193 The applicant disputes that the Lafarge memorandum of 17 December 1996 was drawn up following the discussion of prices between Mr [V], commercial director at Rigips, the applicant's German subsidiary, and Mr [X], managing director of Lafarge Gips. It has always denied the existence of that discussion. Moreover, it rejects the Commission's conclusion that that memorandum is evidence of direct contacts between the producers. So far as concerns the parallelism of the price increases, the applicant states that, in an oligopolistic market, it is normal for undertakings to follow competitors' prices and act in parallel, at least in respect of list prices. However, competition remained vigorous at the level of net net prices.

194 With regard to the Lafarge memorandum of 7 October 1998, the applicant considers that it describes the normal mechanism of price increases in an oligopolistic market. It submits that the memorandum discloses a number of facts which contradict the Commission's allegations, such as the fact that producers granted discounts even after raising list prices, the fact that Rigips announced an increase eight weeks before the date of the memorandum without the other producers following that increase, the fact that there was uncertainty about competitors' reactions to a price increase, the fact that most price increases were limited during the previous years and that until 1993–1994 Lafarge attempted to gain market share.

195 As regards the Knauf internal memorandum of 15 November 1993, the applicant claims that, even if that memorandum recommended the adoption of a course of action which might be anti-competitive, that does not mean that that course of action was actually adopted.

196 As regards the Rigips internal memorandum of October 1994, the applicant submits that the phrase 'it is expected that the prices will be frozen on this level' does not disclose any collusion but merely records Rigips' assessment of the outlook for price developments.

197 As regards the price increase of 1 December 1995, the applicant denies that the failure of that rise was the reason for the Versailles meeting. It contends that the fall in prices from December 1995 to June 1996 is in fact evidence of the absence, rather than the existence, of an agreement.

198 As regards the September 1997 price increase, the applicant denies having participated in the attempts made by other producers to avoid 'poaching' of customers. The applicant submits that, even if the producers had discussions on market sharing, those discussions did not yield any results. Thereafter, competition continued in the market and, therefore, the proposed September 1997 list price increase failed.

199 As regards the September 1998 price rise, the applicant maintains that it did not participate in any collusion between producers. It argues that the Commission's only evidence regarding it is the fact that it received a copy of a letter from Knauf concerning a price increase. However, that adds nothing to the admission by Knauf that it occasionally sent letters to its competitors informing them of a price increase. In addition, it denies having received a communication from Gyproc. Thus, the Commission's assertion that the September 1998 price increase constituted a further manifestation of collusion in which the applicant participated in the German market is unsupported by evidence.

200 As regards the Lafarge memorandum of 7 October 1998, the Commission contends that it was used not to decide whether there were contacts between the undertakings in question but as evidence of the fact that price increases followed a particular pattern. The fact that the announced price increases were not always reflected in achieved increases in transaction prices does not mean that the contacts established were not illegal or that they had no effect. It also considers that the fact that Lafarge tried to gain market share until 1993–1994 does not call in question its findings in that respect, since it merely found that there was coordination of price increases from the end of 1994 or the beginning of 1995.

201 As regards the fact that Knauf sent its price lists to its competitors, the Commission refers to recitals 313, 314 and 472 to 474 of the contested decision.

202 The Commission accepts that the Knauf internal memorandum of 15 November 1993 does not describe a course of action already adopted, but rather recommends a course of conduct. However, the content of that memorandum illustrate the attitudes within Knauf which led to the later contacts between competitors, which the Commission has proven and which clearly corroborate the Commission's findings that those contacts were anti-competitive. They also cast light on the motives underlying those later contacts.

203 As regards the Rigips internal memorandum of October 1994, the Commission contends that the context in which it was written, including the fact that it is dated one month before letters announcing the February 1995 price increases, is not just evidence that the author of the memorandum was well informed.

204 As regards the 1 December 1995 price increase, the Commission contests the applicant's claim that the failure of that increase shows that no agreement was concluded in 1992. Moreover, subsequent events showed that contacts had been made in 1996 (perhaps in response to that failure), including the June 1996 meeting in Versailles, and that a price increase had been agreed for 1 February 1997.

205 As regards the Lafarge memorandum of 17 December 1996, the Commission submits that the price increases agreed upon are a manifestation of the complex and continuous agreement described in recitals 430 to 434 of the contested decision. Moreover, the importance of that memorandum is described in recitals 335 to 352 of the contested decision.

206 As regards the September 1997 price increase, the Commission states that the failure of that increase does not show that there was no agreement.

207 As regards the September 1998 price increase, the Commission observes that, if an undertaking receives price information from a competitor and does not protest, there is sufficient reciprocity to constitute a concerted practice. The Commission also considers that the fact that Gyproc admitted that there were concerted attempts to raise prices on the German market supports its conclusion. It observes that the BPB memorandum referred to in recital 380 of the contested decision (containing a reference to a second price increase in the first quarter of 1999) preceded the Knauf instructions referred to in recital 337 of the contested decision, and therefore could not be a reaction to those instructions or to the market rumours that undertaking suggested provoking.

Findings of the Court

208 BPB disputes that it had direct contact with its competitors on price rises on the German market and that there was concerted action on the application of the price rises. It also submits that, in any event, even if direct contact with competitors were established, that could not prove a common wish to concert with one another on prices.

209 It is necessary to examine, first, evidence of contacts and concerted action between the undertakings, which is expressly contested by BPB.

210 In this respect, it should be recalled that those contacts must be viewed in the context of a period characterised by a series of anti-competitive manifestations demonstrating a common wish of the competitors to stabilise the plasterboard market in the four major European markets, including the German market. It must also be observed that, although the content of an isolated document found by the Commission may not unequivocally disclose the existence of anti-competitive conduct and so might possibly be explained otherwise than by a wish to restrict competition, that fact cannot preclude that document from being interpreted as corroborating the existence of such a wish when it is one of a series of other documents which provide reliable indicia of the existence of contemporaneous and similar anti-competitive conduct.

211 As regards Knauf's internal memorandum of 15 November 1993 (recital 305 of the contested decision), BPB observes merely that that memorandum recommends a line of conduct which could be anti-competitive, but that it does not constitute evidence that that line of conduct was actually adopted. It should be noted that, according to that memorandum, '[Knauf's] new price list was sent to all direct customers at the end of October. At the same time, a copy was sent to all [its] competitors to inform them'. Thus, BPB's explanation is contradicted by the fact that the event mentioned in that memorandum of November 1993 took place at the end of October 1993. Consequently, the explanation given by BPB of that memorandum is not convincing. In any event, BPB's argument seeks at most to reproach the Commission for not demonstrating that the exchange of information in question had had any effect, an argument which cannot diminish its anti–competitive object.

212 As regards the internal memorandum of October 1994 discovered at Rigips' premises, the applicant maintains its explanation set out in recital 323 of the contested decision. In its view, that memorandum reflects a company manager's assessment of the state of the German market based on the knowledge he had acquired from information collected by his sales staff.

213 In this respect, the Commission's interpretation of that memorandum is more convincing in view of the other evidence in the file which shows that, at the time, there was concerted action between the undertakings in question. The Commission rightly considers that that memorandum reveals knowledge of competitors' strategies and points to contact between them. Having first summarised the situation on the market, the author of that memorandum explains that Gyproc's sales manager had complained that his firm had lost market share and had to win it back. Further, the memorandum envisaged a price freeze at the level referred to therein and that a price increase would take place from 1 February 1995. That last comment is particularly revealing. If the notification of the price rise announcements by Knauf were unilateral and if BPB was merely following that price rise, BPB could not have known in October 1994 that a price rise was planned

for 1 February 1995, given that Knauf announced that price rise only in November 1994. Furthermore, if, as BPB claims, it had been aware of that price rise through its customers, nothing prevented it from demonstrating that so as to contradict the tangible evidence that the Commission found. Further, it should be recalled that a price rise actually took place on 1 February 1995.

214 Furthermore, it is noteworthy that, despite that concrete evidence of collusive contact between producers, the Commission merely finds, at recital 329 of the contested decision, that the competitors informed each other of their intentions concerning the price rise of 1 February 1995 but does not claim that that memorandum constitutes direct evidence of concerted action on the price rise.

215 As regards the price increase in December 1995 (recitals 330 to 333 of the contested decision), the applicant submits that the fact that it failed is further evidence of the non–existence of the 1992 agreement. In this respect, it is sufficient to recall that, even if there are no economic effects, that is not proof that there was no cartel, but, at most, evidence that the cartel did not function well, which is irrelevant for a finding that there has been concerted action with an anti–competitive object.

216 Moreover, the fact that the Commission again mentions, in that context, the Versailles meeting of June 1996, the purpose of which was to stabilise the German market is entirely relevant, since it is evidence that the undertakings concerned felt the need to rediscuss the situation on the German market after the failure of the 1995 price rise.

217 That view is backed up by Lafarge’s memorandum of 17 December 1996 (recital 335 of the contested decision). The author begins that memorandum by stating:

‘[W]e were discussing again the current situation on the German market.’

218 BPB disputes that that discussion with its representative, to which reference is made, took place. BPB submits that it is normal market behaviour in an oligopolistic market for undertakings to follow each other’s prices and act in parallel. Competition was vigorous at the level of transaction prices.

219 BPB’s argument must be rejected. Given that the memorandum of 17 December 1996 recounts the events that took place at the meeting of the German Plasterboard Association on 16 December 1996, there is no reason to doubt that the discussion between the BPB representative and the author of that memorandum, a Lafarge employee, took place.

220 Further, the Commission’s interpretation of that memorandum, marked ‘strictly confidential and personal!’, is not vitiated by error. That memorandum clearly reflects the author’s concern, against the background of a price increase announced by all producers for 1 February 1997, about the conduct of competitors and the pricing policies, especially discounts, that they applied. It establishes the existence of direct contacts between the competitors during which they conveyed their analyses and intentions. The author of that memorandum explained that the price offered by BPB to certain customers would be ‘below the [then] agreed lowest price level’ and that ‘[t]his [would] lead to a destabilization again.’ He adds:

‘[Knauf] gave them prices for projects until May [19]97 for a lower than agreed price level. With us they insist on discipline for the price increase … To increase the price to the agreed level ([2.5-3] DM/m²) will be very tough again.’

221 In those circumstances, the Court considers that the Commission was right to find, at recital 352 of the contested decision that, on the occasion of the February 1997 price rise, the competitors colluded directly on the price rise and, at the very least, had informed one another of their intentions in anticipation of the price rise.

222 So far as concerns the attempted price increase of September 1997, BPB submits that none of the documents submitted by the Commission relates to it and that any imputation of customer sharing does not concern it.

223 First of all, it must be pointed out that the four undertakings in question sent out letters announcing the price increase of 1 September 1997 in May or at the beginning of June 1997 (recital 353 of the contested decision). Those facts are not contested by the applicant.

224 In addition, even if the Commission does not provide direct evidence of contacts between BPB and its competitors concerning that increase, the exchanges between Knauf and Lafarge, referred to in recital 356 of the contested decision by way of example, confirm that there was concerted action on the price increases and monitoring of the prices charged by distributors in general. The fact that an undertaking did not hesitate to contact a competitor to discuss customers or the prices charged by a distributor bears out the fact that there was cooperation between producers.

225 The Commission gives another example which, in its view, is an additional manifestation of the collusion between BPB, Knauf, Lafarge and Gyproc on the German market. It concerns an attempted price increase in September and October 1998.

226 In this respect, it is true that as early as June 1998 BPB announced a price increase for September 1998 and that the other competitors did so only in August 1998 for an increase planned to start in October 1998. It is also true that the only other evidence directly concerning BPB that the Commission cites in the contested decision is the fact that Knauf sent a copy of its announcement of a price increase to the private address of a BPB director.

227 It should be borne in mind that it is normal, in the context of anti-competitive practices and agreements, for the activities to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti–competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraphs 55 to 57).

228 In this instance, given the context of the case, the Court considers that the fact that Knauf sent a copy of its announcement of a price increase to the private address of a BPB director, which is an unusual manner of communication between competing undertakings, suffices to show that there was also close cooperation between the producers concerning the price rises on the German market in September and October 1998.

229 Lastly, as regards the Lafarge memorandum of 7 October 1998 (recitals 290 to 294 of the contested decision), BPB takes the view that it is a mere description of the operation of the market. It is true that if that memorandum were the only item of evidence found, it would not constitute sufficient evidence of prior concerted action on price rises. However, examined in the context of the other evidence described above, that memorandum confirms, first, that there were contacts between the competitors on price rises and that there was a connection between them and, second, that there were discussions on German market shares. Having regard to the other steps taken by the undertakings in question in order to stabilise the German market, the parallelism of the price rises and the discovery by the Commission, during its investigations, of numerous copies of announcements of their competitors' price increases in those undertakings' premises, which those undertakings admitted in part having sent to or received directly from their competitors, the coherent interpretation of that memorandum cannot be the one given by the applicant.

230 It is necessary to consider, second, the applicant's argument that, even if proved, the direct contacts between the competitors did not amount to anti-competitive conduct.

231 As regards the applicant's assertion that it was purely unilateral conduct given that the applicant never sent to its competitors copies of its letters announcing price increases, it is true that the concept of concerted practice does in fact imply the existence of reciprocal contacts. However, that condition is met where the disclosure by one competitor to another of its future intentions or conduct on the market is requested or, at the very least, accepted by the latter (*Cement*, paragraph 32 above, paragraph 1849).

232 In addition, in Case T–1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II–867, in which the applicant had been accused of taking part in meetings at which competitors exchanged information concerning, inter alia, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking, by its participation in a meeting with an anti-competitive purpose, had not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not have failed to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (paragraphs 122 and 123).

233 That conclusion also applies where, as in the present case, the participation of one, or more than one, undertaking in a concerted practice with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of its market competitors.

234 Each economic operator must determine independently the commercial policy which he intends to adopt on the market. That therefore precludes any direct or indirect contact between economic operators with the object or effect of influencing their conduct on the market, giving rise to conditions of competition which do not correspond to the normal conditions of the market in question, but also any disclosure by an undertaking to a competitor of the course of conduct which it itself has decided to adopt or contemplates adopting on the market (Joined Cases T‑305/94 to T‑307/94, T‑313/94 to T‑316/94, T‑318/94, T‑325/94, T‑328/94, T‑329/94 and T‑335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II‑931, '*LVM* v *Commission*', paragraph 720).

235 As regards the applicant's claim that the price information which was transmitted was known by the customers of the undertaking concerned before it was transmitted to the competitors and that, therefore, the information disclosed could already have been collected on the market by those competitors, it should be recalled that the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti‑competitive intention (*Tate & Lyle and Others* v *Commission*, paragraph 154 above, paragraph 66).

236 The applicant's claim that the price information was known by customers before it was transmitted to the competitors and, therefore, could be collected on the market must be rejected. That fact, if proved, does not mean that, at the time that the price lists were sent to the competitors, those prices already constituted objective market data that were readily accessible. The fact that those price lists were sent directly allowed the competitors to become aware of that information more simply, rapidly and directly than they would via the market. Further, that prior notification allowed them to create a climate of mutual certainty as to their future pricing policies.

237 In those circumstances, the Court considers that, even if the Commission has not been able to prove that there were contacts between all the producers as regards each price rise on the German market during the period in question and even if Gyproc's acknowledgement of price collusion on the German market cannot be taken into account (see the first plea), the Commission was right to find that the information exchange system set up between BPB, Knauf, Lafarge and Gyproc on price rises on the German market constituted a concerted practice which is contrary to Article 81(1) EC.

The geographic scope of the cartel

238 The applicant asserts that the Commission has failed to show to the requisite legal standard that the geographic scope of the cartel also extended to France and the Benelux.

239 In this respect, it is sufficient to recall that the London meeting and the exchanges of information on quantities sold also concerned France and the Benelux.

240 When the Commission is legally entitled to conclude that the various manifestations were part of a single infringement in that they were elements of an overall plan designed to distort competition, the fact that the number and intensity of the collusive practices varied according to the market concerned does not mean that the infringement did not concern the markets on which the practices were less intense and less numerous. It would be artificial to split up continuous conduct, characterised by a single purpose, into a number of separate infringements on the ground that the collusive practices varied according to the market concerned. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the amount of the fine (see, by analogy, *Commission* v *Anic Partecipazioni*, paragraph 61 above, paragraph 90).

241 In conclusion, the Commission did not commit an error of law or a manifest error of assessment in its examination of the various elements constituting the infringement in question.

242 In those circumstances, the second plea must be rejected.

3. The third plea: misapplication of the concept of single infringement

Arguments of the parties

243 The applicant claims that the essential legal condition in establishing a continuous infringement is proof of continuity of the undertakings' participation in the pursuit of the final objective. It submits that the Commission erred in considering that the alleged 1992 common purpose could be a basis for the illegality of the various subsequent acts. According to the applicant, the subsequent events, such as the Versailles meeting, do not constitute an infringement but only an attempted infringement and that classification cannot be called in question by presuming that it is a continuous infringement. The applicant thus considers that, in order to prove the existence of a complex and continuous agreement, the Commission must examine each manifestation with sufficient rigour in declaring it illegal. Moreover, the Commission committed an error of deduction in finding the existence of a common wish on the basis of those manifestations and in considering that their illegality derived from the common wish. The applicant submits that the Commission must show that the common wish exists independently of the infringement in question.

244 According to the applicant, the Commission's explanation, namely that it found the common wish by looking at the five instances of anti-competitive conduct in conjunction, is unconvincing. The applicant observes that the identity of object found by the Commission is vague and goes no further than saying that all anti–competitive activity ultimately achieves the same purpose because all anti–competitive conduct will, ultimately, have an impact on price. It also states that the Commission is quite unable to explain with any clarity what the alleged agreement actually contained and when it was made, if it was not made at the 1992 meeting. It also maintains that the alleged single and continuous infringement in which four undertakings participated and which lasted from 1992 to 1998 is further undermined by the limited number of undertakings which took part in some of the anti–competitive manifestations or by the non–involvement of certain undertakings in them. The applicant and Knauf participated in the 1992 London meeting, but Lafarge and Gyproc did not. Although it is common ground that the information exchanges that followed that meeting were extended to Lafarge and Gyproc, the Commission does not explain how or when that took place or through whom those undertakings acceded to the common wish or joint intention allegedly underlying the information exchanges. Moreover, the applicant considers that the Commission could not draw any inference from the anti–competitive manifestations with regard to the French and Benelux markets, since they related only to the German and United Kingdom markets.

245 The Commission claims that it set out considerations concerning the factual elements of each of the five instances of conduct referred to in recital 429 of the contested decision and that it is the existence of those factual elements that it must demonstrate. It adds that it concluded, in the light of those factual considerations, that those instances of conduct were the expression of a common wish to restrict competition to a minimum in the four main European plasterboard markets. Once those deductions had been made, the only logical way of describing those instances of conduct was to consider them as manifestations of that common wish. The Commission did not thus engage in any circular reasoning in that analysis. It also contends that the various elements of the single infringement are clearly complementary, that complementarity being evidence of the identity of object of the various manifestations of that infringement. For example, for the price rises to be successful, the competitors had to be satisfied with the market shares they held.

Findings of the Court

246 As a preliminary paragraph, it must be observed, according to the contested decision (recital 479), that the Commission found that the set of agreements and concerted practices in the present case formed part of a series of actions by the undertakings in question pursuing a single economic aim, namely the restriction of competition, and constituted the various manifestations of a complex, continuous agreement, the object and effect of which was to restrict competition. Taking the view that the abovementioned agreements and concerted practices had given, without interruption from 1992 until 1998, substantive shape to those undertakings' common wish to stabilise, and hence restrict competition on at least the German, French, United Kingdom and Benelux plasterboard markets, the Commission characterised the infringement as single, complex and continuous.

247 Thus, Article 1 of the contested decision states that the undertakings concerned, including the applicant, 'have infringed Article 81(1) [EC] by participating in a set of agreements and concerted practices in the plasterboard business'.

248 It is first necessary to examine the applicant's argument that the Commission erred in law by finding that there was an overall plan on the basis of the various manifestations of the infringement,

without showing that the common wish existed independently of those various manifestations.

249 It should be recalled that, in most cases, the existence of an anti–competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 57). That case–law can be transposed to the concept of a single and continuous infringement. Where there is a complex, single and continuous infringement, each manifestation corroborates the actual occurrence of such an infringement.

250 Thus, contrary to what the applicant claims, the various manifestations of the infringement in question must be assessed in the overall context explaining the reason for their existence. It is not a question of circular reasoning but of evaluation of evidence, in which the evidential value of various facts is corroborated or weakened by other facts, which, taken as a whole, may show that there has been a single infringement.

251 BPB also submits that the Commission has not demonstrated to the requisite legal standard the common purpose causing the various manifestations to constitute a single and continuous infringement.

252 In this respect, it should be recalled that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. When the different actions form part of an overall plan because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 258).

253 In the present case, examination of the second plea clearly shows that, following the London meeting, BPB participated in a single, complex and continuous infringement characterised by the sole purpose of putting an end to the price war and stabilising the four plasterboard markets. The meetings, the exchange of information and the price–fixing practices pursued the same anti-competitive object of maintaining prices at a supra–competitive level and of reducing competition between the undertakings on the relevant market.

254 The matters set out in the second plea permit the conclusion that the Commission was right to find, at recital 432 of the contested decision, that:

‘These various manifestations are … clearly complementary in the light of the functioning of the plasterboard market. The improvement of the economic situation of the undertakings through an increase in prices rendered necessary a coordination of those undertakings at the level of market shares.’

255 In the present case, the Court finds that, owing to their identical object and close synergies, the agreements and concerted practices formed part of an overall plan which was itself part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to influence the normal movement of prices. As the Commission correctly states at recital 422 of the contested decision, it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices. The infringement constitutes a single infringement by virtue of the identical nature of the objective pursued by each participant in the cartel, not by virtue of the methods of implementing it (see, to that effect, *Cement*, paragraph 32 above, paragraph 4127).

256 Further, in the context of an overall agreement extending over several years, a gap of several months between the manifestations of the cartel is immaterial. The fact that the various actions form part of an overall plan owing to their identical object, on the other hand, is decisive (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 260).

257 As regards the argument alleging that there was no such plan, it is sufficient to recall that the notion of a single infringement covers precisely a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was

intended to distort competition, and also individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object).

258 Lastly, as regards the applicant's assertion that the single nature of the infringement is contradicted by the fact that a limited number of undertakings took part in some of the anti-competitive manifestations and that some of the undertakings did not participate in the infringement from the beginning, it is sufficient to recall that the fact that an undertaking has not taken part in all aspects of a cartel or that it played only a minor role in it is not material to the establishment of the existence of an infringement committed by it. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the amount of the fine (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 86).

259 Thus, even if the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings who are all co–perpetrators of the infringement, their participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.

260 Consequently, the mere fact that each undertaking participates in the infringement in forms specific to it does not affect the categorisation of the infringement as a single and continuous infringement.

261 It follows from the foregoing considerations that the complaints challenging the categorisation of the cartel as a single and continuous infringement are unfounded.

4. The fourth plea: infringement of Articles 253 EC and 15(2) of Regulation No 17 and breach of general principles in the calculation of the amount of the fine

262 This plea comprises five parts. First, with regard to the starting amount of EUR 80 million, the applicant considers that amount to be arbitrary, disproportionate and not supported by a statement of reasons. In this respect, it also submits that the Commission erred in classifying the infringement as very serious. Furthermore, it claims that the Commission was wrong to conclude that the infringement had an actual adverse impact on the plasterboard market. Second, the increase of the starting amount in respect of the duration of the infringement is based on an incorrect interpretation of the duration of the infringement and of the Guidelines. The Commission also failed to assess and take due account of the limited intensity of the infringement during the relevant period or during certain periods concerned. Third, the applicant considers that the Commission erred by increasing the amount of the fine on account of aggravating circumstances. Fourth, the Commission did not take proper account of the attenuating circumstances. Fifth, the Commission erred in applying the Leniency Notice.

The disproportionate nature of the starting amount of the fine determined according to the gravity of the infringement

The gravity of the infringement

– Arguments of the parties

263 The applicant considers that, in view of its limited impact on the market, the infringement should have been classified as serious rather than very serious.

264 The applicant observes that in Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] EC (IV/34.466 – Greek Ferries) (OJ 1999 L 109, p. 24) and Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article [81] EC (Case IV/F–3/33.708 – British Sugar plc, Case IV/F-3/33.709 – Tate & Lyle plc, Case IV/F-3/33.710 – Napier Brown & Company Ltd, Case IV/F-3/33.711 – James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1), the Commission considered that the infringements in question could be regarded as serious rather than very serious on the basis of their limited market impact.

265 The applicant submits, in the alternative, that, even if the Commission's classification were correct, it should have recognised that even infringements within the very serious category vary in their

degree of gravity and that in comparison with other cartel cases, the agreement alleged in this case was a considerably less intensive and anti-competitive example of a cartel. The applicant states that when the contested decision was adopted, the fine imposed on the undertakings concerned was the second highest imposed by the Commission, after that imposed in the case which gave rise to Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E–1/37.512 – Vitamins) (OJ 2003 L 6, p. 1). It claims that the cartel alleged in the present case was much less intensive than, for example, that in the Vitamins case and in the cases which gave rise to Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case No COMP/E–1/36.604 – Citric acid) (OJ 2002 L 239, p. 18), Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81 EC] (Case No IV/35.691/E–4 – Pre–Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/36.545/F3 Amino Acids) (OJ 2001 L 152, p. 24) and Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E–1/36.490 – Graphite electrodes) (OJ 2002 L 100, p. 1). It claims that those five cases concerned very serious infringements of Article 81(1) EC. Thus, they all involved cartels which covered the entire common market or the European Economic Area (EEA). Those cartels displayed attempts to set up cartels which were much more intensive than the alleged cartel among plasterboard producers which, compared with other cartels, was a rather loose and vague agreement, lacking any form of structure or organisation. In those circumstances, the applicant considers that the starting amount of the fine imposed on it by reason of the gravity of the infringement in question is disproportionate and contrary to the principle of equal treatment, given that that amount is the third highest set in comparison with all the participants in the other cartels mentioned above.

266 The applicant submits that the Commission was wrong to compare the various fines by reference to the size of the relevant market. First, the Guidelines do not say that account should be taken of the size of the market in terms of value in order to assess the gravity of the infringement. Second, the Commission took account only of the size of the market and not of other factors which determine the gravity of the infringement. Third, the Commission does not usually take account of the size of the product market in assessing the gravity of an infringement.

267 The Commission refers to the aspects of the infringement which were found to be particularly serious in this case (recitals 534, 535 and 539 to 542 of the contested decision). It also states that the cartel was conceived, directed and encouraged at the senior levels of each of the undertakings participating. BPB was involved in all the manifestations of anti-competitive conduct in question and it was accepted by BPB that the same persons, Mr [D] and Mr [A] (both CEOs of BPB), were directly involved in all but one of the instances of offending conduct described in the contested decision.

– Findings of the Court

268 For the purpose of fixing the amount of the fine, the gravity of the infringement is to be assessed by taking into account, in particular, the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed (Case 41/69 *ACFChemiefarma* v *Commission* [1970] ECR 661, paragraph 176).

269 Article 81(1)(a) EC expressly states that concerted practices which directly or indirectly fix purchase or selling prices or any other trading conditions are incompatible with the common market.

270 Infringements of that kind, particularly in the case of horizontal cartels, are classified by the case–law as ‘particularly serious’ since they involve direct interference with the essential parameters of competition on the market in question (Case T–141/94 *Thyssen Stahl* v *Commission* [1999] ECR II–347, paragraph 675) or clear infringements of the Community competition rules (*Tréfilunion* v *Commission*, paragraph 178 above, paragraph 109, and Case T–311/94 *BPB de Eendracht* v *Commission* [1998] ECR II–1129, paragraph 303).

271 It is also important to bear in mind that very serious infringements within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines are ‘generally horizontal restrictions such as price cartels and market–sharing quotas’.

272 It follows that the Commission was right to classify the infringement at issue as very serious, having regard to its nature. It is nevertheless necessary to examine the factors capable of moderating that classification on which the applicant relies.

273 As regards the applicant's argument that the infringement should have been classified as serious on the ground that its impact on the market was limited, it must be observed that in Case T–203/01 *Michelin* v *Commission* [2003] ECR II–4071, paragraphs 258 and 259, the Court held that the gravity of the infringement could be established by reference to the nature and the object of the abusive conduct and that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects.

274 Therefore, even if the size of the geographic market concerned and the impact on the market, when measurable, must also be taken into account, the nature of the infringements constitutes an essential criterion for assessing the gravity of an infringement (Case T–241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II–2917, paragraph 84).

275 As regards the applicant's argument that the Commission has reduced the amounts of fines in its other decisions owing to the limited impact of the cartels on the market, assuming that this is correct, it should be pointed out that the Commission's previous decision-making practice does not in itself serve as a legal framework for fines in competition matters (Case T–23/99 *LR AF 1998* v *Commission* [2002] ECR II–1705, paragraph 234).

276 As regards the applicant's alternative claim that, even if the classification of the infringement were correct, the Commission should have recognised that even infringements within the very serious category vary in their degree of gravity and that in comparison with other cartel cases, the agreement alleged in this case was a considerably less intensive and anti-competitive example of a cartel, that question overlaps with the question, which will be examined below, whether the amount of the fine imposed by the Commission was proportionate to the gravity of the infringement.

277 It must none the less be borne in mind that, in any event, a comparison between the gravity of the various cartels is virtually impossible because of the different circumstances in each case.

278 As regards the applicant's claim that the Commission erred in comparing the various fines by reference to the size of the relevant market, it must be borne in mind that, in assessing the gravity of an infringement, the Commission is required to take account of numerous factors, the nature and importance of which vary according to the type of infringement at issue and the specific circumstances surrounding the infringement in question (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120). The factors tending to establish the gravity of an infringement may, where appropriate, include the size of the market for the relevant product (Case T–330/01 *Akzo Nobel* v *Commission* [2006] ECR II–3389, paragraph 37).

279 Lastly, it must be observed that a horizontal price cartel as extensive as the one found by the Commission in the contested decision, relating to such an important economic sector, cannot normally escape classification as a very serious infringement, whatever its context. In any event, the circumstances invoked by the applicant in this case are not such as to call in question the validity of the Commission's assessment of the gravity of the infringement.

280 The Court must therefore reject the applicant's complaints challenging the classification of the infringement as very serious on account of its nature.

The actual impact of the infringement on the market

– Arguments of the parties

281 The applicant submits that in the contested decision, the Commission was not able to demonstrate any quantifiable loss.

282 The applicant considers that the impact of the cartel on the market concerned was limited given that, during the period 1992 to 1998, the 'net net' prices remained at the same level in real terms in the United Kingdom and fell by 11% in Germany. The applicant states that the Commission has not

demonstrated any effects on the market in France or the Benelux. Moreover, the Commission has failed to show any consumer detriment.

283 The applicant further claims that prices and market shares moved in the United Kingdom and Germany during the period concerned in a predictable manner in the context of the return to more normal conditions of competition after a savage price war.

284 It admits that the London meeting may have contributed to an acceleration of the ending of the price war but denies that it could have been the only cause. According to the applicant, the price war would have ended anyway.

285 The applicant also maintains that the information exchanges had little effect. It submits in that connection that it used the information obtained only to determine whether there was a new mood in the industry. Moreover, Mr [D] had disclosed the data to no-one, except once in 1993. The lack of effect of those exchanges is borne out by an examination of the data actually exchanged. The applicant states that the initial exchanges were of annual data. In 1993, the exchanges became half yearly, and in 1996 they became quarterly. However, the exchanges did not occur on a regular basis. Moreover, the information was of an aggregated nature, being a single figure for the entire national market.

286 The applicant refers to *Deere* v *Commission,* paragraph 108 above, and the judgment in *Thyssen Stahl* v *Commission*, paragraph 270 above, and submits that the circumstances giving rise to the present case are completely different from those which led to those two judgments. In those two cases the information exchanged was much more detailed and recent.

287 As regards the advance warnings of list price increases, the applicant argues that in almost every case the advance warning preceded the announcement of those increases to customers by only a few days and that, in certain cases, was even made at the same time. Thus, the information was not confidential when it was imparted. Moreover, the applicant observes that the list prices are rarely the prices which customers pay.

288 The applicant also considers that the alleged infringement could not have caused harm to consumers because the customers are nearly all commercial concerns with considerable buyer power and the ability to negotiate discounts by playing the producers off against each other.

289 The applicant also contests the Commission’s conclusion that competition tends to be more limited in an oligopolistic market. It submits that market shares moved considerably, with considerable customer switching.

290 Finally, the Commission has not shown that the infringement had an impact on the French and Benelux markets. It states that the Commission’s main evidence is that the information exchanges extended to those markets. However, it failed to produce evidence of anti-competitive conduct relating to those two markets.

291 The Commission considers that the infringement committed in this case had a practical impact by reason of the very nature of the relevant market.

292 Further, the end of the price war was one of the principal objectives of the cartel and the price war did end as a result of the cartel. As to BPB’s argument that the infringement was not the only cause of the ending of the price war, it submits that even if that were true it does not lessen the practical impact of the infringement on the market concerned.

293 As regards the information exchanges, the Commission found that they were used to monitor the market and to prevent any competition considered too aggressive by the undertakings in question in the four markets concerned.

294 The fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had as both its object and its effect a serious restriction of competition. It is not therefore necessary to determine whether the variations in the transaction prices obtained evolved in parallel with those of the prices announced in order to show a practical effect on the market concerned.

295 The Commission states that it is not required to demonstrate either that the infringement caused a quantifiable loss or that consumers were harmed. It contends, however, referring to recital 534 of the contested decision, that increased price and market share stability is consistent with the implementation of the cartel. It also states that plasterboard is used in the construction industry, and that it affects housing prices and therefore consumers.

296 As regards the geographic scope of the cartel, the Commission contends that the fact that anti-competitive activity may have been less intense in some markets does not mean that the cartel did not operate in those markets.

– Findings of the Court

297 It should be borne in mind that, according to Section 1A, first paragraph, of the Guidelines, the Commission is to take account, inter alia, of '[the] actual impact [of the infringement] on the market, where this can be measured', when calculating the amount of the fine on the basis of the gravity of the infringement.

298 In this regard, it is necessary to analyse the exact meaning of the words 'where this [i.e. the actual impact] can be measured'. In particular, it is a question of establishing whether those words mean that the Commission can take account of the actual impact of an infringement for the purpose of calculating fines only if, and in so far as, it is able to quantify that impact.

299 It should also be emphasised that when appraising the effects of agreements or practices in the light of Article 81 EC it is necessary to take into consideration the actual context in which they are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (*ASNEF-EQUIFAX and Administración del Estado*, paragraph 106 above, paragraph 49).

300 Further, consideration of the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. When examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. Account must be taken of the objective fact that, because of the price cartel, the undertakings concerned specifically waived their freedom to compete with one another on prices. Thus, the assessment of the influence of factors other than that voluntary decision of the undertakings concerned in the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable.

301 Therefore, unless the criterion of Section 1A, first paragraph, of the Guidelines is to be deprived of its effectiveness, the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti–competitive object even though it does not quantify that impact or provide any assessment in figures in this respect. Consequently, the actual impact of a cartel on the market must be regarded as having been sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market.

302 In the present case, it is apparent from the summary of the Commission's analysis (see recitals 534 to 538 of the contested decision) that it relied on several indicia in order to find that the cartel had an actual impact on the market. The Commission relied on the fact that the cartel participants held all or almost all plasterboard supply on the four markets to which the cartel extended. It also found that the various elements of the cartel were put into practice in that the undertakings in question effectively modified their conduct after the London meeting and that the information exchanges decided on were implemented throughout the period in question, on the main markets and more specifically on the United Kingdom and German markets. As regards prices, it added, referring to recitals 212 and 395 of the contested decision, that they had tended to rise or, at least, stabilise and that the contacts relating to price increases were effectively linked to the publication of price lists subsequently taken into account in the prices invoiced to customers. Furthermore, the Commission, referring to recitals 71, 196 and 289 of the contested decision and the annex thereto, found that market shares had been relatively stable during the period in question, more so than during the period before 1988–1992, which was characterised by the undertakings in question as a price war.

303 Both the fact that the parties involved in the cartel held the majority (indeed even almost all) of the

market concerned and that the arrangements brought to light were specifically intended to increase prices to a level higher than that which they would otherwise have reached are indications tending to show that the infringement was capable of producing significant anti–competitive effects.

304 Thus, the Commission cannot be criticised for having found that the fact that the cartel participants held a very considerable share of the market concerned was an important factor which ought to be taken into account in examining the cartel's actual impact on the market. It cannot be denied that the probability that a cartel on prices and on market stabilisation is effective increases with the size of the market shares divided among the participants in that cartel. Although that alone does not prove an actual impact, nevertheless in the contested decision the Commission did not show a cause-and-effect relationship of that kind, but merely took it into account in the same way as other factors.

305 As regards the Commission's assertion that prices effectively tended to rise or, at least, stabilise (recital 534 of the contested decision), it must be pointed out that the Commission does not present statistics on price developments, but notes merely that BPB and Lafarge stated in their replies to the statement of objections that prices on the United Kingdom and German markets had tended to rise or, at least, stabilise.

306 In this respect, the following should be noted. First, concerning Lafarge's reply to the statement of objections, it is apparent from paragraph 58 above that the Court has decided, for the sake of completeness, to disregard it as inculpatory evidence against the applicant. Second, even if the applicant's reply to the statement of objections can be interpreted in the way that the Commission claims, namely that, for the United Kingdom and German markets, the applicant itself admitted that prices tended to rise or, at least, to stabilise, the French and Benelux markets are not covered by that assertion. Third, it is apparent from the applicant's reply to the statement of objections that it stated that, during the period 1992 to 1998, transaction prices had remained at the same level in real terms in the United Kingdom and had fallen in Germany.

307 However, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel. It would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved (Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I–9855, I–9858, point 109).

308 In the present case, it is apparent from the contested decision and from the applicant's own admission that the price war came to an end, which, by definition, had the effect of increasing prices to levels higher than they would have reached without the illicit arrangements.

309 Further, the fact that the contacts relating to price increases were linked to the publication of price lists subsequently taken into account in the prices invoiced to customers (recital 534 of the contested decision) had, by its very nature, an impact on the market and on the conduct of the various operators, both on the supply and demand side, given that such announcements influenced the pricing process, in that the price announced constituted a point of reference for individual negotiation of transaction prices with customers (see, to that effect, Case T–338/94 *Finnboard* v *Commission* [1998] ECR II–1617, paragraph 342), who inevitably saw their scope for price negotiation restricted (see, to that effect, *LVM* v *Commission*, paragraph 234 above, paragraph 745).

310 Moreover, the fixing of a price, even one which merely sets a target, affects competition because it enables all the cartel participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 21). More generally, such cartels involve direct interference with the essential parameters of competition on the market in question (*Thyssen Stahl* v *Commission*, paragraph 270 above, paragraph 675). By expressing the common intention to apply a given price level to their products, the producers concerned do not independently determine their policy in the market, thus undermining the concept inherent in the provisions of the Treaty relating to competition (see, to that effect, *BPB de Eendracht* v *Commission*, paragraph 270 above, paragraph 192).

311 The Court therefore considers that the Commission has demonstrated to the requisite legal standard that the cartel had an actual impact on the marked concerned as regards prices.

312 As regards the Commission's assertion at recital 534 of the contested decision that market shares were relatively stable during the period in question on account of the infringement in question, that assertion is not borne out. Admittedly, it is apparent from the table in the annex to the contested decision, to which the Commission refers, that market shares during the period 1992 to 1998 seem to have remained relatively stable. None the less, in the absence of data relating to the situation on the market concerned before the cartel, that table does not prove to the requisite legal standard that the stability, if established, was the consequence of the infringement in question.

313 So far as concerns the exchanges of information, it is settled case–law that, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period, as is the case here (see *HFB and Others* v *Commission*, paragraph 79 above, paragraph 216, and the case-law cited).

314 In the light of the foregoing considerations, the Court finds that the Commission has sufficiently proved the effects of the infringement on the market concerned, with the exception of the stability of market shares. Given the gravity of the conduct in question and the nature of the market, it may also be presumed that there was an effect on the French and Benelux markets.

315 Thus, it is still necessary to consider whether the fact that the Commission has not proved all the alleged effects of the infringement has an impact on the classification of the infringement as a very serious infringement and therefore on the amount of the fine.

316 In this respect, it should be recalled that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (Case C–219/95 P *Ferriere Nord* v *Commission* [1997] ECR I–4411, paragraph 33).

317 The Court held, in *Michelin* v *Commission*, paragraph 273 above (paragraphs 258 and 259), that the gravity of the infringement could be established by reference to the nature and the object of the abusive conduct and that, according to settled case–law, factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects.

318 The Court of Justice has confirmed that approach by holding that the effect of an anti-competitive practice is not a conclusive criterion for assessing the proper amount of a fine. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as price fixing and market sharing (judgment of the Court of Justice in *Thyssen Stahl* v *Commission*, paragraph 180 above, paragraph 118).

319 Moreover, it must be remembered that horizontal price agreements have always been regarded as among the most serious infringements under Community competition law (*Tate & Lyle and Others* v *Commission*, paragraph 154 above, paragraph 103, and Case T–213/00 *CMA CGM and Others* v *Commission* [2003] ECR II–913, paragraph 262).

320 Finally, it is also important to point out that the Commission did not attach primary significance to the criterion of the actual impact of the infringement on the market in setting the starting amount of the fine. The Commission also based its determination on other considerations, namely the finding that the infringement was to be classified as very serious by its very nature (recitals 528 to 530 of the contested decision) and that the relevant geographic market constituted a large part of the Community market, geographically and in terms of value, since it represented approximately 80% of the market's total value (recitals 539 to 542 of the contested decision).

321 Consequently, in the light of all the foregoing considerations, the Commission was right to classify the infringement as very serious.

322 Further, the Court finds, in the exercise of its unlimited jurisdiction and in the light of the foregoing considerations, that the fact that the Commission demonstrated only partially the effects of the infringement is not capable of calling in question the Commission's assessment of the starting amount of the fine set according to gravity.

The determination of the starting amount of the fine according to the gravity of the infringement

– Arguments of the parties

323 The applicant considers that, according to the third indent of the second paragraph of Section 1.A of the Guidelines, a very serious infringement will attract a fine of a starting amount which will be likely to be above EUR 20 million. The applicant takes the view that, in view of that provision, the Commission should explain on the basis of which criterion it chose an amount above EUR 20 million. In the absence of such an explanation, the figure chosen appears to have been chosen at random.

324 The applicant asserts that its fine is also disproportionate and excessive when compared with its turnover. It observes that the fine imposed represents 18.1% of its plasterboard turnover in Europe, 24.3% of its plasterboard turnover in the four main markets, and 44.4% of its plasterboard turnover in the United Kingdom and Germany in 2001–2002. Moreover, its fine is much higher in terms of its turnover than the other fines imposed for the same or comparable infringements.

325 The applicant submits that, in examining the proportionality of the fine, a comparison with other cases must be 'illuminating'. It asks by what yardstick proportionality is to be measured if it is not able to argue that the fine is disproportionate by comparison even with contemporaneous cases or by reference to the applicant's turnover or that of other undertakings.

326 The applicant also maintains that the Commission's delay of at least one year in taking the contested decision has contributed to the imposition of a much higher fine than would have been likely had that decision been taken at the end of 2001 rather than on 27 November 2002. At that time, the Commission tried to deflect public attention away from a number of setbacks in a series of merger cases and therefore sought to derive maximum political capital from the imposition of 'heavy fines' for that cartel.

327 The Commission asserts that the starting amounts it selected for each of the undertakings bear a clear and proportionate relationship to each other and to the gravity of the infringement.

328 The Commission states that the reasons which prompted it to set the initial amount at EUR 80 million are set out in recitals 545 to 549 of the contested decision. It states that it is not required to give further reasons for its choice.

329 The Commission contends that any comparison between the fines imposed in the other cases is not illuminating, because it determines the amount of the fines case by case and may in any event increase the general amount of fines within the limits set by Regulation No 17 if that proves necessary in order to implement competition policy. The Commission gives a table of the starting amounts of fines imposed in cases concerning markets with the largest values to demonstrate that the starting amount of the fine imposed on the applicant is no higher than those of the fines imposed in other cases and that, on the contrary, it is significantly lower when the size of the relevant market is taken into account. It emphasises, however, that it does not seek to justify the starting amount by reference to that table, which relates to only one of the factors taken into account in assessing the starting amount.

330 Finally, the Commission submits that BPB has shown neither that there has been unreasonable delay, given the complexity of the case, nor that this delay had caused any prejudice to its rights of defence. BPB's assertions concerning the political climate are pure speculation, and wholly irrelevant to the question whether the fine was lawfully imposed.

– Findings of the Court

331 As regards the scope of the duty to state reasons as it applies to the setting of a fine imposed for infringement of the Community competition rules, it should be noted, first, that such a fine must be fixed in the light of the provisions of the second subparagraph of Article 15(2) of Regulation No 17, which states that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement'. In this respect, the Guidelines and the Leniency Notice indicate what

factors the Commission takes into consideration in measuring the gravity and duration of an infringement (Case T–220/00 *Cheil Jedang* v *Commission* [2003] ECR II–2473, paragraph 217). In those circumstances, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine (*Cheil Jedang* v *Commission*, cited above, paragraph 218).

332 It is true that, in the present case, the Commission has not indicated figures other than those relating to the market shares of the undertakings in question on the basis of which it set the starting amount of the fine imposed on the applicant at EUR 80 million.

333 However, there is no obligation on the Commission, as part of its duty to state reasons, to indicate in its decision the figures relating to the method of calculating the amount of fines (Case C–286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I–9925, paragraph 66).

334 Statements of figures relating to the calculation of the amount of fines, however useful such figures may be, are not essential to compliance with the duty to state reasons for a decision imposing fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own power of assessment (Case C–182/99 P *Salzgitter* v *Commission* [2003] ECR I–10761, paragraph 75).

335 As regards the reasons underlying the setting of the amount of fines in absolute terms, it must be borne in mind that fines constitute an instrument of the Commission's competition policy and the Commission must be allowed a margin of discretion when fixing their amount in order that it may channel the conduct of undertakings towards observance of the competition rules (Case T–150/89 *Martinelli* v *Commission* [1995] ECR II–1165, paragraph 59).

336 Moreover, it is important to ensure that fines are not easily foreseeable by economic operators. If the Commission were required to indicate in its decision the figures relating to the method of calculating the amount of fines, the deterrent effect of those fines would be undermined. If the amount of the fine were the result of a calculation which followed a simple arithmetical formula, undertakings would be able to predict the possible penalty and to compare it with the profit that they would derive from the infringement of the competition rules.

337 In the present case, it must be noted that in recitals 522 to 553 of the contested decision the Commission set out the factors which it took into account in calculating the fines on the basis of the gravity of the infringement of each of the undertakings concerned. Those recitals plainly set out the reasoning followed by the Commission in a clear and detailed manner, thereby allowing the applicant to ascertain the factors taken into account in order to measure the gravity of the infringement for the purposes of calculating the amount of the fine and the Court to exercise its power of review. It must therefore be held that the contested decision satisfies the duty to state reasons imposed on the Commission under Article 253 EC.

338 Concerning the applicant's argument that its fine is disproportionate and excessive when compared with its turnover, it is sufficient to recall that, as the Commission is not obliged to calculate the fine by reference to amounts based on the turnover of the undertakings concerned, it is likewise not required to ensure, where fines are imposed on several undertakings involved in the same infringement, that the final amount of the fines produced by the calculation for the undertakings concerned reflects any distinction between them regarding their total turnover or their turnover in the relevant product market (*Dansk Rørindustri and Others* v *Commission*, paragraph 90 above, paragraphs 255 and 312).

339 Further, Community law contains no general principle that the penalty be proportionate to the undertaking's size on the product market in respect of which the infringement was committed (Case C–397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I–4429, paragraph 101).

340 Article 15(2) of Regulation No 17 likewise does not require that, where fines are imposed on several undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than those imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and

for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified, for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than that imposed on other undertakings (Case T‑21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II‑1681, paragraph 203).

341 The applicant's argument that the disproportionate nature of the fine imposed is obvious when its amount is compared with that of fines imposed on other undertakings in similar cases must also be rejected. The Commission cannot be compelled to set fines that are proportionate to turnover and also perfectly coherent with those imposed in earlier cases.

342 It must be emphasised, in that connection, that the Commission's practice in earlier decisions does not in itself serve as a legal framework for fines in competition matters. The fact that in the past the Commission has applied fines of a particular level for certain types of infringements does not mean that it is estopped from raising that level within the limits indicated by Regulation No 17 if that is necessary to ensure implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, paragraph 278 above, paragraph 109).

343 Furthermore, the gravity of infringements must be established by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (*Ferriere Nord* v *Commission*, paragraph 316 above, paragraph 33, and *LR AF 1998* v *Commission*, paragraph 275 above, paragraph 236). The relevant data, such as the markets, the products, the countries, the undertakings and the periods concerned differ in each case. It follows that the Commission cannot be compelled to impose on undertakings fines whose amount corresponds to the identical percentage of their respective turnovers in cases that are comparable as regards the gravity of the infringements (see, to that effect, Case T‑67/01 *JCB Service* v *Commission* [2004] ECR II‑49, paragraphs 187 to 189).

344 In this respect, it must be borne in mind that the Court has power to assess, in the exercise of its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amount of the fines.

345 In the present case, the Court finds that the infringement is particularly serious in the light of certain factors, as observed by the Commission at recitals 534, 535 and 539 to 542 of the contested decision, in particular the oligopolistic nature of the market and the fact that the infringement in question affected all or almost all plasterboard supply on the four national markets covered by the cartel. Further, the size of the market concerned, both geographically and in terms of value, was large. The four markets concerned were the four main Community plasterboard markets and accounted for approximately 80% of the total value of the Community market, which amounted to EUR 1.21 billion in the last complete year of the infringement. Lastly, having regard to the nature of the product concerned, the cartel necessarily had an impact on a substantial part of the construction market and thus affected a sector which is very important for the whole of the economy.

346 Moreover, it is not evident that the starting amount set according to the gravity of the infringement in the present case is more severe than that imposed in other cases, having regard to the size of the market in question. However, that comparison does not mean that the size of the relevant market is the best or only criterion for comparing the fines imposed in different cartels. Comparison between different cartels is difficult, given the large number of the various factors that the Commission may take into account in order to assess the gravity of the infringement. Further, as was recalled at paragraph 342 above, such a comparison, in any event, only serves as an indication, since the Commission's practice in earlier decisions cannot itself constitute a legal framework for fines in competition matters.

347 Given the numerous factors which made the infringement particularly serious in the present case (see paragraph 345 above), the Court finds that the starting amount of the fine imposed on the applicant determined according to the gravity of the infringement is proportionate.

348 Lastly, the applicant's argument that its fine would have been less severe had the Commission brought the administrative procedure to an end at an earlier stage, given that it is only very recently that it has increased the general level of penalties, must be rejected. Even if it is accepted that the general level of fines has increased during the period of the administrative procedure, it is sufficient

to recall 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 (*Musique diffusion française and Others* v *Commission,* paragraph 273 above, paragraph 109, and judgment of the Court of Justice in *Dansk Rørindustri and Others* v *Commission*, paragraph 90 above, paragraph 169).

349 It follows from all the foregoing that the applicant's arguments seeking to show that the starting amount of the fine determined according to the gravity of the infringement was disproportionate must be rejected.

– Duration of the infringement

Arguments of the parties

350 The applicant considers that the Commission incorrectly assessed the duration of the alleged infringement on the basis of separate and distinct facts. The Commission was wrong to conclude that it had committed an infringement lasting from 31 March 1992 to 25 November 1998, namely six years and seven months, amounting to an infringement of long duration justifying an increase of 65% of the starting amount of the fine.

351 The applicant maintains that the alleged infringements relate to two separate periods. The first includes the London meeting and the exchange of information between Mr [A] and the cousins of the Knauf family from 1992 to early or mid-1993, and the second includes information exchanges from mid– or late 1993 to 1998 between Mr [D] and the CEOs of the undertakings in question. Those events have no connection with other alleged infringements, which occurred in the period 1994 to 1998 or with the information exchanges on United Kingdom sales from mid–1992 to February 1998.

352 In those circumstances, the applicant maintains that there was no complex and continuous agreement and contends that, under Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), infringements occurring before the five-year period ending with the commencement of the Commission inspections are time barred and cannot be the subject of any fine.

353 Moreover, the applicant maintains that Mr [D] continued the information exchanges in March and November 1998, even though it had prohibited them in March 1998. The applicant considers that it cannot be responsible for action taken by an employee who is acting contrary to its instructions and that the end of the infringement should therefore be set at the end of March 1998.

354 The applicant further claims that the Guidelines are unclear on the question whether the Commission is entitled to take into account partial years. Adopting a strict interpretation of the Guidelines, the applicant submits that the Commission was entitled only to impose an increase of 60% of the starting amount, rather than 65%, that is to say 10% for each complete year of infringement.

355 The applicant also observes that the Commission should not always apply a 10% increase, as it has automatically in all the recent cartel cases. The Commission should take account of all the relevant circumstances of the case in determining the increase of the fine. It adds that that was the Commission's practice in its Decisions 98/273/EC of 28 January 1998 relating to a proceeding under Article [81 EC] (Case IV/35.733 – VW) (OJ 1998 L 124, p. 60) and 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 [EC] (Case COMP.F.1/35.918 – JCB) (OJ 2002 L 69, p. 1), and in the pre-insulated heating pipes case, in which it took account of the intensity of the infringement in the different periods.

356 The Commission considers that BPB's arguments are yet another attempt to challenge the Commission's finding in the contested decision of a single, complex and continuous infringement.

357 As regards the conduct of Mr [D], the Commission contends that it is not required to distinguish between various organs of the undertakings, some of whom are actively involved in the cartel and

some of whom were attempting to put an end to the infringement.

358 According to the Commission, there is nothing in the Guidelines to indicate that the Commission must confine itself to increasing the amount of fines only for complete years of infringements. It explains that the risk of having to pay a much larger fine, proportionate to the duration of the infringement, will necessarily increase the incentive to denounce it or to cooperate with the Commission. Any other approach would be inconsistent with its stated goal of increasing the fine proportionately to the duration of the infringement.

Findings of the Court

359 The applicant's arguments seeking to show that this case involves separate infringements, part of which is therefore time barred, overlap with those set out in the third plea. Thus, since the Court held earlier that the Commission did not err in finding that it was a single and continuous infringement, the applicant's arguments must be rejected.

360 The applicant's argument that its participation in the infringement would have already come to an end in March 1998 if Mr [D] had not disobeyed its instructions is irrelevant. An undertaking – that is to say an economic unit comprising personal, tangible and intangible elements (Case 19/61 *Mannesmann* v *High Authority* [1962] ECR 357, 371) – is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management as provided for in those articles of association (management board, management committee, chairman, manager, and so on). The rules of competition would be easily circumvented if the Commission, faced with unlawful conduct on the part of an undertaking, were required to ascertain and to prove who is the author of the various activities, which could have the effect of preventing it from penalising the undertaking which benefited from the cartel.

361 As regards the applicant's assertion that the Guidelines are unclear on the question whether the Commission is entitled to take into account partial years, it is sufficient to note that nothing in the Guidelines prevents the actual duration of the infringement from being taken into account in the calculation of the amount of the fine. Such an approach is entirely logical and reasonable and falls, in any event, within the Commission's discretion.

362 As regards the applicant's objection to the fact that the Commission automatically applied the maximum rate of 10% per year, it must be borne in mind that, even if the third indent of the first paragraph of Section 1.B of the Guidelines does not provide that there should be an automatic increase of 10% per year for infringements of long duration, it leaves the Commission a margin of assessment in that connection (*Cheil Jedang* v *Commission*, paragraph 331 above, paragraph 134).

363 In the present case, at recital 554 of the contested decision, the Commission found that BPB had committed the infringement for six years and seven months, that is a long duration for the purposes of the Guidelines, and it thus increased the amount of the fine determined on the basis of the gravity of the infringement to 65%. It is apparent from this that the Commission complied with the rules which it had imposed upon itself in the Guidelines. Furthermore, the Court considers that, having regard to the duration of the infringement, the increase of 65% is not disproportionate in the present case.

364 So far as concerns the applicant's assertion that the Commission did not take account of the different levels of intensity of the infringement during the period in question, it must be borne in mind that the increase is calculated by the application of a certain percentage to the starting amount which is determined according to the gravity of the infringement as a whole, thus already reflecting the different levels of intensity of the infringement. Thus, it would not be logical to take into account, for the increase of that amount on the basis of the duration of the infringement, a variation in the intensity of the infringement during the period concerned.

365 In so far as BPB submits that in other cases concerning restrictions of a similar nature and duration the Commission applied increases in respect of the duration of the infringement that were lower than that applied in the present case, it is sufficient to point out that the Commission's practice in earlier decisions does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and that, moreover, economic operators 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 (judgment of the Court of Justice in *Dansk Rørindustri and Others* v *Commission*, paragraph 90 above, paragraph 171).

366 It follows that the complaint alleging that the Commission erred in increasing the amount of the fine in respect of the duration of the infringement must be rejected.

Repeated infringement

Arguments of the parties

367 The applicant considers that the increase of 50%, that is EUR 66 million, of the basic amount of the fine for repeated infringement is excessive and disproportionate.

368 First, the applicant claims that the role played by its subsidiary in the earlier infringement was minor and passive (Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article [81 EC] (IV/C/33.833 – Cartonboard) (OJ 1994 L 243, p. 1)). Consequently, the fine ultimately imposed on its subsidiary was only EUR 750 000. Moreover, the earlier infringement was penalised more than eight years before the contested decision was issued. The applicant maintains that the Commission is not entitled to determine an increase mechanically on the basis of the existence of an earlier infringement. It should take account of all the circumstances of the earlier infringement: its nature, the circumstances in which it was committed, how long ago it took place and the penalty imposed. The applicant refers to a number of jurisdictions to show that the nature of any earlier infringement and the time that has elapsed since it was committed are taken into account when a court envisages an increase of the penalty for repeat offences.

369 Second, the applicant claims that the Commission is not entitled to increase the fine on account of repeated infringement where the first offence is contemporaneous with the second offence. In this case, the decision in Cartonboard (see paragraph 368 above) was adopted on 13 July 1994 and, accordingly, the increase of 50% should have been applied only as from that time. According to the applicant, the increase should therefore be reduced accordingly to EUR 43.7 million. Looked at another way, the aggravation factor should only be applied to the fine increased in respect of the duration of the infringement from July 1994. In that case, the amount to be added for aggravating circumstances would be EUR 56 million.

370 Third, the applicant maintains that the increase is excessive and disproportionate because it exceeds the starting amount of the fine imposed in respect of the gravity of the infringement on Knauf, Lafarge and Gyproc.

371 Fourth, the applicant claims that the increase exceeded the 30% decrease in the fine awarded to it to recognise its cooperation with the Commission in this case. Reductions granted for cooperation should be real and should not be cancelled out on account of the increase for repeated infringment.

372 Fifth, the applicant claims that there is only one Commission decision, that concerning the British Sugar case (see paragraph 264 above), in which the increase was higher, namely 75% of the basic amount, and that, in that case, the increase was based on British Sugar's role as instigator of the first infringement. In the light of the circumstances of that case and of Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 [EC] (COMP/E-2/36.041/PO – Michelin) (OJ 2002 L 143, p. 1), the increase of 50% which was applied to it is excessive.

373 Finally, the applicant claims that the Commission applied to it the same increase in respect of repeated infringement as to Lafarge even though the infringement committed by Lafarge in the case which gave rise to Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article [81 EC] (Cases IV/33.126 and 33.322 – Cement) (OJ 1994 L 343, p. 1) was more serious than that penalised in the Cartonboard case. The Commission should have taken account of the differences between the two earlier cartels, in particular Lafarge's significant role, the long duration of the cartel in which Lafarge had participated and the fact that Lafarge had been fined EUR 14.9 million for that infringement. By not taking account of those differences and by imposing the same increase of 50% on both the undertakings, the Commission infringed the principle of equal treatment.

374 The Commission considers repeat offending to be an aggravating circumstance because the undertaking commits a further infringement despite having been penalised for an infringement of the same type and therefore having received a clear warning that those actions were unlawful and not to be repeated.

375 As regards the applicant's argument that the first and second infringements are contemporaneous and that the increase should be applied pro rata, the Commission maintains that the applicant fails to take account of the aim of the increase, which is to penalise the undertaking's willingness to infringe the competition rules despite earlier penalties being imposed.

376 It is wholly irrelevant whether the increase for repeat offending is above or below the starting amount of the fine imposed on other undertakings or the reduction granted on account of BPB's cooperation.

377 According to the Commission, BPB has added a complaint which was not made in the application, namely that the Commission should have considered the length of time that has elapsed since its previous offence which, according to the reply, took place 'more than eight years before the decision in this case was issued'. That complaint is inadmissible under Article 44(1)(c) of the Rules of Procedure.

Findings of the Court

378 It follows from the case-law that the taking into account of aggravating circumstances when setting the amount of the fine is consistent with the Commission's task of ensuring compliance with the competition rules (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 71).

379 Thus, any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 91).

380 The applicant's argument that the Commission did not correctly take account of all the circumstances of the earlier infringement must be rejected.

381 First of all, as regards the period of time which elapsed between the two infringements, it is common ground that the first infringement was penalised after the beginning of the infringement at issue.

382 In accordance with settled case-law, the Commission has a discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as the particular circumstances of the case, its context and the dissuasive effect of fines, there being no need to refer to a binding or exhaustive list of the criteria which must be taken into account (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

383 It must be emphasised that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and that the Commission cannot be bound by any limitation period when making such a finding. Repeated infringement is an important factor which the Commission must appraise, since the purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including the time that has elapsed between the infringements in question.

384 In this respect, it should be noted that the Court has held that a time lapse of less than 10 years between the findings of two infringements showed a tendency on the part of an undertaking not to draw the appropriate conclusions from a finding that it had infringed the competition rules (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraphs 354 and 355).

385 *A fortiori*, in the present case, the history of the infringements found against the applicant shows a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules, given that, having already been the subject of Commission measures imposed previously by the decision in the Cartonboard case, the applicant continued for more than four years to participate actively in the cartel at issue in the present case after that decision had been notified to it.

386 In those circumstances, it is not necessary to examine the admissibility of the applicant's argument relating to the period of time which elapsed between the sanctioning of the first infringement and

the issuing of the contested decision.

387 Next, with regard to the characteristics of the previous conduct, the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement of Community competition law has been made in the past (*Groupe Danone* v *Commission*, paragraph 384 above, paragraph 363).

388 The purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct when it transpires that a previous finding of infringement on its part has not been sufficient to prevent the repetition of unlawful conduct. Thus, it is not the previous imposition of a fine, and *a fortiori* not the amount thereof, which is determinative of repeated infringement, but the fact that a previous finding of infringement has been made.

389 Lastly, the applicant does not even claim that the infringement for which its subsidiary was penalised in the Cartonboard case is not of the same type as that in question in this case.

390 Consequently, the Commission did not err in finding, in the present case, that the specific circumstances of the case, in particular the fact that the same undertaking had already been the subject of a finding of infringement and that, despite that finding and the penalty imposed, it had continued to participate in a similar infringement of the same Treaty provision, were proof of repeated infringement.

391 Concerning the applicant's argument that where the first offence is contemporaneous with the second offence the Commission is entitled to increase the amount of the fine on account of repeated infringement only from the time of the adoption of the first decision penalising one of those offences, it must be rejected.

392 It is true that a policy of penalising repeated infringement can have no practical effect on the perpetrator of an infringement unless the threat of a more severe penalty for a new infringement is capable of inducing him to change his conduct. The taking into account of a repeated infringement is justified by the need to ensure a higher level of deterrence, as demonstrated by the fact that a previous finding of an infringement had not been sufficient to prevent the repetition of the infringement. Thus, a repeated infringement necessarily arises after the finding and the sanctioning of the first infringement, since it is explained by the fact that that penalty was not a sufficient deterrent.

393 In this respect, in *Thyssen Stahl* v *Commission,* paragraph 270 above, the Court of First Instance held that the Commission's decision was vitiated by an error of law in so far as the increase of the amount of the fine imposed on Thyssen Stahl AG was based on the consideration that the Commission had already penalised it for similar infringements by Decision 90/417/ECSC of 18 July 1990 relating to a proceeding under Article 65 of the ECSC Treaty concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (OJ 1990 L 220, p. 28), whilst, in the case then before the Court, the greater part of the infringement period, from 30 June 1988 to the end of 1990, taken into account against Thyssen Stahl, pre-dated that decision (paragraphs 617 to 625).

394 However, unlike in *Thyssen Stahl* v *Commission*, paragraph 270 above, in which the greater part of the infringement took place before the first decision, in the present case, BPB continued to participate in the cartel in question for more than four years after the decision adopted in the Cartonboard case.

395 As stated in paragraph 382 above, the assessment of the specific characteristics of a repeated infringement depends on an appraisal of the circumstances of the case by the Commission in the course of its discretion.

396 In the circumstances of the present case, the Court holds that the Commission did not exceed its discretion in finding that the fact that BPB had continued to participate, after the first finding of an infringement, in a similar infringement of the same Treaty provision for more than four years was proof of repeated infringement, and in therefore increasing the amount of the fine for that reason.

397 With regard to the level of that increase, the Court recalls that, when fixing the amount of the fine, the Commission has discretion. In this respect, it is not required to apply specific mathematical

formulae (*Michelin* v *Commission*, paragraph 273 above, paragraph 292).

398 Furthermore, in the context of deterrence, repeated infringement justifies a significant increase in the basic amount of the fine. It is evidence that the sanction previously imposed was not sufficiently deterrent (*Michelin* v *Commission*, paragraph 273 above, paragraph 293).

399 As regards the rate of increase applied in the present case, the Court considers that it is proportionate. In this respect, it should be noted that the decision adopted in the Cartonboard case and the contested decision concern similar infringements. The consequences of that finding cannot be called in question by the applicant's assertion that the role played by its subsidiary in the Cartonboard case was minor and passive. What matters is the fact that, despite the finding that there has been an infringement of Community competition law, the undertaking in question continued to infringe it. Accordingly, the Commission was entitled to increase the basic amount of the fine by 50% in order to channel the conduct of the applicant towards observance of the Treaty competition rules.

400 In so far as the applicant's argument that the increase on account of repeated infringement was not proportionate relies, in essence, on the fact that the increase in absolute terms (EUR 66 million) is disproportionate, it must be rejected.

401 When setting an increase for repeated infringement, the Commission may confine itself to examining what would be the proportional percentage and does not need to take into account the amount, in absolute terms, of the increase of the basic amount of the fine as a result of the application of that percentage. As long as the percentage increase is not excessive, the increase in absolute terms is only the mathematical consequence of the application of that percentage to the basic amount, whose proportionality in relation to the gravity and duration of the infringement in question was examined separately.

402 Consequently, the increase of 50% of the basic amount of the applicant's fine on account of repeated infringement is not disproportionate.

403 So far as concerns the Commission's previous practice, the applicant claims that there is only one Commission decision, in the British Sugar case, in which the increase was higher (75%), and that, in that case, the increase was based on British Sugar's role as instigator of the first infringement. The applicant considers that, in the light of the circumstances of that case, the increase of 50% applied to it is excessive.

404 As regards the comparisons with other Commission decisions imposing fines for infringements of the competition rules, those decisions can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions are identical to those of the present case (see, to that effect, *JCB Service* v *Commission*, paragraph 343 above, paragraph 187).

405 However, the applicant has failed to adduce sufficient evidence that those conditions have been met in the present case. In particular, the applicant does not refer to any decisions contemporaneous with that of the present case in which the Commission applied a lower percentage increase for circumstances similar to those of the present case. As regards the reference to the Michelin decision, in which Michelin was penalised for repeated infringement in respect of a rebate system designed to secure customers' loyalty, that is clearly a different set of circumstances from those of the present case, since such a rebate system cannot be deemed equivalent, in terms of the gravity of the Community competition law infringement, to a secret cartel concerning prices and the stabilisation of a market of considerable value.

406 In any event, the mere fact that, in another decision, the Commission increased the basic amount for a repeated infringement differently does not mean that it was required to apply the same percentage increase in the contested decision. The Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 (*Michelin* v *Commission*, paragraph 273 above, paragraph 292).

407 The applicant also maintains that the increase is excessive and disproportionate because it exceeds the starting amount of the fine imposed for the gravity of the infringement on Knauf, Lafarge and Gyproc.

408 That argument is irrelevant. Since BPB's fine was determined correctly and the increase for repeated infringement is proportionate, the fact that the increase in absolute terms is higher than the starting fines imposed on the other cartel participants is just a mathematical consequence of the increase which is unrelated to the amount of the other fines.

409 The applicant also claims that the increase was more than the 30% decrease in the fine awarded in recognition of its cooperation with the Commission in this case.

410 That argument is also irrelevant, since they are two separate stages in determining the amount of the fine.

411 Finally, the applicant claims that the Commission applied to it the same increase for repeated infringement as to Lafarge even though the infringement committed by Lafarge in the Cement case was more serious than that penalised in the Cartonboard case.

412 That argument is also unfounded. As explained above, since the increase for repeated infringement relates to an aggravating circumstance specific to the undertaking in question, the fact that the characteristics of the earlier infringement committed by Lafarge are not analogous to those of the earlier infringement attributed to the applicant is irrelevant. What is relevant is the fact that both undertakings were previously involved in very serious infringements, but that, despite the finding of those infringements, they did not bring to an end their involvement in the infringement penalised in the case in point.

413 It follows from all the foregoing that the applicant's arguments relating to the taking into account of the repeated infringement must be rejected.

Attenuating circumstances

Arguments of the parties

414 The applicant considers that the Commission should have reduced the amount of the fine by virtue of the measures taken before and after the Commission's investigation. It submits that the Commission was wrong to regard its efforts as ineffective. The Commission's refusal to recognise its efforts is contrary to the principles of equal treatment and protection of legitimate expectations.

415 First, the applicant claims that, on the basis of allegations contained in the anonymous letter, it engaged the services of independent lawyers to carry out its own investigations ('Project Alpha'). On the basis of the conclusions of Project Alpha, the applicant's Board of Directors implemented a more formal competition law compliance programme, under which it adopted a more formal policy statement on compliance which the directors, the other officers and members of staff concerned were required to sign. The applicant also decided to cease all information exchanges and instructed a firm of lawyers to help it design and implement various further elements of its formal compliance programme.

416 Second, the applicant claims that, after the opening of the Commission investigation, the measures taken by it evinced a high level of cooperation. It gave the inspectors unhindered access to its business records and computers. It also provided the documents requested and Mr [D] accurately answered the questions put by the Commission. Moreover, it provided the Commission, in its reply to the second request for information, with information of which the Commission had no previous knowledge. The applicant considers that, because of its efforts to bring the infringement to an end even before the start of the Commission's investigations and its willing cooperation during the investigations, the amount of its fine should be further reduced.

417 The applicant rejects the Commission's argument that it destroyed or concealed evidence. The applicant states that those allegations are not supported by any evidence. It states that, although documents were removed in connection with Project Alpha, a note recording their removal was left in the file.

418 Third, with regard to the fact that its CEO, Mr [D], disobeyed the instructions of its Board of Directors and continued the information exchanges without the knowledge of the Board or that of any of the staff, the applicant considers that it cannot be held responsible for Mr [D]'s activities, particularly because of his independent position. The applicant also claims that when Mr [D]'s continued information exchanges came to light, he had to leave his position immediately without

any compensation. The applicant states that Mr [D]'s failure to obey its instructions was the only occasion on which its efforts to terminate the infringement failed. Consequently, the Commission cannot say that the measures taken by the applicant were ineffective.

419 Fourth, the applicant maintains that it withdrew from the information exchange system in April 1998. Thus, had it not been for Mr [D]'s wilful disregard of the instructions from the Board of Directors, there would have been total compliance from March 1998. Furthermore, it submits that it is entitled to a reduction of the fine for having terminated the infringement immediately after the Commission's intervention.

420 Fifth, the applicant submits that it did not profit from the infringement. Prices remained at the same level in real terms in the United Kingdom and fell in Germany whilst its costs were rising. Moreover, its market share in each of the four markets concerned was less in 1998 than in 1992 and its turnover did not reach its 1991–1992 level until 1997–1998. Furthermore, prices would have recovered in any event following the end of the price war. The applicant considers that if the Commission can increase the amount of a fine on account of profits obtained following an infringement, it should also take account of the absence of any profit from the infringement and reduce the amount of the fine.

421 The Commission disputes the applicant's arguments.

422 The Commission considers that, in its reply, BPB sets out a new argument seeking a reduction of the amount of the fine for ceasing the infringement after the Commission's investigations at the end of 1998. That new argument is inadmissible at this stage of the procedure. It is also unfounded since the Commission is not required, as a general rule, either to regard the continuation of an infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance.

Findings of the Court

423 First, with regard to the measures adopted by the applicant in order to prevent a repeated infringement on its part (the dismissal of its senior executive officers involved in the offending conduct and the adoption of internal programmes to ensure compliance with the competition rules and awareness-raising initiatives for the staff in that connection), it should be noted that, whilst it is indeed important that an undertaking takes steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance cannot affect the fact that an infringement was found to have been committed. It follows that the mere fact that in certain cases the Commission took the implementation of a competition law compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in any given case (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 280).

424 The Commission is therefore not required to take a circumstance such as that into account as a mitigating factor, provides that it adheres to the principle of equality of treatment, which requires that it should not assess the matter differently for any undertaking addressed by the same decision (judgment of the Court of First Instance in *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 423 above, paragraph 281). There is no indication whatsoever in the contested decision that the Commission's assessment differentiated in this respect as between the four undertakings in question, and the applicant does not claim that that was the case.

425 Second, the applicant claims that the measures that it took after the opening of the Commission investigation evinced a high level of cooperation and that, consequently, its fine should be further reduced. Those arguments overlap with the question whether the Commission correctly took account of the applicant's cooperation in the context of the Leniency Notice. Accordingly, the applicant's cooperation during the administrative procedure will be examined below, but does not constitute an attenuating circumstance justifying a reduction separate from that granted under the Leniency Notice.

426 It should, however, be borne in mind that the possibility of granting to an undertaking which has cooperated with the Commission during proceedings for infringement of the competition rules a reduction of the fine outside the framework laid down by the Leniency Notice is recognised by the Guidelines, the sixth indent of Section 3 of which provides for the taking into account, as an attenuating circumstance, of 'effective cooperation by the undertaking in the proceedings, outside

the scope of the [Leniency Notice]'.

427 However, to the extent that this complaint must be interpreted as seeking a finding that the Commission should have granted the applicant another reduction of its fine under that provision, it must be pointed out that the infringements in the present case fall well within the scope of application of the Leniency Notice, Section A.1, first subparagraph, of which refers to secret cartels between undertakings aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports. The applicant cannot therefore validly complain that the Commission failed to take into account the extent of its cooperation as an attenuating circumstance outside the legal framework of the Leniency Notice (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 586).

428 Moreover, such a complaint cannot be levelled at the Commission, even if it were necessary to accept that cooperation with an investigation into horizontal cartels which fix prices and share sales is capable of being rewarded under the sixth indent of Section 3 of the Guidelines. If that were to be the case, a reduction under that provision would necessarily mean that the cooperation in question was not capable of reward under the Leniency Notice and that it was effective, that is to say, that it facilitated the Commission's task of finding and putting an end to infringements of the competition rules (*BASF* v *Commission*, paragraph 427 above, paragraphs 587 and 588).

429 Third, the applicant considers that it cannot be held responsible for the fact that Mr [D], its CEO, disobeyed the instructions of its Board of Directors and continued the information exchanges without the knowledge of the Board or of any of the staff.

430 That argument is irrelevant. An undertaking – that is to say an economic unit comprising personal, tangible and intangible elements (Case 19/61 *Mannesmann* v *High Authority*, paragraph 360 above, 357, 371) – is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management as provided for in those articles of association (management board, management committee, chairman, manager, and so on). The rules of competition would be easily circumvented if the Commission, faced with unlawful conduct on the part of an undertaking, were required to ascertain and to prove who is the author of the various activities, which could have the effect of preventing it from penalising the undertaking which benefited from the cartel.

431 Although BPB claims to have been betrayed by its former CEO, who failed to follow the explicit instructions of his Board of Directors, the solution to that conflict must be sought in the relationship between Mr [D] and BPB, and not at the level of the Commission's application of competition law. Thus, even if Mr [D] did in actual fact disobey the instructions of BPB's Board of Directors and continue the information exchanges without the latter's knowledge, the Commission was entitled to impose a fine on the undertaking, whilst BPB and/or its owners were free to pursue any action deemed appropriate against Mr [D].

432 Fourth, the applicant maintains that it withdrew from the information exchange system in April 1998. Thus, had it not been for Mr [D]'s wilful disregard of the instructions from the Board of Directors, there would have been total compliance from March 1998.

433 That argument overlaps in part with the previous one and is no more relevant. Since the applicant is responsible for Mr [D]'s activities, the infringement continued until November 1998.

434 Furthermore, the Commission rightly found that, even if the withdrawal from the information exchange system demonstrated a willingness to avoid conduct which could give rise to suspicion, it was not accompanied by other measures designed to put an end to the collusive arrangements, as illustrated by the continued exchange of information or the discussions which took place between competitors at The Hague.

435 As regards the applicant's argument relating to the termination of the infringement after the Commission's investigation, which the Commission regards as inadmissible, it must be stated that the applicant already referred, in its application, to 'prompt termination of the infringement as a mitigating factor'. Thus, that argument does not constitute a new plea for the purposes of Article 48 (2) of the Rules of Procedure but the amplification of a plea made previously, whether directly or by implication, in the original application and must be considered admissible (see Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 86, and the case-law cited).

436 Under the third indent of Section 3 of the Guidelines, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is an attenuating circumstance. However, a reduction of the fine by reason of the termination of an infringement as soon as the Commission intervenes cannot be automatic but depends on an appraisal of the circumstances of the case by the Commission in the course of its discretion. In that regard, the application of that provision of the Guidelines in favour of an undertaking will be particularly appropriate where the conduct in question is not manifestly anti–competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti–competitive, on the assumption that it is proven (Case T–44/00 *Mannesmannröhren–Werke* v *Commission* [2004] ECR II–2223, paragraph 281; see also, to that effect, judgment of 15 June 2005 in Joined Cases T–71/03, T–74/03, T–87/03 and T–91/03 *Tokai Carbon and Others* v *Commission* [2005], not published in the ECR, paragraphs 292 and 294).

437 Even if, in the past, the Commission has regarded voluntary termination of an infringement as an attenuating circumstance, it is entitled, when applying its Guidelines, to take account of the fact that, even though their illegality was established at the inception of Community competition policy, very serious manifest infringements are relatively frequent and, therefore, to take the view that it is appropriate to abandon that generous practice and no longer reward the termination of such an infringement by a reduction of the fine.

438 In those circumstances, the appropriateness of a reduction of a fine by reason of termination of the infringement depends on whether the applicant could reasonably doubt the illegality of its conduct.

439 In the present case, it should be recalled that the infringement in question relates to a secret cartel whose object was an exchange of information in an oligipolistic market and a stabilisation of markets. That type of cartel constitutes a very serious infringement. The undertakings concerned must therefore have been aware of the unlawful nature of their conduct. The secret nature of the cartel confirms moreover the fact that the undertakings concerned were aware of the unlawful nature of their actions.

440 Accordingly, for the reasons set out above, the failure in the present case to take the termination of the infringement as soon as the Commission intervened into account as an attenuating circumstance cannot be regarded as incorrect.

441 Fifth, with regard to the applicant's argument that the Commission did not take account of the fact that it had not benefited from the infringement in question, it must be borne in mind that, whilst the amount of the fine imposed on an undertaking must be proportionate to the duration of the infringement and the other factors capable of affecting the assessment of the gravity of the infringement, including the profit that it was able to derive from those practices, the fact that an undertaking did not benefit from an infringement cannot preclude the imposition of a fine since otherwise it would cease to have a deterrent effect (Case T–52/02 *SNCZ* v *Commission* [2005] ECR II–5005, paragraph 89).

442 Lastly, it must be stated that, although the Commission may, under its Guidelines (Section 2, fifth indent) and in respect of aggravating circumstances, increase a fine in order to exceed the amount of gains improperly made as a result of the infringement, that possibility does not mean that the Commission is then under an obligation to establish in every case, for the purpose of determining the amount of the fine, the financial advantage linked to the infringement found to have been committed. In other words, the absence of such an advantage cannot be regarded as an attenuating circumstance (*SNCZ* v *Commission*, paragraph 441 above, paragraph 91).

443 Consequently, the applicant's arguments seeking to obtain a reduction in respect of attenuating circumstances must be rejected.

Cooperation

Arguments of the parties

444 The applicant maintains that the Commission infringed the principle of the protection of legitimate expectations and the principle of fairness by deciding that the measures taken by it merited a reduction of only 30% of the amount of the fine in accordance with Section D of the Leniency Notice. The applicant considers that it should have been granted a reduction of 50% to 75% of the

amount of the fine in accordance with Section C of the Leniency Notice.

445 The applicant submits that it provided decisive information on which the contested decision relied heavily. For example, that the Commission would not have obtained any information concerning the London meeting, which was the factual basis of the start of the infringement, without its admission in response to the second request for information. In that connection, it states that the Commission's question related only to the information exchanges conducted under the direction of the chief executives of the four companies in question. It could therefore have confined itself strictly to answering that question. However, in the meantime, it had learned from its former Chairman and Chief Executive, Mr [A], that a meeting had taken place in 1992. It chose to disclose that meeting and what took place. That was therefore a major admission. The information exchanges in the United Kingdom and the advance warning of one or two list price rises in the United Kingdom would likewise not have come to light without its cooperation. It states that, on a fully voluntary basis, it admitted that there had been discussions on the attempt to share the German markets in Versailles and also admitted in its reply to the statement of objections that other discussions had taken place in Brussels at the end of 1997 and at a dinner in The Hague, even though it contends that no agreement had been concluded. The applicant states that it also admitted its participation in the information exchange system. Moreover, even though certain information concerning those exchanges was obtained from the inspection of BPB's head office, the information provided by BPB gave the Commission a better understanding of the exchanges.

446 Although Knauf confirmed the existence of the London meeting and the Commission also relied to some extent on the evidence provided by Knauf concerning that meeting, Knauf acted in that way only because the meeting was referred to in the statement of objections. Knauf would have had nothing to confirm if BPB had not disclosed the existence of the meeting prior to the issue of the statement of objections. Moreover, after its initial inspections, the Commission was not in a position to initiate an administrative procedure because, rather than doing so, it continued the preliminary investigation phase by issuing requests for information to the undertakings concerned. One of those requests, addressed to the applicant, was based entirely on information it had provided voluntarily. It was therefore only after the receipt of the applicant's information that the Commission was in a position to issue the statement of objections.

447 The applicant claims that, had Mr [D] not disobeyed its instructions, it would have already ended its involvement in any infringement eight months before the Commission's inspection.

448 The applicant further observes that it did not compel any other undertaking to take part in the cartel, did not instigate it and did not play a determining role in the offending conduct at issue.

449 Finally, the applicant maintains that, even if the Commission were right to grant it a reduction only under Section D of the Leniency Notice, it infringed the principle of equal treatment by granting Gyproc a reduction of 40% and as regards the applicant a reduction of only 30%. The information provided by it was more decisive for the Commission's arguments on the ground that the information provided by Gyproc related exclusively to the period 1996 to 1998 and to the German market. As regards the Commission's argument that Gyproc's participation in the infringement was less serious than the applicant's, the applicant takes the view that the extent of the reduction of the amount of the fine the Commission grants to an undertaking should depend on the quality of the information provided, and not on the gravity of an undertaking's participation in the infringement.

450 The applicant adds that the Commission is not entitled to treat it differently from Gyproc on the basis that Gyproc did not contest the facts or their classification as infringements. It emphasises that its objections related mainly to the inferences the Commission drew from the facts rather than the facts themselves.

451 The Commission considers that its findings under the Leniency Notice could only be annulled if they were vitiated by an error of fact or a manifest error of assessment.

452 The Commission claims that, with the exception of paragraphs 5, 6 and 9 of the table set out on pages 151 to 154 of the application, the information referred to by the applicant was provided either in response to requests for information or given orally in response to questions during investigations. The Commission considers itself entitled not to take account of information of that kind when assessing the cooperation of an undertaking. The Commission states that it took account of the fact that the answers were very detailed and on occasion went further than was necessary to give a full answer.

453 As regards the information given spontaneously, the Commission contends that, as regards paragraph 6 of the table, it already had the information indicated at recitals 201 and 205 of the contested decision. It states that, even before BPB's admissions, it had sufficient information about paragraph 9 (and paragraph 10) of the table. As regards paragraph 5, although the information was useful and the Commission took account of it to determine the reduction of the amount of the fine under the Leniency Notice, it adds that there were two reports to Mr [D] mentioned in paragraph 77 of the statement of objections. They contain detailed information on sales of the other producers, which could have provided the basis for further inquiries on that question, even though it was not decisive in itself. Thus, much of the information provided by BPB was not decisive.

454 As regards the London meeting, the Commission does not deny that that meeting is an important element of the infringement, but states that, without the information provided on that subject, it would still have been able to establish the existence of a single, complex and continuous infringement on the basis of the anti-competitive conduct as a whole, including the information exchanges regarding which it had direct contemporary proof. Moreover, the information concerning the London meeting was provided in response to a specific question in the second request for information concerning the origins of the exchange of information, so that its disclosure was not absolutely spontaneous. Also, the Commission's second request for information was not based entirely on the information provided voluntarily by BPB. In fact, the second part of that request related to information provided orally by Mr [D] following the discovery of the two series of tables setting out details of sales by the four major European producers on BPB's premises on the first day of the Commission's investigation on 25 November 1998.

455 Consequently, the Commission contends that none of the information provided by BPB was decisive evidence of the cartel's existence.

456 The Commission emphasises that Gyproc's participation in the infringement was less serious than that of BPB. On the other hand, in relation to those elements of the cartel in which it participated actively, Gyproc provided important information. Thus, the findings concerning the German market are heavily based on Gyproc's contribution. The Commission maintains that the information given by that undertaking was as valid for the finding of the infringement as that provided by BPB. Moreover, Gyproc's statement of 1 September 1999 was not a reply to a request for information. In addition, Gyproc has never contested that those activities constituted an infringement of Article 81(1) EC.

Findings of the Court

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

458 As is stated in Section E, paragraph 3, of the Leniency Notice, the notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on an undertaking, it assesses the latter's cooperation (Case T–26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II–713, paragraph 147).

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

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

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

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

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

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

460 Furthermore, pursuant to Section C of the notice, '[undertakings] which both satisfy the conditions set out in Section B, paragraphs (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 [administrative] procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine'.

461 The applicant submits, principally, that the Commission was wrong to deny it the reduction of 50% to 75% referred to in Section C of the Leniency Notice. It is thus necessary to ascertain whether the Commission failed to have regard to the conditions for applying that provision.

462 In the present case, the relevant question for deciding whether Section C was applicable in the determination of the amount of the fine imposed on the applicant is whether the investigations carried out by the Commission provided it with sufficient grounds for initiating the administrative procedure leading to the contested decision.

463 The Commission states at recitals 593 and 594 of the contested decision that following its investigations, it had enough information to prove the existence of the cartel and that since BPB did not meet the conditions of Section B(b) of the Leniency Notice, it was therefore not eligible for a major reduction in the amount of its fine under Section C of the Notice.

464 In this respect, it is important to note that the applicant does not claim that it provided decisive evidence in relation to all the manifestations of the cartel or that the Commission would not have been able to demonstrate the existence of the cartel without the evidence that it provided the Commission. It asserts, in essence, that the Commission would not have been able to prove the existence of a single and complex cartel in the way that it did.

465 Consequently, it is necessary to ascertain whether, following its investigations, the Commission had enough information to prove the existence of the cartel which was ultimately penalised.

466 As regards the London meeting, BPB disclosed information about that meeting only in its reply to the second request for information (of 21 September 1999) in response to a specific question: 'Please state at whose suggestion or initiative the exercise of exchanging data amongst the CEO's was initiated.'

467 Thus, since it already knew about the exchanges of information on sales volumes on the four markets concerned, the Commission had, on the basis of the investigations carried out in November 1998, sufficient grounds for initiating the administrative procedure leading to a decision.

468 In this respect, it must be borne in mind that in Case C‑301/04 P *Commission* v *SGL Carbon* [2006] ECR I‑5915 the Court held that replies given pursuant to Article 11(1) of Regulation No 17 did not constitute voluntary cooperation but the performance of an obligation. It recalled that, in carrying out the duties assigned to it in the matter, the Commission could obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings. The Commission is therefore entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti‑competitive conduct (paragraphs 34, 39, 41 and 44).

469 As regards the exchanges of information on sales volumes on the four markets concerned, it is not contested by the applicant, as is indeed apparent from paragraph 334 of the application, that the Commission found direct evidence of those exchanges during the investigations which it carried out in November 1998.

470 As for the exchanges of information on sales volumes and market shares in the United Kingdom, the Commission states that two reports to Mr [D], mentioned in paragraph 77 of the statement of objections, contained detailed information on sales of the other producers, which could have

provided the basis for further inquiries on that question, even though it was not sufficient in itself.

471 In that connection, it is noteworthy that the documents mentioned in paragraph 77 of the statement of objections are reports by Mr [M], managing director of BG before Mr [N], on developments in the United Kingdom market sent to Mr [D]. Thus, those internal documents do not show that the information in question was disclosed to persons outside BPB. However, in its note of 17 March 1996 and, in a more detailed manner, in its statement of 28 May 1999, BPB admitted that an exchange of information on sales volumes on the United Kingdom had taken place between the competitors during the period 1992 to the beginning of 1998.

472 So far as concerns the exchanges of data on price rises on the United Kingdom market, the Commission claims that it already had the information set out in recitals 201 and 205 of the contested decision. As is apparent from those recitals, not only do the two BPB internal memoranda found during the investigations prove only that the price rises were discussed, but the Commission relies on the parallelism of the price rises to demonstrate that aspect of the infringement. In those circumstances, the fact that BPB admitted in its note of 17 March 1996 and in a more detailed manner in its statement of 28 May 1999, as is clear from recital 207 of the contested decision, that there had been 'isolated instances' when Mr [N] had telephoned the representatives of Lafarge and Knauf in the United Kingdom to inform them of BG's pricing intentions and the planned range of increases, significantly strengthened the Commission's reasoning.

473 Concerning the Versailles and The Hague meetings, only in its reply to the statement of objections did the applicant admit that it took part in those meetings. With regard to the Brussels meeting, it admitted that it participated in it only in response to an explicit question by the Commission in the context of the first request for information.

474 Lastly, as regards the information exchange system, it is apparent from recital 271 of the contested decision that the Commission knew of its existence on the basis of the information found during the inspections.

475 Consequently, the Court finds that, to the extent that the information provided by BPB can be regarded as voluntary in the light of the case-law of the Court of Justice referred to in paragraph 468 above, it does not constitute decisive evidence of the cartel's existence and that, in fact, the Commission had sufficient information to establish its existence following those inspections.

476 In the light of the cumulative nature of the conditions set out in Section B(b) to (e) of the Leniency Notice, as referred to in Section C thereof, and since at least one of those conditions, namely that laid down in Section B(b), in conjunction with Section C of that notice, is not satisfied, it is not necessary to consider whether BPB satisfied the other conditions laid down in those provisions.

477 It follows that the Commission did not err in denying the applicant a reduction in the amount of its fine under Section C of the Leniency Notice.

478 None the less, it is still necessary to ascertain, in the exercise of the Court's unlimited jurisdiction, whether the reduction granted by the Commission in respect of BPB's cooperation under Section D of the Leniency Notice was sufficient.

479 In this connection, it must be pointed out, as recitals 592 and 596 of the contested decision make clear, that BPB was the first cartel participant to send, after the Commission's request for information but in a way that went beyond what was requested, evidence in addition to that discovered during the inspections, confirming the existence of the cartel. The Commission admits that this information includes details regarding the meetings in question, especially that in London, and the sharing of information on the major European markets, and the United Kingdom market in particular.

480 Further, as is apparent from the examination of the second plea, although the Commission could, without knowledge of the London meeting, have proved the existence of the cartel, its perception of it would have been different. The Court has found that the information provided by BPB, in particular regarding the London meeting, substantially strengthened the Commission's arguments concerning the existence of an overall plan and, consequently, made it possible to substantially increase the amount of the fines in respect of the gravity of the infringement. The same reasoning applies to the detailed information that BPB provided on the exchanges of information on sales volumes and price rises on the United Kingdom market. That conclusion is supported by the

numerous references in the contested decision to evidence provided by BPB.

481 Lastly, as is apparent from point 2.2.2 of its reply to the statement of objections and from the examination of the second plea, BPB also admitted most of the facts set out in the statement of objections. Similarly, as is apparent from points 1.1.4, 2.2.2 and 6.2.27 of its reply to the statement of objections, from the examination of the second plea and from the reply to the written question of the Court, BPB does not dispute the classification of some of the evidence as infringements of Community law. Thus, BPB acknowledged that the London meeting, the exchange of data on the four markets concerned and in particular on the United Kingdom market together with an exchange, on one or two occasions, on price rises on the United Kingdom market constituted infringements of Article 81 EC.

482 In the exercise of its unlimited jurisdiction, the Court holds that is appropriate to grant the applicant an additional reduction of 10% of the amount of its fine, as calculated before the application of the Leniency Notice, in addition to the 30% already granted by the Commission.

483 In those circumstances, it is no longer necessary to examine the applicant's arguments that the Commission infringed the principle of equal treatment in granting a 40% reduction in respect of Gyproc's cooperation.

5. The claim that the Commission should be ordered to repay the amount of the fine or, in the alternative, the amount by which the fine is reduced, plus interest

Arguments of the parties

484 The applicant claims that it has already paid the fine. However, it deplores the fact that the rate of interest applicable in the event that the Commission is required to repay it wholly or in part is not mentioned in the contested decision. It considers that that interest rate should, at the minimum, be the same as that which would have been applied if BPB had provided a bank guarantee, namely 4.79%. However, it relies on the wisdom of the Court with regard to the applicable interest rate and asks the Court to give a decision on that point if its fine is annulled or the amount thereof is reduced. It also requests that default interest be paid from the date of the present judgment until full reimbursement of the sums due by the Commission.

485 The Commission considers that those arguments are premature. Moreover, the third head of claim is inadmissible in so far as the Court of First Instance cannot order that type of measure.

Findings of the Court

486 It has been held on numerous occasions that as a consequence of a judgment of annulment, which takes effect *ex tunc* and thus has the effect of retroactively eliminating the annulled measure from the legal system, the defendant institution is required, by virtue of Article 233 EC, to take the necessary measures to reverse the effects of the illegalities as found in the judgment of annulment, and, in the case of a measure that has already been executed, this may take the form of restoring the applicant to the position he was in prior to that measure (Case T‑48/00 *Corus UK* v *Commission* [2004] ECR II‑2325, paragraph 222).

487 Foremost amongst the measures referred to in Article 233 EC, in the case of a judgment annulling or reducing the fine imposed on an undertaking for infringement of the Treaty competition rules, is the Commission's obligation to repay all or part of the fine paid by the undertaking in question in so far as that payment must be characterised as a sum unduly paid following the annulment decision. That obligation applies not only to the principal amount of the fine overpaid but also to default interest on that amount (*Corus UK* v *Commission*, paragraph 486 above, paragraph 223).

488 It follows that, if the Commission did not consent to any default interest on the principal amount of the fine reimbursed following such a judgment, it would be failing to take a measure necessary to comply with that judgment and would thereby be in breach of its obligations under Article 233 EC.

489 Thus, the claim that the Commission should be ordered to repay the amount by which the fine is reduced, plus interest, is inadmissible.

6. The application for measures of organisation of procedure

490 The applicant stated in its application that '[t]he Court may wish to consider a measure of inquiry, in the form of an independent expert's report, to determine which of the parties is correct regarding the economic context'.

491 In so far as that application must be interpreted as an application for measures of organisation of procedure, the Court considers that it is not necessary to act on it, given that the examination of the case has demonstrated the clearly anti-competitive nature of the cartel in question.

Costs

492 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

493 In the present case, the Commission has been unsuccessful only in so far as the reduction that it granted in respect of BPB's cooperation was not sufficient.

494 In such a situation, the Court will make an equitable assessment of the case in holding that the Commission is to pay one tenth of its own costs and one tenth of the costs incurred by BPB and that BPB will pay nine tenths of its own costs and nine tenths of the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Sets the amount of the fine imposed on BPB plc by Article 3 of Commission Decision 2005/471/EC of 27 November 2002 relating to a proceeding under Article 81 [EC] against BPB plc, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 – Plasterboard) at EUR 118.8 million;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission to pay one tenth of its own costs and one tenth of the costs incurred by BPB;**

4. **Orders BPB to pay nine tenths of its own costs and nine tenths of the costs incurred by the Commission.**

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 8 July 2008.

E. Coulon M. Jaeger

Registrar President

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* Language of the case: English.

Case T-151/01

Der Grüne Punkt – Duales System Deutschland GmbH

v

Commission of the European Communities

(Competition – Abuse of a dominant position – Collection and recovery system for packaging carrying the Der Grüne Punkt logo and put into circulation in Germany – Decision finding abuse of a dominant position – Barrier to entry – Fee payable under the 'Trade Mark Agreement')

Summary of the Judgment

1. *Competition – Dominant position – Abuse – Concept*

   (Art. 82(2)(a) EC)

2. *Competition – Dominant position – Abuse – Concept*

   (Art. 82(2)(a) EC)

3. *Competition – Undertakings entrusted with the operation of services of general economic interest*

   (Art. 86(2) EC)

1. The concept of abuse is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

   In particular, it is apparent from point (a) of the second paragraph of Article 82 EC that such abusive practice may consist, inter alia, of directly or indirectly imposing unfair prices or other unfair trading conditions. Thus, an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided.

   Similarly, an undertaking in a dominant position may commit an abuse by obstructing its competitors through binding its customers in law or in fact to its services and thereby prevent them from using competing suppliers.

   (see paras 120-122)

2. Abuse of a dominant position is constituted by conduct of a nationwide undertaking in Germany, which manages a collection and recovery system for sales packaging, consisting in requiring undertakings which use its system to pay a fee for all sales packaging carrying its logo and put into circulation in Germany, where those undertakings show that they do not use that system for some or all of that packaging. As long as the users of the logo in question prove that the quantities of packaging for which they do not use the system have actually been taken back and recovered by one or more other collective or individual systems which they use, that undertaking cannot claim that it is disproportionate to ask it not to be paid for a service which it does not provide. That does not, however, exclude the possibility of that undertaking levying an adequate fee for merely using the mark where it is shown that the packaging bearing its logo has been taken back and recovered by another system, since the placing of the logo, which indicates to the consumer that he has the

possibility of using the system offered by the undertaking, corresponds to a service, namely the making available of the system.

(see paras 148, 164, 181, 193, 195)

3. Assuming an undertaking which manages a system of collection and recovery of sales packaging is entrusted with the operation of services of general economic interest within the meaning of Article 86(2) EC, the fact that it cannot be remunerated for a service which has been shown to be provided by another system in no way leads to the conclusion that the carrying out, under economically acceptable conditions, of the take–back and recovery service entrusted to the system is threatened.

(see paras 207-209)

Judgment of the Court of First Instance (First Chamber)
First Instance (First Chamber)First Instance (First Chamber)2007. Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities. Competition - Abuse of a dominant position - Collection and recovery system for packaging carrying the Der Grüne Punkt logo and put into circulation in Germany - Decision finding abuse of a dominant position - Barrier to entry - Fee payable under the Trade Mark Agreement'. Case T-151/01.

In Case T151/01,

Der Grüne Punkt - Duales System Deutschland GmbH, formerly Der Grüne Punkt - Duales System Deutschland AG, established in Cologne (Germany), represented by W. Deselaers, B. Meyring, E. Wagner and C. Weidemann, lawyers,

applicant,

v

Commission of the European Communities, represented initially by S. Rating, and subsequently by P. Oliver, H. Gading and M. Schneider, and finally by W. Mölls and R. Sauer, acting as Agents,

defendant,

supported by

Vfw AG, established in Cologne (Germany), represented by H.F. Wissel and J. Dreyer, lawyers,

and by

Landbell AG für RückholSysteme, established in Mayence (Germany),

BellandVision GmbH, established in Pegnitz (Germany),

represented by A. Rinne and A. Walz, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding pursuant to Article 82 [EC] (Case COMP D3/34493 - DSD) (OJ 2001 L 166, p. 1)

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

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges,

Registrar: K. Andova, Administrator,

having regard to the written procedure and further to the hearing on 11 and 12 July 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant, Der Grüne Punkt - Duales System Deutschland GmbH, to bear its own costs and those incurred by the Commission, Landbell AG Rückhol Systeme and BellandVision GmbH, including those relating to the interlocutory proceedings;

3. Orders Vfw AG to bear its own costs, including those relating to the interlocutory proceedings.

Law

A - Ordinance on the avoidance of packaging waste

1. On 12 June 1991 the German Government adopted the Verordnung über die Vermeidung von Verpackungsabfällen (Ordinance on the avoidance of packaging waste (BGBl. 1991 I, p. 1234)), the amended version of which - applicable in the present case - entered into force on 28 August 1998 (the Ordinance' or the Packaging Ordinance'). That ordinance is intended to prevent and reduce the impact of packaging waste on the environment. For that purpose it requires manufacturers and distributors to take back and recover used sales packaging outside the public waste disposal system.

2. Under Paragraph 3(1) of the Ordinance, sales packaging (packaging') is packaging which is provided as a unit at the point of sale and passes to the final consumer. It also includes packaging used by trades, restaurants and other service providers which enables or supports the handing over of goods to final consumers (service packaging), and non-returnable tableware and cutlery.

3. Paragraph 3(7) of the Ordinance defines the manufacturer as someone who manufactures packaging, packaging materials or products from which packaging is directly made, or who imports packaging into German territory. Paragraph 3(8) of the Ordinance provides that a distributor is someone who puts into circulation, regardless of the marketing stage, packaging, packaging materials or products from which packaging is directly made, or packaged goods. The mail-order trade may also be a distributor within the meaning of the Ordinance. Lastly, a final consumer is principally defined in Paragraph 3(10) of the Ordinance as someone who does not resell the goods in the form in which they are delivered to him.

4. The obligations to take back and recover which are imposed on manufacturers and distributors under the Ordinance can be met in two ways.

5. First, pursuant to Paragraph 6(1) and (2) of the Ordinance, manufacturers and distributors are obliged to take back from final consumers used sales packaging, free of charge, at or in the immediate vicinity of the actual point of sale and to recover it (the selfmanagement solution'). The distributor's take-back obligation is limited to packaging of the type, shape and size, and of the goods which are part of his range. In the case of distributors with a sales area of less than 200 square metres, the take-back obligation applies only to packaging for the brands sold by the distributor (fourth and fifth sentences of Paragraph 6(1) of the Ordinance). Under the third sentence of Paragraph 6(1) of the Ordinance, in a self-management solution, the distributor must draw the attention of the final consumer by means of clearly visible and legible signs' to the fact that the packaging may be returned.

6. Second, in accordance with the first sentence of Paragraph 6(3) of the Ordinance, manufacturers and distributors may participate in a system which guarantees the regular collection, throughout the distributor's sales territory, of used sales packaging from the final consumer or in the vicinity of the final consumer in order for them to be recovered (the exemption system'). Manufacturers and distributors participating in an exemption system are exonerated from their take-back and recovery obligations in respect of all packaging covered by that system. Pursuant to the second sentence of point 4(2) of Annex I to Paragraph 6 of the Ordinance, manufacturers and distributors have to make it known that they are participating in an exemption system by marking packaging or by other suitable means'. They can thus make such participation known on the packaging or use other measures, such as informing customers at the point of sale or by a package leaflet, for example.

7. Pursuant to the 11th sentence of Paragraph 6(3) of the Ordinance, exemption systems need to be approved by the competent authorities in the Länder concerned. To be approved, those systems

must, inter alia, cover the territory of at least one Land , ensure regular collections reaching the final consumer and have signed agreements with the local bodies responsible for waste management. Any undertaking which satisfies those conditions in a Land is entitled to organise an authorised exemption system in that Land.

8. Since 1 January 2000 both self-management solutions and exemption systems are subject to the same recovery rates. Those rates, which are laid down in Annex I to the Ordinance, vary depending on the packaging material. Compliance with the takeback and recovery obligations is ensured, in the case of selfmanagement solutions, by certificates provided by independent experts and, in the case of exemption systems, by the provision of verifiable data on the quantities of packaging collected and recovered.

9. In addition, the ninth sentence of Paragraph 6(1) of the Ordinance states that, if a distributor does not comply with his takeback and recovery obligations by means of a self-management solution, he must do so by means of an exemption system.

10. In that regard, in their observations of 24 May 2000, sent to the Commission in the context of the administrative proceedings (the observations of the German authorities'), the German authorities stated that the Packaging Ordinance allowed distributors to combine the taking back of packaging in the vicinity of his business, in the context of a selfmanagement solution, and the collection of packaging in the vicinity of the final consumer, in the context of an exemption system, by participating in the exemption system for only part of the packaging which it had put into circulation.

11. In the observations of the German authorities it was also stated that, if the distributor chose to participate in an exemption system for all the packaging which he put into circulation, he was no longer subject to the obligations laid down in Paragraph 6(1) and (2), which meant that a subsequent individual waste collection solution was not possible. However, if the distributor chose to participate from the outset in a self-management solution, subsequent participation in an exemption system was possible if the recovery rate was not achieved in the context of the individual waste disposal.

B - The exemption system of Der Grüne Punkt - Duales System Deutschland GmbH and the Trade Mark Agreement

12. Since 1991, Der Grüne Punkt - Duales System Deutschland GmbH (the applicant' or DSD') is the only undertaking which operates a Germany-wide exemption system (the DSD system'). For that reason, in 1993, DSD was approved by the competent authorities in all of the Länder .

13. The relationship between DSD and the manufacturers and distributors which participate in its system is governed by a standard agreement which concerns the use of the Der Grüne Punkt logo (the Agreement' or the Trade Mark Agreement'). In signing that agreement, the participating undertaking is authorised, in return for a fee, to affix the Der Grüne Punkt logo to sales packaging included in the DSD system (Article 1(1) of the Trade Mark Agreement).

14. DSD ensures, on behalf of the undertakings which participate in its system, the collection, sorting and recovery of the used sales packaging which it decides to include in the DSD system, thus relieving them of their take-back and recovery obligations of that packaging (Article 2 of the Agreement).

15. The participating undertakings are obliged to notify the types of packaging which they wish to dispose of by means of the DSD system and to affix the Der Grüne Punkt logo to each piece of packaging belonging to those types and destined for domestic consumption in Germany so that DSD may release the participating undertaking from that obligation (Article 3(1) of the Agreement).

16. The user of the logo pays DSD a fee for all the packaging bearing the Der Grüne Punkt logo which he distributes on German territory in accordance with the Trade Mark Agreement. The exceptions

to that rule must be given separate written approval (Article 4(1) of the Agreement). Article 5(1) of the Agreement also specifies that all packaging bearing the Der Grüne Punkt logo and distributed by the user of the logo on Germany territory are billed (Article 5(1) of the Agreement).

17. The amount of the fee is determined on the basis of two factors, namely, (i) the weight of the packaging and the type of material used, and (ii) the volume or surface area of the packaging. Fees are calculated without any profit mark-up and they serve solely to cover the costs incurred in collecting, sorting and recovering packaging and the associated administrative costs (Article 4(2) and (3) of the Agreement). Fees may be adjusted by decision of the DSD if those costs vary.

18. In the context of the DSD system, packaging bearing the Der Grüne Punkt logo may be collected in either special bins and divided up into metal, plastic and composite materials, or in containers placed close to private households (in particular for paper and glass), while residual waste must be put into the bins provided by the public waste disposal bodies.

19. However, DSD neither collects nor takes back used packaging itself, but sub-contracts that service to collection undertakings. The relations between DSD and those undertakings are governed by a standard agreement, amended on a number of occasions, which seeks to create and operate a system to collect and sort packaging. By reason of those Service Agreements signed between DSD and 537 local undertakings, each of those undertakings has the exclusive power to carry out, in a determined zone, the collection of packaging on DSD's behalf. Once sorted, that packaging is transported to a recycling centre for it to be recovered.

20. The Service Agreement is the object of Commission Decision 2001/837/EC relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Cases COMP/34493 - DSD, COMP/37366 - Hofman + DSD, COMP/37299 - Edelhoff + DSD, COMP/37291 - Rechmann + DSD, COMP/37288 - ARGE and five other undertakings + DSD, COMP/37287 - AWG and five other undertakings + DSD, COMP/37526 - Feldhaus + DSD, COMP/37254 - Nehlsen + DSD, COMP/37252 - Schönmakers + DSD, COMP/37250 - Altvater + DSD, COMP/37246 - DASS + DSD, COMP/37245 - Scheele + DSD, COMP/37244 - SAK + DSD, COMP/37243 - Fischer + DSD, COMP/37242 - Trienekens + DSD, COMP/37267 - Interseroh + DSD) (OJ 2001 L 319, p. 1). That decision was the subject of an action for annulment brought by applicant in Case T289/01 Duales System Deutschland v Commission.

Facts at the origin of the dispute

21. On 2 September 1992 DSD notified the Commission of its Statutes and also of a number of agreements, including the Trade Mark Agreement and the Service Agreement with a view to obtaining negative clearance or, failing that, a decision granting exemption.

22. Following publication of the notice in the Official Journal of the European Communities of 27 March 1997 (OJ 1997 C 100, p. 4), pursuant to Article 19(3) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), in which the Commission announced its intention to take a favourable view of the agreements notified, it received observations from interested third parties concerning, inter alia, various aspects of the application of the Trade Mark Agreement. In particular, those interested third parties complained of the distortion of competition which might arise if an undertaking were charged twice as a consequence of participating in the DSD system and the system of another service provider.

23. On 15 October 1998 DSD submitted to the Commission a series of commitments aimed at preventing manufacturers and distributors of packaging participating in the DSD system and in another exemption system operating at regional level from being charged twice. In particular, DSD envisaged the situation in which exemption systems, restricted to one or more Länder , are set up alongside the DSD system. In that case, packaging of the same type and of the same distributor or manufacturer

could be taken back, in those Länder , by one of the new exemption systems and, in the other Länder , by the DSD system. DSD gave the following commitment in that regard (recitals 4, 58 and 59 of the contested decision):

On condition that regional alternative systems to [the DSD system] are created and are formally approved by the highest competent regional authority under Paragraph 6(3) of the Packaging Ordinance, [DSD] is prepared to apply the Trade Mark Agreement in such a way that licensees are able to participate in such a system as regards some of their packaging. [DSD] will not charge a licence fee under the Trade Mark Agreement for packaging that can be shown to be covered by such an alternative system. A further condition for release from the licence fee obligation in respect of packaging bearing the mark [Der Grüne Punkt] is that protection of the trade mark [Der Grüne Punkt] should not be impaired.'

24. On 3 November 1999, the Commission considered that the series of commitments given by DSD on 15 October 1998 should also include self-management solutions used for the disposal of some of the packaging and not be restricted only to exemption systems.

25. On 15 November 1999 certain manufacturers of packaging sent a complaint to the Commission. They claimed that the Trade Mark Agreement prevented the setting up of a selfmanagement solution for taking back packaging. They considered that the use of the logo, where the waste disposal service has not actually been provided by DSD, constituted an abuse of a dominant position on the part of DSD.

26. By letter of 13 March 2000, DSD submitted two further commitments to the Commission. The first one concerned the case where manufacturers and distributors of packaging opt for a selfmanagement solution for part of their packaging and participate in the DSD system for the remainder. In that case, DSD undertook not to charge a fee under the Trade Mark Agreement for the part of the packaging taken back by the selfmanagement solution, on the condition that it is provided with evidence in respect of that second type of collection. That evidence should be furnished in accordance with the requirement laid down in point 2 of Annex I to the Packaging Ordinance. In its letter of 13 March 2000 DSD also stated that it did not seem necessary to amend the series of commitments given on 15 October 1998 (see recitals 7, 60 and 61 of the contested decision).

27. On 3 August 2000 the Commission sent a Statement of Objections to DSD, which replied by letter of 9 October 2000.

28. On 20 April 2001 the Commission adopted Decision 2001/463/EC relating to a proceeding pursuant to Article 82 [EC] (Case COMP D3/34493 - DSD) (OJ 2001 L 166, p. 1; the contested decision').

Procedure and forms of order sought

29. By application lodged at the Registry of the Court of First Instance on 5 July 2001, the a pplicant brought an action seeking annulment of the contested decision under the fourth paragraph of Article 230 EC.

30. By a separate document, lodged on the same day, the applicant also brought an application under Article 242 EC to suspend application of Article 3 of the contested decision, and Articles 4, 5, 6 and 7 thereof in so far as they refer to Article 3, until the Court of First Instance gives a ruling on the substance.

31. By order of 15 November 2001 in Case T151/01 R Duales System Deutschland v Commission [2001] ECR II3295, the President of the Court of First Instance rejected the application to suspend application of the contested decision.

32. By applications registered at the Registry of the Court of First Instance on 16, 19 and 20 July 2001, Vfw AG, Landbell AG für Rückhol-Systeme (Landbell') and BellandVision GmbH sought

leave to intervene in the present proceedings in support of the form of order sought by the Commission. Those applications for leave to intervene were notified to the parties, which submitted their observations within the prescribed period.

33. By order of 5 November 2001, the Court of First Instance (Fifth Chamber) granted the three undertakings leave to intervene and they submitted their observations on 7 February 2002.

34. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, sent the parties a number of questions to be answered orally at the hearing. Those questions concerned the different stages of the collection of recovery process of packaging and the conditions in which competition between selfmanagement solutions and exemption systems could exist. The Court also called on the Commission to produce a document presented by the German authorities in the context of the administrative proceedings. The Commission sent that document on 26 June 2006.

35. The parties presented oral argument and answered the questions put by the Court at the hearing on 11 and 12 July 2006.

36. The applicant claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

37. The Commission contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

38. Vfw claims that the Court should dismiss the action.

39. Landbell claims that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

40. BellandVision claims that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

Law

41. Before examining the arguments of the parties on the admissibility and the substance of the dispute, the content of the contested decision must first be set out.

A - The contested decision

42. By contrast with the Ordinance, in which it is not stated whether it is possible to combine a selfmanagement solution with an exemption system or even to use several exemption systems to take back and recover the marketed packaging, the contested decision takes as a starting point the possibility that a manufacturer or distributor of packaging may combine those different systems in order to comply with the obligations imposed on him under the Ordinance.

43. In that respect, the Commission's legal assessment is divided into two parts: the first part concerns the analysis of DSD's conduct in light of Article 82 EC (recitals 65 to 160 and Article 1 of the contested decision). The second part relates to the examination of the measures enabling the Commission, on the basis of Article 3(1) of Regulation No 17, to bring an end to the abuse

found (recitals 161 to 167 and Articles 3 to 7 of the contested decision). The contested decision does not take a view on the legality of DSD's conduct in the light of Article 86(2) EC.

1. The possibility of combining several takeback and recovery systems to comply with the obligations under the Packaging Ordinance

44. The possibility of using several takeback and recovery systems to comply with the obligations under the Packaging Ordinance (mixed systems') constitutes the premiss of the contested decision in which the Commission envisages the following three cases (recital 101 of the contested decision):

- Case No 1 corresponds to the case in which a manufacturer or distributor uses the DSD (national) exemption system for part of its packaging and uses another (regional) exemption system for the remainder of the packaging;

- Case No 2 corresponds to the case in which a manufacturer or distributor uses the DSD system for part of its packaging and uses a selfmanagement solution for the remainder of the packaging;

- Case No 3 corresponds to the case in which a manufacturer or distributor has all of his sales packaging in Germany disposed of by systems in competition with the DSD system, while participating in a system which uses the Der Grüne Punkt logo in other Member States.

45. The contested decision sets out several facts enabling the finding that it is possible to use mixed systems. Thus, the decision states that it is apparent from the observations of the German authorities (recital 20 of the contested decision) that the Ordinance makes it possible to combine a self-management solution and an exemption system by participating in an exemption system only for the taking back of some of the packaging put into circulation. In such a case, the German authorities state, however, that it is necessary to clearly define, in the interests of the consumer and of the authorities, which packaging is subject to the takeback obligation at, or in the immediate vicinity of, the points of sale and the packaging which is not (recital 20 of the contested decision). The contested decision also points out that it is apparent for an earlier response of the German authorities that Article 6(3) of the Ordinance does not imply that it is possible to use only one system. It was never the intention of the German authorities that only one exemption system should be created in the whole of the country or in each Land (recital 23 of the contested decision).

46. The observations of the German authorities also permit the finding that the alternative presentation of the Ordinance, according to which a manufacturer or distributor of packaging may use a selfmanagement solution or an exemption system to respect its obligations, does not preclude a mixed system. Moreover, the Court points out that, in the present case, the applicant does not dispute that a manufacturer or distributor of packaging may use a mixed system, but challenges the Commission's assessment of its conduct in relation to Article 82 EC and Article 3(1) of Regulation No 17.

2. Assessment relating to Article 82 EC

47. According to the contested decision, DSD is the only undertaking which offers a Germanywide exemption system and the DSD system collects approximately 70% of the sales packaging in Germany and approximately 82% of the sales packaging collected in Germany from final consumers (recital 95 of the contested decision). DSD's dominant position is not contested in this case.

48. In the present case, the abuse of a dominant position found in the contested decision is based on the fact that the fee which DSD charges manufacturers and distributors of packaging who participate in the DSD system is not conditional upon the actual use of that system, but calculated on the basis of the amount of packaging bearing the Der Grüne Punkt logo which those manufacturers and distributors put into circulation in Germany (Article 4(1) and Article 5(1) of the Agreement). Manufacturers and distributors who participate in the DSD system must affix the Der Grüne Punkt logo to every piece of packaging notified to DSD and intended for consumption in Germany (Article

3(1) of the Agreement). Thus, according to the decision, DSD abuses its dominant position by not linking the fee payable under the Agreement to the actual use of the DSD system. It is apparent from the investigation carried out by the Commission, on the basis of complaints lodged by customers and competitors with DSD, that the method of calculation of the fee paid to DSD stands in the way of the wish of certain packaging manufacturers, which are customers of the DSD system, to be able to use their own selfmanagement solution or another exemption system to take care of part of the packaging which they put into circulation (recitals 100 to 102 of the contested decision).

49. In that regard, the contested decision considers that the solution proposed by DSD, namely to refrain from marking with the Der Grüne Punkt logo packaging which is not to be covered by the DSD system, but by another system, whether a selfmanagement solution or exemption system, would, in a not inconsiderable number of cases', be economically unrealistic (recital 103 of the contested decision). Such a solution would require selective labelling of packaging (with or without the Der Grüne Punkt logo), which results in significant additional costs in the case where only one form of presentation is used for packaging or where different distribution channels are used (recitals 104 and 105 of the contested decision). In addition, such a solution requires manufacturers and distributors of packaging which use mixed systems to ensure that packaging bearing the Der Grüne Punkt logo ends up only in places where it is picked up by the DSD system and that the packaging which does not bear that logo is placed where the other systems can ensure that it is taken back, which is impossible in practice (recital 106 of the contested decision). Finally, in the light of the fact that the final consumer will often not decide until after buying the packaged product and sometimes after consuming the product whether to dispose of the packaging by means of an exemption system close to his home or to bring it back to the place where he bought it for it to be taken back by a selfmanagement solution, it is impossible to allocate the portion of the packaging bearing the Der Grüne Punkt logo to one type of collection or another (recital 107 of the contested decision).

50. In the contested decision, the Commission considers that the effects of the abuse, established as regards the fee system linked to the Trade Mark Agreement, are twofold. First, by making the fee subject exclusively to the use of the logo, DSD exposes to unfair prices and trading conditions the undertakings which do not use the service assuming the obligation to dispose of packaging, or those which use the service for only some of their packaging. As a result of the excessive difference between the cost of the service provision and its price, there is an abuse of a dominant position for the purposes of point (a) of the second paragraph of Article 82 EC (recitals 111 to 113 of the contested decision). Second, by virtue of the fee system established in the Trade Mark Agreement undertakings subject to it have no economic interest, in participating in a competing self-management solution or exemption system because those undertakings must either pay a fee to DSD in addition to the remuneration paid to the competitor or introduce separate lines of packaging and distribution channels. The fee system thus makes it more difficult for organisations competing with the DSD system to enter the market (see recitals 114 and 115 of the contested decision).

51. The Commission describes the abuse constituted by the contractual fee in further detail in the three cases cited above. As regards Case No 1, namely a mixed system combining the use of the national DSD exemption system with the use of another regional exemption system, the contested decision states that that case currently requires either the affixing of a different mark depending on the system used, or payment of a fee to two systems. Therefore, for DSD to require payment of a fee for the total amount of packaging put into circulation in Germany has the effect of depriving participation in a regional exemption system of any financial interest (see recitals 118 to 123 of the contested decision).

52. In order to address that problem, DSD undertook, in the context of the administrative proceedings (recitals 58 and 59 of the contested decision), to apply the Trade Mark Agreement in such a way

that the manufacturers and distributors concerned are able to participate in another exemption system for some of their packaging, on the condition, however, that the protection of the mark Der Grüne Punkt is not impaired. Since DSD refused to withdraw the condition concerning the protection of the mark, an expression which was not explained in more detail, the contested decision considered that that commitment was not sufficient to allay the Commission's concerns (recitals 122 and 123 of the contested decision).

53. As regards Case No 2, concerning a mixed system combining the use of a selfmanagement solution and the DSD system, the contested decision states that for DSD to require payment of the fee for the total amount of packaging put into circulation in Germany has the effect of excluding participation in a selfmanagement solution for some of that packaging (see recitals 124 to 128 of the contested decision).

54. In order to address that problem, DSD undertook, during the administrative proceedings (recitals 60 and 61 of the contested decision), not to charge a fee under the Agreement for the part of the packaging taken back by a selfmanagement solution, on the condition, however, that evidence is furnished thereof. In that commitment, DSD also stated that the use of the Der Grüne Punkt logo remained restricted to packaging taken back by the DSD system and that it could thus not be affixed to packaging taken back by a selfmanagement solution. The Commission considered that it was hardly conceivable, in practice, to put in place separate packaging lines and distribution channels given that it was virtually impossible for the manufacturer or distributor of the packaging concerned to be able to determine, at that stage, which packaging consumers were going to bring back to the exemption system and which packaging they were going to bring back to the selfmanagement solution. Therefore, the Commission considered that that commitment was not sufficient to allay the Commission's concerns regarding the competition situation (see recitals 127 and 128 of the contested decision).

55. As regards Case No 3, which assumes the absence of participation in the DSD system in Germany but participation in a take-back and disposal system which uses the Der Grüne Punkt logo in another Member State, a case in which DSD could request payment of a fee in Germany, the contested decision states that a commitment and a declaration from DSD presented in the context of the administrative proceedings enable the problems identified by the Commission in that regard to be addressed (see recitals 62 to 64 and 129 to 135 of the contested decision).

56. The contested decision states that the abuse found is not justified by the alleged incompatibility between the provisions of the Ordinance and the affixing of the Der Grüne Punkt logo to packaging for which no service assuming the obligation to dispose of waste is provided (see recitals 136 to 142 of the contested decision). It is also not justified by the need to preserve the distinctive character of the Der Grüne Punkt logo (see recitals 143 to 153 of the contested decision). In that regard, the decision refers to a judgment of the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) of 14 June 1994 and states that the essential function of that logo is fulfilled when it signals to the consumer that he has the option of having the packaging collected by DSD'. Therefore, the function of that logo does not require, where participation in the DSD system is only partial, that it be affixed only to the packaging which the DSD system is responsible for (see recital 145 of the contested decision).

57. The contested decision also points out that, in the light of the circumstances specific to the taking back and recovery of the packaging in Germany and in the common market, the abuse of the dominant position constituted by the way in which the contractual fee in dispute is imposed is likely to have an appreciable effect on trade between Member States (see recitals 155 to 160 of the contested decision). The effect on trade between the Member States is moreover not contested in the present case.

58. By way of conclusion in its assessment under Article 82 EC, the contested decision states

that, in certain cases, the conduct of DSD in requiring payment of a fee for the total quantity of the packaging carrying the Der Grüne Punkt logo and put into circulation in Germany constitutes an abuse of a dominant position. That infringement of Article 82 EC is characterised in Article 1 of the contested decision in the following terms:

The conduct of [DSD] in requiring, under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Trade Mark Agreement, payment of a licence fee for the total quantity of sales packaging carrying the [Der Grüne Punkt logo] and put into circulation in Germany is incompatible with the common market even where undertakings subject to the obligations arising out of the Packaging Ordinance:

(a) either use DSD's exemption service as referred to in Article 2 of the Trade Mark Agreement only for partial quantities [Cases No 1 and 2] or, instead of using the said service, put into circulation in Germany uniformly designed packaging which is also in circulation in another member country of the European Economic Area and participates in a take-back system using the [Der Grüne Punkt logo] [Case No 3], and

(b) prove that, in respect of the quantity or partial quantity for which they do not use the exemption service, they fulfil their obligations under the Packaging Ordinance through competing exemption systems or through self-management solutions.'

3. Assessment relating to Article 3(1) of Regulation No 17

59. After finding the existence of an abuse of a dominant position, the contested decision determines, in accordance with Article 3(1) of Regulation No 17, the way in which DSD must bring the infringement to an end (recitals 161 to 167 and Articles 2 to 7 of the contested decision).

60. The most important of those measures requires DSD not to charge any licence fee for such quantities of packaging carrying the Der Grüne Punkt logo as are put into circulation in Germany for which the exemption service is not used and for which the Packaging Ordinance obligations have been fulfilled in another way. That measure, established in Article 3 of the contested decision, as regards Cases No 1 and 2, is the following:

DSD shall undertake vis-à-vis all parties to the Trade Mark Agreement not to charge any licence fee for such partial quantities of sales packaging carrying the [Der Grüne Punkt logo] as are put into circulation in Germany for which the exemption service referred to in Article 2 of the Trade Mark Agreement is not used and for which the Packaging Ordinance obligations have demonstrably been fulfilled in another way.

The commitment in the first paragraph shall replace a derogation under the second sentence of Article 4(1) of the Trade Mark Agreement.'

61. In addition, in Article 5 of the contested decision, the Commission sets out the rules of evidence required in those Cases as follows:

(1) [Case No 1] Where there is partial or complete participation in a competing exemption system, the system operator's confirmation that the relevant quantity of packaging is covered by the competing system shall constitute sufficient proof that the Packaging Ordinance obligations under Articles 3 and 4 have been fulfilled in another way.

(2) [Case No 2] Where there is partial or complete participation in a self-management solution, the subsequent presentation of an independent expert's certificate stating that the take-back and recovery requirements for the relevant amount of packaging have been fulfilled shall be sufficient. The certificate may be issued either to the individual manufacturer or distributor or to an association of self-managers.

(3) DSD may on no account require the certificate to be presented at an earlier time than is laid down under the Packaging Ordinance.

(4) Irrespective of the version of the Packaging Ordinance in question, the fact that the certificate confirms to the contractual partner that the take-back and recovery requirements, related to a specific quantity of packaging, have been fulfilled shall suffice for the proof to be furnished to DSD.

(5) Should the certificate contain other information, this shall be obliterated.

(6) Both the system operator's confirmation and the independent expert's certificate may be replaced by an accountant's certificate confirming retrospectively the fulfilment of the Packaging Ordinance obligations in respect of a specific volume of packaging.

(7) Other provisions of the Trade Mark Agreement shall not be applied in such a way as to require a higher level of proof to be furnished to DSD.'

62. Article 4 of the decision envisages the specific situation of Case No 3:

(1) In the case of packaging which is collected and recovered in another Member State under a system using the [Der Grüne Punkt logo] and which is put into circulation using the trade mark in the territory covered by the Packaging Ordinance, DSD shall not charge a licence fee if the requirements of the Packaging Ordinance have demonstrably been met otherwise than through participation in the system set up by DSD under [Paragraph] 6(3) of the Ordinance.

(2) DSD may require, as a precondition for the waiver of the licence fee, that it be made clear to the final consumer on the packaging referred to in paragraph 1, in words or other suitable form placed close to the [Der Grüne Punkt logo], that the packaging does not participate in the dual system set up by DSD under [Paragraph] 6(3) of the Ordinance.

(3) In the event of disagreement over the recognisability of the notice, the parties shall within one week of either or both sides finding that such disagreement has arisen, ask the Commission to appoint an expert.

The expert shall be charged with determining within four weeks whether, having regard to the packaging's basic function, the possible forms of the notice discussed by the parties fulfil the requirements set out in paragraph 2.

...'

63. It is against that background that the arguments of the parties need to be examined.

B - The admissibility of the action

1. The admissibility of the action in so far as it concerns Article 4 of the contested decision

64. The Commission claims that the action seeks the annulment of the contested decision in its entirety without referring to the particular situation laid down in Article 4, which is separable from the rest of the contested decision. The applicant's failure to mention that point does not conform with the requirements of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance and the action must be declared inadmissible in so far as it concerns Article 4 of the contested decision.

65. The applicant submits that, in accordance with the requirements of the Rules of Procedure, the application contains a clear and precise presentation of the facts and pleas in law which enables the Commission to prepare its defence and the Court to exercise its power of judicial review (order in Case T85/92 De Hoe v Commission [1993] ECR II523, paragraph 20). In particular, the applicant lists the reasons why the provisions of the Trade Mark Agreement at issue cannot be considered to be abusive in the light of Article 82 EC. This has the effect of depriving the measures laid

down in Article 4 of the contested decision of all effect.

66. The Court observes that the contested decision finds an abuse of a dominant position (Article 1) and therefore imposes certain obligations on DSD in order to bring an end to that abuse (Articles 3 to 7). In particular, in Article 4 of the contested decision, the Commission imposes an obligation seeking to bring an end to the abuse of a dominant position in the case where a manufacturer or a distributor envisages marketing packaging in a Member State other than Germany by participating in a takeback and recovery system which uses the Der Grüne Punkt logo, but which, for the same packaging put into circulation in Germany, complies with its obligations without participating in the DSD system.

67. In the context of the first plea in law, alleging infringement of Article 82 EC, the applicant seeks annulment of the contested decision in so far as it, erroneously, finds there to be an abuse of a dominant position. If the Court finds in favour of that plea, all the obligations imposed on DSD by the contested decision, seeking to put an end to that abuse, would have to be annulled without the need to examine the particular situation laid down in Article 4 of the contested decision.

68. Similarly, in the context of the second plea in law, alleging infringement of Article 3 of Regulation No 17 and of the principle of proportionality, the applicant seeks annulment of the obligation laid down in Article 4 of the contested decision in so far as it is disproportionate in view of the possibility of selectively labelling packaging or refraining from using the mark Der Grüne Punkt', it requires DSD to provide its services while being paid for them at a later stage and it excludes payment of a fee just for using the mark.

69. It must be found that the application satisfies the formal conditions laid down in Article 44(1)(c) of the Rules of Procedure and that the Court is thus able to exercise its power of judicial review. The Commission's application for the action be found inadmissible in so far as it concerns Article 4 of the contested decision must consequently be rejected.

2. The introduction of new pleas in the course of proceedings

70. The Commission submits that the reply contains three new pleas, concerning a new interpretation of the Trade Mark Agreement (see paragraph 115 below), the criticism of the citations of an old version of the Packaging Ordinance in the presentation of the facts of the contested decision and the fact that the consumer cannot request selfmanagement solutions to collect packaging in the vicinity of his home. Those pleas should therefore be declared inadmissible.

71. The Court points out that, under the first subparagraph of Article 48(2) of the Rules of Procedure, the introduction of a new plea in law in the course of proceedings is not allowed unless it is based on matters of law or of fact which come to light in the course of the procedure. In that regard, a plea which constitutes an amplification of a submission previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible (see Case T195/00 Travelex Global and Financial Services and Interpayment Services v Commission [2003] ECR II1677, paragraphs 33 and 34, and the caselaw cited).

72. In the present case, the alleged new pleas criticised by the Commission amount, in reality, to nothing more than arguments developed by the applicant in response to the arguments presented by the Commission in its defence as to the first plea in law, alleging infringement of Article 82 EC.

73. Consequently, the plea of inadmissibility raised by the Commission as regards the introduction of new pleas in the course of proceedings must be dismissed.

3. The taking into account of certain annexes produced by the applicant

a) The annexes prepared by C. Weidemann

74. The Commission submits that the annexes prepared by C. Weidemann, one of DSD's lawyers, concerning the environmental management of the packaging system in Germany (Annex A to the application) and the justification for the DSD system in the light of Article 86 EC (Annex A to the reply), contain explanations which are not referred to in the applicant's pleadings. Therefore, the Court cannot take account of those annexes in so far as an allegation of infringement of the legislation cannot be made by a mere referral to annexes.

75. The Court observes that, in order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential points of fact and of law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (Joined Cases 19/60, 21/60, 2/61 and 3/61 Société Fives Lille Cail and Others v High Authority [1961] ECR 281, 294, and Case T-87/05 EDP v Commission [2005] ECR II3745, paragraph 155, and the caselaw cited). In that regard, although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of essential elements of legal arguments which, under Article 44(1) of the Rules of Procedure, must be included in the application (order in Case T-154/98 Asia Motor France and Others v Commission [1999] ECR II-1703, paragraph 49, and EDP v Commission , paragraph 155 and the caselaw cited).

76. In the present case, it must be found that the annexes prepared by C. Weidemann, concerning the environmental management of the packaging system in Germany and the justification for the DSD system in the light of Article 86 EC constitute actual written pleadings submitted by one of the lawyers representing DSD before the Court. The essential elements of the legal arguments developed in those annexes must therefore be included in the application or in the reply, which must refer to the extracts of those annexes in order to substantiate or to complement the content of those arguments and not merely make a general reference to those annexes.

77. Where it refers to the first of those annexes, the application indicates only - without further explanation - that the conclusion reached by Mr Weidemann, at the end of his examination of the environmental management of the packaging system in Germany, is also the conclusion referred to in the application, without stating the specific points of that 54 page annex to which reference is made.

78. It is only in regard to that indication alone, from which it is apparent that the author of the annex shares the analysis presented in the application, that account should be taken of the annex on the environmental management of the packaging system in Germany.

79. As regards the second annex prepared by C. Weidemann, concerning the justification for the DSD system in the light of Article 86 EC, it should be pointed out that that 58 page annex was submitted as an additional reference' at the stage of the reply, which refers completely to the arguments in the annex for the statement of the pleas relating to Article 86 EC'.

80. In principle, such indications cannot be considered to be sufficient in the light of the caselaw cited above, in so far as a general reference to an annex cannot compensate for the lack of essential elements of legal arguments which must be included in the application. The reply takes care, however, to give a succinct resume of the content of that annex, which supplements the line of argument put forward in that regard in the application and enables, as such, the Commission to prepare its defence and the Court to examine the third plea alleging infringement of Article 86(2) EC.

81. Accordingly, the annex concerning the justification for the applicant's system in the light of Article 86 EC will be taken into consideration by the Court only in so far as it relates specifically to the arguments raised expressly by DSD in its written pleadings.

b) The opinion polls joined to the reply

82. The Commission submits that the applicant did not give any reasons for the delay in presenting the evidence constituted, in particular, by two opinion polls annexed to the reply, which is contrary to Article 48(1) of the Rules of Procedure.

83. The Court points out the opinion polls produced by the applicant in the reply are not offers of evidence for the purposes of Article 48(1) of the Rules of Procedure, but serve to substantiate the arguments submitted, in the reply, in response to the arguments raised in the defence as to the roles played by the mark Der Grüne Punkt and by the final consumer in the taking back and recovery of packaging.

84. Consequently, the plea of inadmissibility opposed by the Commission as regards the opinion polls annexed to the reply must be dismissed.

C - Substance

85. The applicant raises three pleas in support of its action. The first alleges infringement of Article 82 EC. The second alleges infringement of Article 3(1) of Regulation No 17 and of the principle of proportionality. The third plea alleges infringement of Article 86(2) EC.

1. The first plea, alleging infringement of Article 82 EC

a) Preliminary observations on the contention that there is a free, compulsory licence

Arguments of the parties

86. The applicant submits that, in Article 3 of the contested decision, the Commission requires it to grant free, compulsory licenses' to use its mark Der Grüne Punkt to undertakings which participate in its system, in so far as the logo corresponding to that mark may now, as a result of the decision, be affixed to all packaging, irrespective of the takeback and recovery system concerned. According to the caselaw of the Court of Justice, a compulsory licence of an intellectual property right may be granted only in exceptional circumstances', namely when the refusal of the licence concerns an industrial property right for which the licence is indispensable for the carrying on of the activity in question and is likely to exclude all competition on the derivative markets and when that refusal is not objectively justified (Joined Cases C241/91 P and C242/91 P RTE and ITP v Commission (Magill ') [1995] ECR I743, paragraphs 50 to 56, and Case C7/97 Bronner [1998] ECR I7791, paragraph 39). Since none of those factors is established in the present case, no abuse of a dominant position can be found on the basis of Article 82 EC. In support of its contention the applicant essentially raises the following arguments: (i) the mark Der Grüne Punkt is not indispensable to participation in a system in competition with the DSD system; (ii) competition is not excluded by the contractual provisions in dispute; (iii) several objective reasons justify DSD's conduct, namely the need to meet the objectives of the Ordinance, the need to preserve the different functions of the mark Der Grüne Punkt, which cannot be the subject of a compulsory licence under trade mark law, and the need to enable the DSD system to function properly.

87. The Commission, supported by the interveners, maintains that the contested decision does not require DSD to grant free, compulsory licences contrary to international law and Community law. The abuse found results from the mere fact that the fee system is contrary to Article 82 EC in th at DSD requires remuneration for a service which it does not provide and which is shown to have been provided by another system.

Findings of the Court

88. In the context of the first plea, which concerns Article 82 EC, the applicant essentially contests the consequences which would follow from the implementation of the obligation adopted on the basis of Article 3(1) of Regulation No 17, as laid down in Article 3 of the contested decision (see paragraph 60 above), in order to bring an end to the abuse of a dominant position found in

Article 1 of the decision (see paragraph 58 above). According to the applicant, the obligation defined in Article 3 of the decision requires it to grant a free, compulsory licence' to use the mark Der Grüne Punkt for packaging intended to be disposed of by systems in competition with the DSD system.

89. However, in criticising the legality of such a compulsory licence, the applicant submits that the mark Der Grüne Punkt is not indispensable to participation in a system in competition with DSD (see paragraph 93 below) and that competition is not excluded by the contractual provisions at issue (see paragraph 95 below). Those arguments are tantamount to claiming DSD's conduct, as found in Article 1 of the contested decision, does not have an impact on competition and does thus not constitute an abuse of a dominant position within the meaning of Article 82 EC.

90. Similarly, the applicant claims that the fee system established by the Trade Mark Agreement is justified by considerations drawn from the Ordinance (see paragraphs 98 to 100 below), from trade mark law (see paragraphs 103 to 114 below) and the need to ensure the proper functioning of the DSD system (see paragraphs 115 and 116 below). Those considerations represent just as many objective justifications for the fee system which is the subject of the abuse found in Article 1 of the decision and that system can thus not be considered to be abusive under Article 82 EC.

91. Consequently, rather than examining the consequences which the applicant's arguments could have with regard to the obligation imposed in Article 3 of the contested decision - namely, according to DSD, the free, compulsory licence' - which are covered by the second plea alleging infringement of Article 3(1) of Regulation No 17, it is necessary to restrict the Court's assessment in relation to the first plea - which concerns Article 82 EC - to only the arguments relating to the abuse of a dominant position found in Article 1 of the contested decision. In the absence of abuse of a dominant position for the purposes of Article 82 EC, Article 3 of the contested decision is unfounded by reason of Article 3(1) of Regulation No 17, since there is no longer an infringement to bring to an end. A contrario , if there is an abuse of a dominant position, the Commission has the power, under Article 3(1) of Regulation No 17, to require the undertaking concerned to bring the infringement found to an end.

92. It is in that context that the arguments of the parties in relation to the abuse of a dominant position found in the contested decision need to be set out.

b) Arguments of the parties regarding the abuse of a dominant position

i) No need to use the mark Der Grüne Punkt to participate in a system competing with DSD

93. First, the applicant submits that a compulsory licence for use of its mark is in no way indispensable, within the meaning of Magill , to enabling a manufacturer or distributor of packaging to opt for a competitor system (paragraph 50 above and Bronner , paragraph 41). In that regard, in the contested decision, the Commission confines itself to stating that it is merely more convenient and simpler' to affix DSD's mark to packaging for which a competitor system is used in order to avoid the additional costs linked with the selective labelling of packaging (see recitals 103 to 105 of the contested decision). In that regard, the applicant points out that, in the case of concurrent use of a system other than the DSD system, the Der Grüne Punkt logo could be affixed to packaging or not, depending on the system used. That process is used moreover in the wine sector, in which the only bottles which are labelled with the DSD mark are those sold in the retail trade and which are not taken back to the shop, in the IT and construction sectors, in which products are sold in packaging bearing DSD's mark in the case of delivery to the retail trade and in packaging not bearing that mark in the case of deliveries to specialised trades or professional clients, and in the food sector, in which large packaging, tinned food and boxes are not labelled with the mark if they are delivered to the industry, restaurants or canteens, even though they are labelled when delivered to the retail trade. Manufacturers and distributors of packaging could thus make sure that packaging bearing

the Der Grüne Punkt logo is deposited only in the facilities belonging to the DSD system and that packaging which does not bear that logo is deposited only in facilities for which competitor systems ensure disposal.

94. The Commission, Landbell and BellandVision claim that selective labelling is not economically viable for manufacturers and distributors of packaging. Vfw also points out that DSD required its customers to pay the fee for all packaging bearing the mark Der Grüne Punkt, regardless of whether that packaging is actually disposed of by the DSD system or not.

ii) No elimination of competition in the absence of a compulsory licence for the mark Der Grüne Punkt

95. Second, the applicant criticises the contested decision in so far as it states (recital 115) that the fee system makes it more difficult for organisations competing with the DSD system to enter the market, which is not sufficient to show the elimination of competition required in Magill (paragraph 56, and Bronner , paragraph 41). As a result of the requirements of the Ordinance, selfmanagement solutions can, as a general rule, compete with the DSD system only for packaging delivered at small craft, retail and industrial undertakings. In that small segment of the market, there are approximately 40 selfmanagement solutions which do not use the mark Der Grüne Punkt and the quantities attributed to such systems increased by 60% between 1997 and 2000. Several large distribution chains have also moved to a system other than the DSD system, which is thus possible without difficulty and without DSD being required to grant a compulsory licence. There is thus no question of making market entry more difficult.

96. The Commission contests the statistical information provided by the applicant, which is explainable by the 1998 reform and the fact that there was, initially, very little packaging covered by selfmanagement solutions.

iii) The different forms of justification for DSD's conduct

97. Third, the applicant submits that the provisions of the Trade Mark Agreement in dispute are necessary to ensure the attainment of the objectives of the Ordinance, to preserve the different functions of the mark Der Grüne Punkt - which cannot, in any case, be subject to a compulsory licence - and to enable the DSD system to function properly.

- The need to ensure the objectives of the Ordinance

98. The applicant sets out the content of the transparency requirement linked to the principle of responsibility for the product, which is laid down in the Packaging Ordinance and the object of which is, according to the observations of the German authorities, to establish, in a transparent way for consumers and the authorities, which packaging is subject to the takeback obligation in the shop or in the direct vicinity and which packaging is not' (response to Question 2.a). Thus, in the case of use of an exemption system, the transparency requirement takes the form of a labelling requirement as defined in point 4(2) of Annex I to Paragraph 6 of the Ordinance, according to which manufacturers and distributors have to make it known that [certain packaging is part of the exemption system] by labelling or by other appropriate measures', whereas, in the case of use of a selfmanagement solution, it takes the form of the requirement to provide information as defined in the third sentence of Paragraph 6(1) of the Ordinance, according to which the distributor must make it known to the final, private consumer, by means of clearly identifiable and legible signs, that it is possible to return [the packaging]'. That transparency requirement makes it possible to know whether, for a specific piece of packaging, the manufacturer or distributor in charge of that packaging complies with his obligations by means of a selfmanagement solution or an exemption system. That also enables the consumer to know which system he needs to take that packaging to. Therefore, packaging participating in the DSD system should be taken back and recovered by that

system and packaging participating in another exemption system or selfmanagement solution should be taken back and recovered by that system. Packaging cannot belong to two systems.

99. Next, the applicant states that Article 3 of the contested decision infringes that transparency requirement since it is now possible for packaging participating in competing systems to bear the mark Der Grüne Punkt, which identifies the DSD system. If all packaging were to bear that mark, the final consumer would not be able to know which packaging should be brought back to the point of sale as part of a selfmanagement solution, and which should be deposited in the vicinity of his home as part of an exemption system. In that regard, the applicant points out that it is impossible to determine with any degree of certainty ex ante whether a specific type of packaging will actually be disposed of by the DSD system or by another system and that it is also impossible to determine, even ex post, whether a consumer has actually disposed of packaging through the DSD system (recital 134 of the contested decision). It is precisely for that reason that it is stipulated in the Ordinance that the consumer must be informed by means of clear labelling so that he knows whether the specific packaging in question is part of the DSD system and must, consequently, be taken to that system.

100. In addition, the applicant submits that the takeback and recovery obligation of a selfmanagement solution does not apply to packaging participating in an exemption system (see the letter of the Environment Minister of the Land Baden-Württemberg of 27 November 2001, p. 7). According to the Ordinance, such packaging is exonerated' from that obligation since it is allocated to the DSD system and bears the Der Grüne Punkt logo. That packaging can thus not be taken back by a selfmanagement solution. The Ordinance aims to prevent a waste war' in which competitor systems seek to collect any amount of waste in order to be able to achieve their recovery rates. Fair and orderly competition supposes rather that the different systems take back and recover only the packaging for which they assume the responsibility of disposing of the product (the case of selfmanagement solutions) or take over that responsibility (the case of exemption systems).

101. In addition, the applicant submits that the contested decision misinterprets the observations of the German authorities when it asserts that the consumer may freely decide whether he is to recover packaging through the DSD system or through another system where the manufacturer of distributor of packaging decides to use the DSD system together with another exemption system or with a selfmanagement solution (recitals 138, 141 and 145 of the contested decision). In response to a question put by the Commission, the German authorities merely stated that, in the case of use of a selfmanagement solution and an exemption system, the final consumer was free to decide whether to leave the packaging in the shop or to take it back there, or to take it to a disposal point near to his home, since the Packaging Ordinance does not contain any precise instructions requiring the final consumer to return packaging' (answer to Question 1.b.aa). The concept of disposing of waste in the vicinity of the home of the final consumer refers only to the disposal by means of public waste disposal bodies, the grey bin', and not to disposal through the DSD system, which also takes place in the vicinity of the home of the final consumer, the yellow bin'. Consumers are thus not free to chose the waste disposal system used.

102. The Commission claims that the applicant exaggerates the importance of marking packaging, since the obligation to take back and recover applies to quantities of packaging and not to specific packaging. In addition, according to Landbell and BellandVision, the Ordinance does not require that DSD's mark be affixed to packaging.

- The justification relating to trade mark law

103. First, the applicant submits that, in the contested decision, the Commission denies the distinctive function - also termed indicationoforigin - of the mark Der Grüne Punkt, whose objective is to distinguish packaging allocated to the DSD system from that covered by a competing exemption system or selfmanagement solution, by making it possible for that mark to be affixed to packaging intended

to be disposed of by a system other that the DSD system. Such an impairment of the distinctive function of the mark Der Grüne Punkt is, in principle, contrary to German, Community and international trade mark law.

104. As regards German law, the applicant states that the mark Der Grüne Punkt is registered in Germany as a collective mark and that it thus makes it possible to distinguish the goods or services of the undertakings affiliated to the owner of the collective mark from those of other undertakings in terms of commercial or geographical origin, type, quality or other property' (Article 97(1) Markengesetz of 25 October 1994 (Law on trade marks)). Therefore, a compulsory licence to use the mark Der Grüne Punkt would have the effect of depriving that mark of its distinctive character and would risk leading it to being deleted from the trade mark register.

105. As regards Community law, the applicant submits that the specific object of the mark Der Grüne Punkt, namely to guarantee the identity of the origin of the marked goods to the final consumer (Case 3/78 Centrafarm [1978] ECR 1823, paragraphs 11 to 14) and to protect its proprietor against a risk of confusion (Case C317/91 Deutsche Renault [1993] ECR I6227, paragraph 30, and the caselaw cited), would no longer be respected if certain packaging participating in the DSD system and others covered by a competitor system were to bear the mark Der Grüne Punkt without any distinction so that competitors with DSD could benefit from the fact that the DSD system is well known.

106. In addition, the applicant points out that the unlawfulness of the principle of compulsory licences for marks is laid down in Article 5A of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as last revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (United Nations Treaty Series , Vol. 828, No 11847, p. 108), ratified by all of the Member States, and in Article 21 of the Trade-Related Aspects of Intellectual Property Rights of 15 April 1994 (Annex 1 C to the Agreement establishing the World Trade Organisation, ratified by all of the Member States and approved by the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1, 214), which do not provide for compulsory licenses for marks.

107. The Commission maintains that the contested decision concerns only the fee system put in place by DSD and not the presumed effects of the decision on its activity as the proprietor of the mark Der Grüne Punkt. In that regard, the only effect of the decision is that undertakings which use the DSD system are not charged the fee twice if they use another system. Landbell and BellandVision also point out that the contested decision concerns only the legal relationship between DSD and its contractual partners in the context of the Trade Mark Agreement, and does not give third parties, which are not contractual partners, the right to use the mark Der Grüne Punkt.

108. Second, the applicant submits that the contested decision fails to have regard to the distinctive function of the mark Der Grüne Punkt, which makes it possible to influence consumer behaviour in the field of waste disposal in a way which is essential to the proper functioning of its system. If consumers do not place packaging bearing the Der Grüne Punkt logo back into the DSD system, the applicant risks no longer being able to achieve the recovery rates laid down in the Ordinance and losing its authorisation. Similarly, if consumers place into the DSD system packaging which does not bear the Der Grüne Punkt logo, the applicant is still required to recover that packaging even if the rates imposed have already been achieved (see the first sentence of point 1(5) of Annex I to Paragraph 6 of the Ordinance).

109. In that regard, the applicant criticises the assertion in recitals 138, 139 and 145 of the contested decision that the essential function of the Der Grüne Punkt logo is met once that logo informs the consumer that he has the option of having the packaging collected by DSD, in so far as it is based on a quote, taken out of context, of the judgment of 1994 of the Kammergericht Berlin

(footnote 22 of the contested decision). The passage cited in the decision merely states that the mark Der Grüne Punkt does not contain any assertion regarding the recyclable nature of the packaging. In another passage of the judgment the Kammergericht recognises the appeal function of the mark Der Grüne Punkt in holding that secondary packaging could bear that mark on overriding environmental grounds, even though, in a sense, consumers would be deceived.

110. Similarly, the applicant also contests the assertion contained in the contested decision that the consumer is free to decide whether to recover the packaging in question by the DSD system or by a competitor selfmanagement solution or exemption system (recital 145 of the contested decision), given that it is fundamental that the consumer be able to identify, by means of the mark Der Grüne Punkt, the fact that the packaging concerned is covered by the DSD system and not by another system. In that regard, the applicant submits that the distinctive function of its mark is confirmed by the survey conducted when preparing the reply. Thus, 60.8% of the consumers surveyed understood the mark Der Grüne Punkt as an indication of an entirely specific organisation which is responsible for recovering and disposing of such packaging' and 27.9% of those consumers referred specifically to the DSD system (see the results of the poll conducted by the Infratest Burke Institute, report of August 2001, Annex 85 to the reply), which shows the link existing between the mark and the DSD system in the mind of the consumer. According to another survey, conducted by the same institute, only 3.3% of the consumers surveyed stated that the mark conveys the information which is attributed to it in the contested decision, namely the indication that it is possible to dispose of the packaging (see the results of the survey conducted by the Infratest Burke Institute, report of August 2001, Annex 86 to the reply).

111. Finally, the applicant submits that the affixing of the mark Der Grüne Punkt to packaging participating in a competitor system impairs the distinctive function of that mark, since consumers are deceived in all of the cases envisaged in the contested decision. In the applicant's view, even where several systems are used, the consumer must always be able to determine for each piece of packaging the system which needs to be used, whether that be the DSD system - by the mark Der Grüne Punkt - or another exemption system - in a way consistent with point 4(2) of Annex I to Paragraph 6 of the Ordinance - or a selfmanagement solution - in a way consistent with Paragraph 6(1) of the Ordinance. Thus, in the case of competitive use of a selfmanagement solution and the DSD system, almost 48.4% of the consumers surveyed in the context of one of the surveys cited above would not understand the contradictory information represented, first, by the indication that packaging may be taken back to a shop in accordance with Paragraph 6(1) of the Ordinance and, second, by the indication transmitted by the Der Grüne Punkt logo that packaging is taken back in the vicinity of the home of the final consumer by the DSD system.

112. More broadly speaking, the applicant submits that the contested decision will lead to a situation where almost all packaging in Germany will bear the mark Der Grüne Punkt. Thus, participation in the DSD system for just 1% of marketed packaging could enable a user of the logo to use that mark, free of charge, for the remaining 99%. T he DSD system therefore is likely, in the short term, to have to treat packaging brought erroneously to its system and for which DSD does not receive any fee. In addition, and almost simultaneously, by virtue of the restriction of the meaning of the mark Der Grüne Punkt to a mere possible means of disposal, the DSD system's collection figures would fall and it would be in danger of not being able to achieve the statutory recovery rates.

113. In addition, the applicant asserts that the mark Der Grüne Punkt also fulfils a control function which makes it possible to prevent and take action against abuses committed by manufacturers and distributors of packaging which use the DSD system without paying a fee by means of checks carried out in shops, sorting checks or checks by the authorities. In that regard, the contested decision makes it more difficult to protect effectively against the problem of the profiteers which very

nearly led DSD to bankruptcy in 1993.

114. The Commission, supported by the interveners, observes that, in the absence of deception or confusion, the indicationoforigin function of a mark, which serves to distinguish or individualise the origin of goods or services, is not affected. In the present case, the perception of the mark Der Grüne Punkt by the final consumer buying the consumer goods and using different systems to dispose of the packaging is in essence that it is possible to ensure the disposal of packaging by the applicant's system. In addition, the mark Der Grüne Punkt does not play a decisive role during the collection of packaging since it is far from the case that the yellow bins and glass and paper containers used by the DSD system bear the mark in all of the collection areas. It is indeed for that reason that consumers do not associate the collection bins with the logo, but with the type of material concerned.

- The proper functioning of the DSD system

115. After having initially submitted that the provisions in dispute concerning the fee were proportionate to the services rendered, in so far as flatrate payment for authorisation to use the mark Der Grüne Punkt and the making available of the DSD system constituted the only practical solution in the absence of being able to determine the exact amount of packaging actually brought to the DSD system, the applicant submitted, at the reply stage, that the fee payable under the contested provisions was valid only for packaging for which the DSD system was used. Thus, the licence conferred by DSD under the Trade Mark Agreement was valid only for packaging participating in the DSD system and not for packaging covered by another exemption system or selfmanagement solution. Such a restriction of the licence to packaging bearing the Der Grüne Punkt logo is consistent with the Ordinance, which requires clear labelling of packaging participating in an exemption system in order to indicate that the manufacturer or distributor concerned is exonerated' from the obligation to take back and recover packaging, which is now DSD's responsibility (order of the Verwaltungsgerichtshof Kassel (Higher Administrative Court, Kassel, Germany) of 20 August 1999). Such a system could not function if the packaging for which the DSD system was not used were also to bear the logo identifying that system. No provision of the Trade Mark Agreement thus enables or requires the user of the logo to affix the mark Der Grüne Punkt to the packaging for which the DSD system was not used and there is no imbalance between DSD's service provision (the taking back and recovery of packaging) and the fee charged in consideration.

116. As regards the reference made by the Commission in the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 15 March 2001, given in BäKo , the applicant states that in that judgment the Bundesgerichtshof did not find that the contractual provisions relating to the fee were not appropriate. On the contrary, it noted that the applicant cannot claim the full fee under Article 4(1) and Article 5(1) of the Trade Mark Agreement for packaging which does not fall within its statutory competence, namely packaging from the industry and large undertakings. In that case, which is not covered in the contested decision (footnote 14 of the contested decision), the applicant had not provided the service providing exemption from the obligations which it had been called upon to provide. However, in the present case, the packaging at issue bears the mark Der Grüne Punkt and thus falls indisputably within DSD's competence, that is to say that it is deposited at the homes of private final consumers to whom DSD supplies the service providing exemption from the packaging treatment and recovery obligations, and even when consumers take packaging, by mistake, to a public waste disposal system or a competitor system which collects and recovers packaging.

117. The Commission submits that, in the case of use of the DSD system and another exemption system or selfmanagement solution, the relation between the service provided by DSD and the fee charged in consideration would be imbalanced if it were limited to taking into account the affixing to packaging of the Der Grüne Punkt logo since such a system would not take account of the reality

of the service provided to the participating undertakings.

118. In addition, the Commission observes that the arguments put forward by the applicant in the reply, according to which the fee applies only to packaging treated by its system, is contrary to its former practice. In that regard, the Commission invokes, first, the judgment in BäKo (paragraph 116 above), in which the Bundesgerichtshof held that, contrary to DSD's assertions, no claim could be made by that undertaking against one of its customers in relation to packaging bearing the mark Der Grüne Punkt which was delivered to professional buyers. Second, the Commission refers to the judgment in Hertzel , in which DSD relied on the Trade Mark Agreement to oppose the request of one of its customers for reimbursement of the part of the fee corresponding to the packaging for which DSD was not in a position to ensure a service providing exemption from the obligation to dispose of packaging (judgment of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) of 11 August 1998, Hertzel , which was the subject of an appeal before the Bundesgerichtshof).

c) Findings of the Court

i) The abuse established in the contested decision

119. According to the contested decision, DSD abuses a dominant position in requiring payment of a fee for the total quantity of packaging bearing the Der Grüne Punkt logo and put into circulation in Germany, even though evidence is provided that, as regards the quantity of packaging for which the manufacturer or distributor does not use the DSD system, the takeback and recovery obligations laid down in the Ordinance are met by means of another exemption system or selfmanagement solution (see paragraph 58 above). The effects of that abuse are, according to the contested decision, twofold and demonstrate both an exploitation of DSD's customers, as a result of the disproportion between the payment required and the service provided, and an obstacle to the entry onto the market of competitors offering alternative solutions to the DSD system, in the light of the costs related to the linked use of a system other than the DSD system (see paragraph 50 above).

120. In that regard, it should be pointed out that the concept of abuse is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 HoffmanLa Roche v Commission [1979] ECR 461, paragraph 91).

121. In particular, it is apparent from point (a) of the second paragraph of Article 82 EC that such abusive practice may consist, inter alia, of directly or indirectly imposing unfair prices or other unfair trading conditions. Thus, an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided (Case 26/75 General Motors v Commission [1975] ECR 1367; Case 27/76 United Brands v Commission [1978] ECR 207, paragraphs 235 to 268; and Case 226/84 British Leyland v Commission [1986] ECR 3263, paragraphs 27 to 30).

122. Similarly, an undertaking in a dominant position may commit an abuse by obstructing its competitors though binding its customers in law or in fact to its services and thereby prevent them from using competing suppliers (see, to that effect, HoffmanLa Roche v Commission , paragraph 90).

ii) The exclusivity claimed by the applicant

123. In that regard, the main argument raised by the applicant in its action is that competition

between the systems can take place only as a result, first, of the fact that the manufacturer or distributor concerned transfers to DSD the packaging in respect of which it wishes to be exonerated from the takeback and recovery obligation imposed in the Ordinance and, second, of the fact that the final consumer must be able to clearly identify the packaging which he may put back into the DSD system and that which he may put back into another exemption system or selfmanagement solution (see paragraph 115 above).

124. The mark Der Grüne Punkt thus makes it possible, at the same time, to indicate the packaging which is to be transferred to DSD, and thus exonerated from the takeback and recovery obligations imposed on manufacturers and distributors, and to inform the consumer as to what he is to do with it, which makes it possible to ensure that DSD is able to carry out the tasks assigned to it by that manufacturer or distributor of packaging. Consequently, only packaging for which the DSD system is used should be marked with the Der Grüne Punkt logo corresponding to that system, since it is packaging for which the applicant relieves the manufacturer or distributor concerned, both contractually and legally, of his takeback and recovery obligations under the Ordinance. In addition, the fact that the packaging concerned is the subject of a single indication regarding the takeback and recovery system to be used makes it possible to influence the behaviour of the final consumer, who is thus not mislead by other indications requesting him to take that packaging back to another system.

125. On the basis of that line of argument, the applicant submits that its fee system does not constitute an abuse in the light of Article 82 EC, given that that system restricts the remuneration payable in consideration for the take-back and recovery service by the DSD system solely to packaging bearing the Der Grüne Punkt logo for which the manufacturer or distributor of packaging has sought to be exempted from his obligations under the Ordinance. By way of example, that means that, if a manufacturer or distributor of packaging decided to market 100 items of packaging in Germany and to entrust the taking back and recovery of half of that packaging to DSD, he should affix the Der Grüne Punkt logo to 50 items of packaging to indicate to the consumer that those 50 items of packaging are intended to be taken back and recovered by DSD, namely the undertaking he has entrusted to treat that packaging. If the manufacturer or distributor decided to affix the logo to all 100 items of the packaging which it markets, it should thus pay a fee calculated on that basis - and do so even if, in concrete terms, only 50 items of that packaging are part of the DSD system - given that DSD could potentially find itself required to take back and recover the 100 items of packaging bearing the Der Grüne Punkt logo which it has been entrusted with pursuant to the Ordinance. The amount of the fee paid under the Trade Mark Agreement thus depends on the amount of packaging bearing the Der Grüne Punkt logo.

126. None the less, the applicant does not contest the fact that the manufacturer or distributor of packaging may combine the DSD system with another exemption system or a selfmanagement solution in order, inter alia, to avoid paying for a service which is not actually provided by the DSD system (see paragraph 46 above). However, in such a case, the applicant submits that that manufacturer or distributor should be in a position - before delivering the product to the final consumer - to distinguish the packaging for which it uses the DSD system from that for which it uses a different system. Taking the above example again, that means that for the other half of the 100 items of packaging placed on the market, the manufacturer or distributor should make it apparent that that packaging is part of another exemption system and not DSD's by a note on the packaging or any other appropriate means or by ensuring, in the case of use of a selfmanagement solution, that the distributor informs the final consumer that it is possible to return the packaging to the point of sale. In any event, the applicant considers that the Der Grüne Punkt logo cannot be affixed to the 50 items of packaging for which that manufacturer does not use the DSD system.

127. Following the applicant's line of argument, the Der Grüne Punkt logo is exclusive and may

not be used jointly with another indication likely to identify a system competing with the DSD system. The packaging marked with the Der Grüne Punkt logo comes exclusively within its system and cannot be taken into account by another system.

128. In order to support those arguments and contest the content of the contested decision, the applicant puts forward both the way in which competition takes place (see paragraph 93), which could be done on the basis of exclusive marking of the relevant packaging of the system used (see paragraph 95), and the Ordinance (see paragraphs 98 to 100), trade mark law (see paragraphs 103 to 113) and the individual needs of the functioning of the DSD system (see paragraphs 115 and 116), which that exclusive marking would require in the case of use of the DSD system.

iii) The detailed rules for the operation of mixed systems

129. The examination of the applicant's arguments requires the Court to check the premises on which they are based. It is necessary, inter alia, to establish whether, as asserted by the applicant, the manufacturer or distributor of packaging transfers to DSD a set amount of packaging intended to bear the Der Grüne Punkt logo and whether, which the applicant contests, the packaging which DSD is entrusted with may be covered by another takeback and recovery system at the same time as the DSD system.

130. At the hearing, the parties were questioned about the detailed rules for the operation of mixed systems in order to enable the Court to understand what the role of the packaging was, as such, and more specifically, that of the packaging bearing the Der Grüne Punkt logo in fulfilling the takeback and recovery obligations imposed in the Ordinance. That adversarial account enables the Court to make the following findings.

131. First, the recovery rates established in Annex I to Paragraph 6 of the Packaging Ordinance are calculated as a percentage of the total of the marketed material which is actually taken back and recovered and not according to the number or type of packaging concerned, whether it bears a logo identifying an exemption system or not. Point 1(1) of Annex I to Paragraph 6 of the Ordinance thus states that manufacturers and distributors of packaging must meet the requirements relating to the recovery of the packaging which they have put into circulation and that the same applies to operators of exemption systems for packaging in respect of which manufacturers and distributors participate in those systems. In that regard, it is stated in point 1(2) of Annex I to Paragraph 6 of the Ordinance that the quantities of relevant packaging are determined as a percentage of the total', whether it concerns packaging put into circulation by the manufacturer or by the distributor or packaging in respect of which the manufacturer or the distributor participates in an exemption system. In addition, since 1 January 2000, selfmanagement solutions and exemption systems have been subject to the same recovery rates per material (recital 19 of the contested decision).

132. Second, it follows from the above that the division of the quantities of packaging between the different systems, decided by the manufacturer or the distributor of packaging, does not concern predetermined quantities of packaging, but totals of the material which correspond to that packaging. That means, in practice, that where a packaging manufacturer decides to entrust in DSD the take back and recovery of half of the plastic packaging which it puts into circulation in Germany, DSD assumes the responsibility of taking back and recovering a quantity of material corresponding to half of that packaging. In order to achieve the recovery rates laid down in the Ordinance, DSD must therefore show the German authorities that it has submitted for recovery 60% of the total amount of plastic assigned to it by that manufacturer (60% is the recovery rate applicable to plastic). Similarly, if the manufacturer can show that it has placed on DSD the burden of the obligation to take back and recover in respect of half of the quantity of plastic put into circulation, it must also prove that it took back and recovered the remaining quantity of the material, corresponding to the remaining half, by means of a self-management solution or another exemption system.

133. Third, as soon as the recovery rates laid down in the Ordinance are achieved and the quantities of packaging are divided between the systems on the basis of the mass of material concerned and not by reference to the packaging as such, whether it bears the Der Grüne Punkt logo or not, that logo ceases to have the role or importance which the applicant claims. Thus, a manufacturer or distributor of packaging which decides to entrust DSD with the taking back and recovery of part of the packaging which it puts into circulation in Germany and to deal personally with the taking back and recovery of the other part of that packaging, by means of a self-management solution or by assigning it to another exemption system, must merely divide the quantities of materials between the different systems concerned without worrying about a specific definition of the conduct of the final consumer, contrary to the applicant's assertion.

134. Taking the specific example of a fastfood chain, raised at the hearing, that means that, where the final consumer purchases a sandwich sold in packaging intended to retain heat, that consumer is free to decide either to consume the product there and then and to place the packaging in the bins provided by the fastfood chain, in the context of its selfmanagement solution, or to take that product home and to place the packaging into the DSD collection facilities situated in the vicinity of his home. That packaging can thus be put back into two collection and recovery systems made available by the fastfood chain to comply with its obligations laid down in the Ordinance.

135. Contrary to the applicant's assertion (see paragraph 112), the fact that the packaging at issue may bear the Der Grüne Punkt logo, even though it may be taken back and recovered by another system, does not adversely affect the proper functioning of the DSD system, since what is important, in the contractual relations between the applicant and the manufacturer or distributor of packaging, is to ensure that the quantities of material to be recovered which are placed on the market are actually taken back and recovered in order to achieve the rates laid down in the Ordinance. As stated above, the achievement of those rates by the DSD system is not based on whether the packaging at issue bears the Der Grüne Punkt logo or not.

136. Also, in the case where a fastfood chain markets 100 tonnes of plastic in a given year and where it knows, in the light of the results of the previous year, that 50 of those 100 tonnes end up in its own selfmanagement solution, it must engage an exemption system to show that the other 50 tonnes of plastic placed on the market will be taken back or recovered in accordance with the obligations under the Ordinance. If the behaviour of that fastfood chain's customers is in line with that division of quantities, that is to say 50 tonnes of plastic to be taken back and recovered by a selfmanagement solution and 50 other tonnes of plastic to be taken back and recovered by an exemption system, the recovery rates of the different systems concerned will be achieved.

137. If, however, the consumer behaviour of that chain is not in line with the anticipated division of quantities, correction mechanisms will be implemented in order to take account of that reality. For example, if only 10 tonnes of plastic end up in the selfmanagement solution, the fastfood chain will thus have to buy back the missing 40 tonnes of plastic from systems which have a surplus, precisely, for having to take back and recover 40 extra tonnes of plastic. Similarly, if 90 tonnes of plastic end up in the selfmanagement solution, the fastfood chain will be able to request the exemption system concerned to reduce its fee, in so far as that chain has shown that it t ook back and recovered 40 of the 50 tonnes entrusted to it. Those rectification possibilities ensure that each system complies with the obligations laid down in the Ordinance while being remunerated for the service actually provided.

138. Such possibilities for rectification of quantities of material attributed on a contractual basis depending on actual collection and recovery results also exist in the case where a manufacturer or a distributor of packaging decides to use two or more exemption systems, such as the DSD system and the Landbell system. Incidentally, it must also be pointed out that concrete expression has

been given to those rectification possibilities in a compensation agreement, referred to at the hearing, which enables different system operators to share the quantities of material recovered by the collection undertakings to which they have recourse in respect of the quantities of the material for which they are responsible under the contracts signed with manufacturers and distributors of packaging.

139. Consequently, it follows from the above that the manufacturer or distributor of packaging does not transfer to DSD a set number of items of packaging intended to bear the Der Grüne Punkt logo, but rather a quantity of material which that manufacturer or distributor is going to market in Germany and whose taking back and recovery he intends to entrust to the DSD system. It is therefore possible for a manufacturer or distributor of packaging to use mixed systems in order to comply with the recovery rates laid down in the Ordinance.

iv) The applicant's criticism of the analysis in the contested decision

140. That account of the practical detailed rules for the operation of mixed systems makes it possible to assess the significance of the applicant's criticism of the analysis in the contested decision.

141. As a preliminary point, it should be recalled that only the provisions of the Trade Mark Agreement concerning the fee are regarded as abusive in the contested decision (namely Article 4(1) and Article 5(1) of the Agreement). Thus, the contested decision does not criticise the fact that Article 3(1) of the Agreement requires the manufacturer or distributor wishing to use the DSD system to affix the Der Grüne Punkt logo to each piece of notified packaging which is intended for domestic consumption. On the contrary, the Commission regards as abusive the conduct of DSD in requiring payment of a fee for the total quantity of packaging carrying that logo and put into circulation in Germany, even though evidence is provided that certain items of that packaging have been taken back and recovered by another exemption system or selfmanagement solution.

- The lack of need to affix the Der Grüne Punkt logo to all packaging in the case of use of a mixed system because it is possible to use selective marking on the basis of the system used

142. First, as regards the applicant's argument that it is not necessary that the Der Grüne Punkt logo feature on the packaging in the case of use of a mixed system, as the mark Der Grüne Punkt may be affixed, or not, to all packaging on the basis of the system being used, it is apparent from the above that no provision of the Ordinance requires selective marking of packaging.

143. In addition, as is stated in the contested decision (recitals 103 to 107 of the contested decision), the selective marking of packaging on the basis of the system used leads to a significant additional costs for manufacturers and distributors wishing to put uniform packaging into circulation in Europe or use mixed systems, because of the need to intervene at the stage of deciding on the packaging range and the need to control its marketing up until delivery to the final consumer. Furthermore, such efforts are likely to be nugatory in the light of the fact that it is the final consumer and not the manufacturer or distributor who decides on the place of take back and recovery of the packaging. In any event, in it arguments the applicant does not contest that selective marking has the effect of dissuading manufacturers and distributors of packaging from using alternative systems to the DSD system, which constitutes, precisely, one of the effects of DSD's conduct which is characterised as abusive in the contested decision (recitals 114 and 115 of the contested decision).

144. Moreover, the examples of selective marking cited by the applicant do not fall within the ambit of the contested decision, since they concern sectors for which part of the packaging at issue, namely the part aimed at business clients, is situated outside of the applicant's field of action, namely packaging for the final consumer.

145. It must therefore be found that the solution of selective marking, advocated by the applicant, is not imposed by the Ordinance and does not make it possible to put an end to the abuse found

in the contested decision.

- The arguments relating to the lack of elimination of competition

146. Second, as regards the applicant's arguments that competition is not eliminated by its conduct given that the quantities of packaging attributed to selfmanagement solutions increased by 60% between 1997 and 2000 and that some of DSD's customers went from using its system to using a different exemption system (see paragraph 95 above), it should be pointed out that that information does not take into account mixed systems which use partly the DSD system and partly a different exemption system or selfmanagement solution.

147. In addition, the increase in the quantities attributed to selfmanagement solutions cited by the applicant is decisive in the light of the information provided by the Commission in the rejoinder, in so far as very little packaging was actually handled by selfmanagement solutions in 1997 and only 333 000 tonnes were collected by selfmanagement solutions in 2000, namely only 6% of the 5.5 million tonnes collected by the DSD system in that same year.

148. In any event, that information cannot suffice to call into question the Commission's assessment in the contested decision as regards the abusive nature, in the light of Article 82 EC, of the conduct of DSD in requiring payment of a fee for all packaging carrying the Der Grüne Punkt logo and put into circulation in Germany, even where it has been proved that some of that packaging has been taken back and recovered by another exemption system or selfmanagement solution.

149. The argument based on the development of selfmanagement solutions and the moving of certain customers from the DSD system to another exemption system must therefore be rejected.

- The need to ensure that the objectives of the Ordinance are met

150. Third, as regards the need to ensure that the objectives of the Ordinance are met by enabling the applicant to require that packaging which is entrusted in the DSD system be equipped only with the Der Grüne Punkt logo (see paragraphs 98 to 100 above), it is apparent from the account of the practical detailed rules for the operation of mixed systems that such exclusivity is not imposed by the Ordinance in the case of use of mixed systems. In addition, the examination of those detailed rules shows that the logo does not have the effect which the applicant claims it to have, given that the recovery rates which must be achieved in order to comply with the takeback and recovery obligations laid down in the Ordinance are calculated on the basis of the material collected and not on the basis of the mark affixed to the packaging.

151. In that regard, as regards determining the role played by the final consumer, the applicant agrees that it is impossible to determine with any degree of certainty ex ante whether a specific type of packaging will actually be disposed of by the DSD system. In addition, the applicant cannot validly deny that, in response to a question put by the Commission which was seeking to find out whether it was accurate that, according to the Packaging Ordinance, the final consumer is free to decide whether to leave the packaging in the shop or to bring it back there, or to take it to a disposal point near his home', the German authorities responded that the Ordinance does not contain any express provision requiring the final consumer to return the packaging' and that the assumption contained in the question [put by the Commission] is therefore correct' (see the observations of the German authorities, response to Question 1.b.aa; reproduced in the contested decision, recital 20, footnote 8). In that regard, the applicant may claim only that the term disposal point near his home' concerns disposal by means of the public waste disposal system and not use of an exemption system, given that it follows clearly from the wording of the first question put by the Commission, concerning ways of complying with the recovery rates laid down in the Ordinance, and from the observations of the German authorities in response to Question 1(a), which states that collection in the vicinity of the final consumer is to take place on the basis of an exemption system, that that term refers

to an exemption system within the meaning of Paragraph 6(3) of the Ordinance.

152. Consequently, none of the arguments presented by the applicant makes it possible to call the contested decision into question in so far as it is stated there that, under the Ordinance, the final consumer is free to decide, in the case of a mixed system, which system he wishes to return the packaging to (recitals 138, 141 and 145 of the contested decision).

153. In addition, in respect of the possibility of indicating to the consumer that packaging may be taken back and recovered by several systems, it is apparent from the contested decision (recitals 141 and 145) that the different types of advertising laid down in the Ordinance - namely by marking packaging or other suitable means for exemption systems (point 4(2) of Annex I to Paragraph 6 of the Ordinance) and the indication of the possibility of returning packaging at the point of sale for selfmanagement solutions (third sentence of Paragraph 6(1) of the Ordinance) - make it possible to inform the final consumer about the different possibilities for returning the packaging at issue without thereby validating the applicant's arguments that the affixing of the Der Grüne Punkt logo to packaging has the effect of preventing the take back and recovery by a system other than the DSD system.

154. In that regard, it should be pointed out that it is not stated in the Ordinance that the Der Grüne Punkt logo may not be affixed to packaging collected in the context of a competitor exemption system or a selfmanagement solution if they comply, in addition, with the conditions laid down in the Ordinance to identify the system used in conjunction with the DSD system. Such indications may be cumulative and the same piece of packaging may thus be covered by several systems at the same time. It is with that in mind that the Commission rightly interprets the transparency requirement defined by the German authorities in their observations, namely that it is necessary to clearly define, in the interests of the consumer and of the authorities, which packaging is subject to the takeback obligation at or in the immediate vicinity of the points of sale and which is not (see the observations of the German authorities, the response to the final sentence of Question 2.a; recitals 20, 141 and 142 of the contested decision).

155. The arguments relating to the need to ensure that the objectives of the Ordinance are met must therefore be rejected.

- The justification relating to trade mark law

156. Fourth, as regards the applicant's arguments relating to trade mark law (see paragraphs 103 to 113 above), the fact that, in the case of shared use of two exemption systems, the Der Grüne Punkt logo and the indication by a suitable means' of another exemption system within the meaning of point 4(2) of Annex I to Paragraph 6 of the Ordinance feature on the same packaging, and the fact that, in the case of shared use of the DSD system and a selfmanagement solution, the Der Grüne Punkt logo and an indication that it is possible to return the packaging to the shop appear on the same packaging, does not adversely affect the essential function of DSD's mark (see, to that effect, Case 238/87 Volvo [1988] ECR 6211, paragraph 9; Magill , paragraphs 49 and 50; and Case T198/98 Micro Leader v Commission [1999] ECR II3989, paragraph 56). As stated in the contested decision, it is apparent from a judgment of the Kammergericht Berlin of 14 June 1994 that for the market in question' that mark says no more than that the product thus identified may be collected via the DSD system' and gives no indication as to the quality of the service offered (recital 145 of the contested decision). In addition, in the case of allocation of part of the packaging to one of DSD's competitors, the consumer is free to decide whether he has the packaging recovered through the DSD system or a competitor system.

157. Therefore, since the function of the Der Grüne Punkt logo is to identify the possibility of having the package at issue collected by the DSD system and since that logo may be affixed

together with other signs of other mechanisms making it possible to identify another possibility for collection by a competitor selfmanagement solution or exemption system, it cannot be claimed that the contested decision constitutes a disproportionate impairment of the trade mark right or, in any event, an impairment which is not justified by the need to prevent an abuse of a dominant position within the meaning of Article 82 EC.

158. In that regard, the applicant's criticism of the use made, in the contested decision, of the judgment of the Kammergericht Berlin (see paragraph 109 above) is not relevant. It merely points to the particular context of the judgment in which the Kammergericht Berlin rejects the idea that the Der Grüne Punkt logo could give any indication as to the quality of the waste disposal service, but does not call into question the conclusion arrived at by the Commission, namely that several indications informing the consumer about the steps to be taken in relation to the different takeback and recovery services may feature on the same packaging. The above example of the fastfood chain thus shows the actual meaning of the mark Der Grüne Punkt where it is affixed to packaging which is also collected and recovered by another system.

159. As regards the arguments based on the surveys provided by the applicant (see paragraph 110 above), it should be pointed out that the results of those polls do not call into question the reasoning in the contested decision. It is logical that consumers identify the Der Grüne Punkt logo affixed to the packaging as being the indication that that packaging may be placed in the collection facilities situated close to their homes. However, that does not disclose the reactions of those consumers when faced with packaging to which several logos identifying exemption systems are affixed. The Commission and the interveners state in that regard, as was confirmed at the hearing, that the collection facilities used by those systems are generally the same and that, most of the time, the consumer deposits packaging in those facilities on the basis of the material used and not on the basis of the logo on the packaging. Similarly, as regards the case of a mixed system combining the DSD system and a selfmanagement solution, the indication that 48.4% of consumers would not understand the contradictory indications referring to those two systems does not seem relevant in the light of the fact that they merely indicate the free choice given to consumers in the case of a mixed system and that, consequently, they cannot give rise to a contradiction, as illustrated by the example of the fastfood chain examined above.

160. In addition, the argument based on deception of the public targeted by the mark cannot be upheld (see paragraph 111 above), given that the Trade Mark Agreement concerns only users of that logo, namely manufacturers and distributors of packaging which use the DSD system, and not consumers.

161. Moreover, accepting the exclusivity claimed by the applicant would have no other effect than to prevent manufacturers and distributors of packaging from using a mixed system and to legitimise the possibility, for the applicant, of being paid for a service which the interested parties have nevertheless shown that it did not actually provide, they having entrusted it to another exemption system or selfmanagement solution in accordance with the detailed rules laid down in Article 1 of the contested decision.

162. The arguments relating to trade mark law must therefore be rejected since the specific function of the mark Der Grüne Punkt in the case of mixed systems is not adversely affected.

- The proper functioning of the DSD system

163. Finally, as regards the arguments concerning the need to respect the proper functioning of the DSD system (see paragraphs 115 and 116 above), it follows from the above that the proper functioning of that system is not called into question in the case of mixed systems. In any event, the specific needs of the functioning of the DSD system cannot justify the applicant's conduct, described in the Bäko judgment of the Bundesgerichtshof and the Hertzel judgment of the Oberlandesgericht

Düsseldorf, cited by the Commission (see paragraphs 116 and 118 above), the various complaints put forward by the Commission (recitals 3 and 6 of the contested decision) and DSD's initial submission in its application (see paragraph 115 above), whereby it requires payment of a fee for all packaging carrying the Der Grüne Punkt logo and put into circulation in Germany, even where it is proved that some of that packaging has been taken back and recovered by another exemption system or a selfmanagement solution.

v) Conclusion

164. It follows from the above that, in accordance with what is stated in the contested decision, neither the Packaging Ordinance, nor trade mark law or the specific needs of the functioning of the DSD system authorise the applicant to require undertakings which use its system to pay a fee for all packaging carrying the Der Grüne Punkt logo and put into circulation in Germany, where those undertakings show that they do not use the DSD system for some of that packaging.

165. Consequently, the first plea must be dismissed.

2. The second plea, alleging infringement of Article 3 of Regulation No 17 and infringement of the principle of proportionality

166. The applicant states that, according to Article 3 of Regulation No 17, the Commission may, by decision, require the undertakings to bring the infringement found to an end. The decision seeking to bring an end to the infringement must respect the principle of proportionality and can, therefore, order only what is appropriate and necessary to bring an end to the infringement and to re-establish compliance with the rules infringed (Case T76/89 ITP v Commission [1991] ECR II575, paragraph 80, and Case T7/93 Langnese Iglo v Commission [1995] ECR II1533, paragraph 209). In the p resent case, the measures imposed by Articles 3, 4 and 5 of the contested decision do not satisfy those requirements.

a) The selective marking

167. In essence, the applicant alleges that selective marking of packaging depending on the system used is more appropriate than the obligation imposed in the contested decision.

168. The applicant observes that, in the contested decision, the Commission states that, for DSD's customers, the selective labelling of uniformlydesigned packaging (with or without the mark Der Grüne Punkt) would, in a not inconsiderable number of cases, be economically unrealistic' (recital 103 of the contested decision). No compulsory licence should therefore be imposed in cases where selective labelling would not fail because of economic realities. In such cases, an abuse of a dominant position is, in itself, excluded and the measures laid down in Article 3 and Article 4(1) of the contested decision are disproportionate.

169. The Commission submits that the contested decision envisages cases where the packaging is identical and that it gives the reasons why it would not be realistic to ask manufacturers and distributors of packaging to differentiate the packaging on the basis of the takeback and recovery system which it belongs to.

170. The Court points out that, when characterising the abuse of a dominant position, the contested decision examined DSD's arguments that manufacturers and distributors of packaging which use its system should be in a position not to affix the Der Grüne Punkt logo to packaging which is not covered by the DSD system. According to the contested decision, the selective marking of packaging on the basis of the system used does not constitute a suitable solution for enabling manufacturers and distributors of packaging to use a selfmanagement solution or another exemption system in conjunction with the DSD system. The Commission considers that that would lead to a significant increase in production and distribution costs (recitals 104 and 105 of the contested decision), that it is

difficult, if not impossible, to control the actual route taken by packaging right up to the final point of sale (recital 106 of the contested decision) and that it is up to the consumer to decide on the place where he wishes to return the packaging in the case of use of a selfmanagement solution and an exemption system (recital 107 of the contested decision).

171. It is in that context that the extract of the contested decision cited by the applicant needs to be understood, where it states that the nonaffixing of the Der Grüne Punkt logo to packaging which does not come under the DSD system would, in a not inconsiderable number of cases, be economically unrealistic' (recital 103 of the contested decision).

172. However, it cannot be inferred from that assessment that the measures imposed in Articles 3 to 5 of the contested decision are disproportionate. Those measures merely require DSD not to charge a fee on the total amount of packaging marked with the Der Grüne Punkt logo where it is shown that some of that packaging has been taken back and recovered through another system. As shown by the examination of the detailed rules for the operation of mixed systems carried out in the context of the first plea (see paragraphs 131 to 138 above), the competition between systems takes place on the basis of the quantities of material to be recovered and not on the basis of predetermined quantities of packaging which fall exclusively - in particular by means of selective marking - within one or the other of the systems used. In addition, the measures at issue do not disproportionately impair DSD's interests, since it is still remunerated for the service which it provides, namely the taking back and recovery of quantities of material entrusted by the manufacturers and distributors of packaging which participate in its system.

173. Therefore, the fact that it may theoretically be possible to affix the logo to packaging selectively cannot entail the annulment of the above measures, since that solution is more expensive and difficult to implement for manufacturers and distributors of packaging than the measures laid down in Articles 3 to 5 of the contested decision, which seek only to limit the remuneration for the service offered by DSD to the service actually provided by its system.

174. Moreover, for the Commission to accept the principle of selective marking would be akin to permitting DSD to continue to abuse its dominant position, in so far as the costs related to that solution and the practical difficulties involved in its implementation are likely to dissuade DSD's customers from using an alternative system to the DSD system to take back and recover in Germany some (Cases No 1 and 2), or all, of their packaging (Case No 3).

175. In consequence, the first complaint must be rejected.

b) The imposition of a compulsory licence without any time restriction

176. The applicant submits that Articles 3 and 4(1) of the contested decision are disproportionate because they require the granting of a licence to third parties to use the mark Der Grüne Punkt without any time restriction and even if the case of nonparticipation in the DSD system, although the only reasoning given in that regard relates to the fact that as a result of the provisions in dispute of the Agreement, it is much more difficult for competitors to enter the market (see recital 115 of the contested decision). A compulsory licence could thus be envisaged only for the period corresponding to the entry of competitors on the market.

177. The Commission observes that the applicant's potential competitors would be excluded from the market once again if their customers were to become liable (again) for payment of the fee to DSD for the quantities outside the DSD system.

178. The Court points out that, in the context of its assessment concerning Article 82 EC, the contested decision considers that the conduct of DSD in requiring payment of a fee for the total quantity of packaging carrying the Der Grüne Punkt logo and put into circulation in Germany amounted

to an abuse of its dominant position and a barrier to market entry (recitals 110 to 135 and Article 1 of the contested decision). According to the decision, the fee cannot be required when the manufacturers and distributors of packaging which use the DSD system for only some of the packaging put into circulation in Germany show that they fulfil the takeback and recovery obligations laid down in the Ordinance through competitor exemption systems or selfmanagement solutions (Cases No 1 and 2). Similarly, the fee cannot be required when the manufacturers and distributors of packaging which have not used the DSD system in Germany, but put into circulation in that country standardised packaging which they also put into circulation in another Member State for which they participate in a takeback system using the Der Grüne Punkt logo, show that they fulfil the obligations under the Ordinance through competing exemption systems or self-management solutions (Case No 3).

179. It is in order to bring an end to the infringement of Article 82 EC that the Commission requires DSD to comply with the obligations laid down in Article 3 and Article 4(1) of the contested decision.

180. Those obligations thus do not concern third parties but manufacturers and distributors of packaging which are either contractual partners of DSD in the context of the Trade Mark Agreement (the case of Article 3, which concerns Cases No 1 and 2), or holders of a licence to use the mark Der Grüne Punkt in another Member State in the context of a take-back and recovery system using the logo corresponding to that mark (the case of Article 4(1), which concerns Case No 3).

181. Similarly, those obligations do not seek to force DSD to grant a licence to use the mark Der Grüne Punkt without any restriction in time, but merely to require it to not charge a fee on the total amount of packaging bearing the Der Grüne Punkt logo where it is shown that all or only some of that packaging has been taken back or recovered through another system.

182. Consequently, as long as the users of the Der Grüne Punkt logo prove that the quantities of packaging for which they do not use the DSD system have actually been taken back and recovered by the exemption system(s) or selfmanagement solution(s) which they use, the applicant cannot claim that it is disproportionate to ask it not to be paid for a service which it does not provide.

183. Accordingly, the second complaint must be rejected.

c) The prior provision requirement

184. The applicant states that it is apparent from the first sentence of Article 3, Article 4(1) and Article 5(2) and (3) of the contested decision that users of the logo are free to refuse to pay the fee to use the mark Der Grüne Punkt by affirming that they no longer intend to use the DSD system for some of their packaging and that they are going to satisfy the obligations resulting from the Ordinance by personally disposing of the packaging. Article 5(3) and (7) of the contested decision prohibits the applicant from demanding the submission of the certificate from an expert before the date laid down in the Ordinance (1 May of the following year) or to demand other proof. In the applicant's view, that measure is disproportionate and leads to an unfair division of risks in so far as the applicant is to forgo payment of the fee in advance and subject that payment to a submission of evidence procedure, which should take place 16 months later, while bearing its customer's liquidity risk during that period.

185. The Commission claims that a situation in which almost all of the distributed packaging is taken back from the DSD system is hardly likely to materialise in view of the obligations to furnish evidence which are associated with it. In addition, the concept of prior provision' is inexact since the applicant would be required to obtain payment after the event only if the other collection systems did not achieve the rates laid down. Undertakings which offer selfmanagement solutions for collection will not advise their customers to act in that way since they seek to achieve the rate laid down for the quantity which has been allocated to them contractually, in order to avoid

the subsequent obligation to obtain a partial licence, from a competitor, supplemented by payment of interest if necessary, if that rate is not achieved.

186. First of all, the Court points out that the case put forward by the applicant that certain users of the logo could refuse to pay the fee to use the mark Der Grüne Punkt by affirming that they no longer intend to use the DSD system for some of their packaging is, in practice, hardly likely in the light of the fact that the Ordinance requires those users to prove that they have complied with their obligations to take back and recover packaging marketed through another system and that, if that were not the case, those users would then have to buy the missing quantities from the DSD system if that system had taken back the quantities of material corresponding to that packaging (see paragraphs 137 and 138 above).

187. In addition, it is apparent from Article 5(3) of the contested decision that DSD may on no account require the certificate to be presented at an earlier time than is laid down under the Packaging Ordinance' and Article 5(7) that other provisions of the Trade Mark Agreement shall not be applied in such a way as to require a higher level of proof to be furnished to DSD'.

188. Those measures seek to guarantee the possibility, for the manufacturer or the distributor of packaging who uses a competitor exemption system or a selfmanagement solution for some of the packaging which he puts into circulation, to provide DSD with the confirmation from the operator or independent expert, or an accountant's certificate, necessary to show that the obligations imposed in the Ordinance are met by a system other than the DSD system for a specific quantity of packaging (see Article 5(1), (2), (4) and (6)).

189. Therefore, the applicant cannot claim that those measures are disproportionate since the certification process is valid for all systems, including the DSD system, and it does not give any particular reasons justifying its derogation from that process. In addition, the concept of prior provision' raised by the applicant is deceptive, given that DSD is remunerated in consideration for the quantities of material entrusted to it by its customers and that it is only in the case of problems, namely if the other collection systems do not achieve the rates laid down for the quantities with which they are entrusted, that DSD may request payment for the surplus.

190. Consequently, the third complaint must be rejected.

d) The exclusion of an adequate fee for merely using the mark

191. The applicant claims that, by Articles 3 and 4 of the contested decision, the Commission requires it to not charge a fee where it is proven that the obligations resulting from the Ordinance are complied with in some other way. DSD is thus not entitled to claim a fee from users of the logo for merely using the mark Der Grüne Punkt. That exclusion is contrary to the caselaw of the Court of Justice which accepts that a reasonable fee may be levied (see Volvo , paragraph 11).

192. The Commission submits that the contested decision does not impose a compulsory licence on DSD but merely seeks to prevent DSD from levying a fee when the packaging to which the logo is affixed is not taken back and recovered by the DSD system. At the hearing, the Commission stated that, as the Trade Mark Agreement notified by DSD does not distinguish the fee payable for use of the mark from that due for use of the DSD system, the decision does not address the issue as to whether a fee may be requested for merely using the mark.

193. The Court observes that the obligation imposed on DSD, in Article 3 of the contested decision, enables manufacturers and distributors which use its system for only some of their packaging not to pay the fee to DSD where it is proved that the packaging bearing the Der Grüne Punkt logo has not been collected and recovered by the DSD system but by a competitor system.

194. However, even in that case, it cannot be excluded that the mark Der Grüne Punkt affixed to

the packaging at issue may have economic value as such, since it can inform the consumer that the packaging at issue may be brought to the DSD system, as is also stated in the contested decision (recital 145). Therefore, even if that packaging is not actually brought to the DSD system and it is shown that its equivalent in material has been collected or recovered by a competitor system, it is none the less the case that the mark leaves it open to the consumer to dispose of that packaging through the DSD system. Such a possibility offered to the consumer for all the packaging put into circulation with the Der Grüne Punkt logo, whether part of the DSD system or not, after checking the quantities collected, is likely to have a price which, even if it cannot represent the actual price of the collection and recovery service, as could be the case under the provisions in dispute of the Trade Mark Agreement, should be able to be paid to DSD in consideration for the service offered in the present case, namely the making available of its system.

195. When questioned in that regard at the hearing, the Commission accepted that that question was not envisaged in the contested decision, which merely examined the legality of DSD's conduct as regards the payment of a fee for a service in respect of which it has been proved that it was not provided by the DSD system but by another system.

196. Consequently, it must be found that the contested decision must be interpreted as not precluding the possibility for DSD to levy an adequate fee for merely using the mark where it is shown that the packaging bearing the Der Grüne Punkt logo has been taken back and recovered by another system.

e) The possibility of affixing an explanatory note

Arguments of the parties

197. The applicant claims that the obligation laid down in the first paragraph of Article 3 of the contested decision is disproportionate in so far as it prevents it from requiring users of the logo to affix an explanatory note to packaging in Cases No 1 and 2. According to DSD, such a note, which could be affixed without great difficulty by the manufacturers and distributors of packaging which use its system, would make it possible to attenuate the infringement of the mark Der Grüne Punkt which follows from the contested decision. That note could thus indicate to the consumer that, in a given Land , the packaging is not part of the DSD system but part of another exemption system (Case No 1) or that, even if the packaging is labelled with the Der Grüne Punkt logo, certain points of sale do not use the corresponding system but a selfmanagement solution (Case No 2).

198. In addition, the applicant states that, under Article 4(2) of the contested decision, it may require manufacturers or distributors of packaging which do not use the DSD system in Germany but put into circulation in another Member State standardised packaging for which they participate in a takeback system using the Der Grüne Punkt logo (Case No 3), to affix an explanatory note to the packaging in order to draw the attention of the consumer to the fact that that packaging is not taken back by the DSD system in Germany. According to the applicant, such a measure is disproportionate since a different measure, namely the total concealment of the Der Grüne Punkt logo and not the mere affixing of a note next to that logo, would have less of an adverse effect on the indicationoforigin function of its mark.

199. The Commission observes that, as regards Case No 1, nothing permits the inference that the Ordinance prohibits competitor systems from using the same logo. In the applicant's view, undertakings subject to the fee should amend the explanatory note each time that the competitor system is introduced into a new Land. That would, in particular during the launch of the competitor system, require continuous amendment of the packaging. For Case No 2, an explanatory note on the packaging would be impossible. As regards Case No 3, the Commission states that, if the mark Der Grüne Punkt were to benefit from the protection claimed by the applicant, manufacturers would have to provide

different packaging for each Member State, which would not be of any economic interest and would constitute a barrier to trade.

Findings of the Court

200. As regards the complaint relating to the first paragraph of Article 3 of the contested decision, the affixing of explanatory notes desired by the applicant cannot have the effect of putting an end to the abuse of a dominant position characterised in Article 1 of the decision. Such notes are based on the idea that it would be possible to distinguish packaging bearing the Der Grüne Punkt logo, which is part of the DSD system, from that to which the Der Grüne Punkt logo is indeed affixed but which is not part of the DSD system and which should thus be the subject of a note aimed at drawing the consumer's attention. However, as has been pointed out (see paragraphs 131 to 138 above), the specific rules for the operation of mixed systems are not based on the identification of packaging by consumers, who remain free to decide which system they are going to bring the packaging back to, but on the allocation of total material to be recovered.

201. The affixing of the notes sought by the applicant thus does not make it possible to bring an end to the abuse of a dominant position found by the Commission in Cases No 1 and 2.

202. Consequently, the Court must reject the complaint alleging that Article 3(1) of the contested decision is disproportionate in so far as it does not envisage the possibility of affixing an explanatory note.

203. As regards the complaint concerning Article 4(2) of the contested decision, it is apparent from that measure that DSD may require, as a precondition for the waiver of the licence fee, that it be made clear to the final consumer on the packaging referred to [in Case No 3], in words or other suitable form placed close to the [Der Grüne Punkt logo], that the packaging does not participate in the dual system set up by DSD under Paragraph 6(3) of the Ordinance'. That provision is merely a reproduction of a commitment proposed by DSD in the context of the administrative proceedings (recitals 63 and 133 of the contested decision). DSD cannot therefore claim, in the context of the current proceedings, that a solution other than that which DSD itself proposed to the Commission now constitutes a more appropriate solution to address the problem identified during the proceedings. In addition, to accept the solution advocated by the applicant, namely the concealing of the Der Grüne Punkt logo rather than placing a note close to that logo would be akin to requiring packaging manufacturers to provide different types of packaging for each Member State, which would not be economically rational.

204. Consequently, the complaint alleging that Article 4(2) of the contested decision is disproportionate in so far as it requires the affixing of a note to packaging even though it would have been possible to conceal the Der Grüne Punkt logo must be rejected.

3. The third plea, alleging infringement of Article 86(2) EC and of Article 253 EC

a) Arguments of the parties

205. The applicant submits that an infringement of Article 82 EC is ruled out because it is entrusted with the operation of services of general economic interest within the meaning of Article 86(2) EC, namely waste management for environmental purposes and, more precisely, the collection and recovery of packaging throughout Germany including in unprofitable rural areas (Case C393/92 Almelo [1994] ECR I1477, paragraph 47; Case C209/98 Sydhavnens Sten & Grus [2000] ECR I3743, paragraphs 75 and 76; and Case T106/95 FFSA and Others v Commission [1997] ECR II229, paragraph 72). That service of general economic interest has been entrusted to it by the German Länder as a result of the recognition of the DSD system under the 11th sentence of Paragraph 6(3) of the Ordinance. The contested decision threatens the carrying out, under economically acceptable

conditions, of that service, since it destroys the signal effect of the mark Der Grüne Punkt and is likely to prevent it from disposing of waste throughout the country. Similarly, the contested decision infringes the duty to give the reasons upon which it is based, to which it is subject under Article 253 EC, since it does not deal with Article 86(2) EC.

206. The Commission, supported by the interveners, disputes that DSD provides a service of general economic interest entrusted to it by the German regional waste authorities, in so far as any operator of an exemption system may obtain the same authorisation as DSD on the basis of the 11th sentence of Paragraph 6(3) of the Ordinance. In addition, it follows from the Ordinance that the legislature did not seek to prevent the coexistence of selfmanagement solutions and exemption systems, parallel to the system put in place by the applicant. That competition is not a risk but the objective of the Ordinance.

b) Findings of the Court

207. Under Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. That article also states that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

208. In the present case, it must be pointed out that, even supposing that the applicant is entrusted with a service of general economic interest within the meaning of Article 86(2) EC, and in the same way as all exemption systems approved by the authorities of the Länder , the fact remains that the risk of that task being called into question as a result of the contested decision has not been shown.

209. Contrary to the applicant's claim in the context of the present plea, the fact that DSD cannot be remunerated for a service which has been shown to be provided by another system in no way leads to the conclusion that the contested decision threatens the carrying out, under economically acceptable conditions, of the takeback and recovery service entrusted to the DSD system.

210. In particular, it is apparent from paragraphs 156 to 158 above, that the contested decision does not call the essential function of the mark Der Grüne Punkt into question in the context of the Trade Mark Agreement. Similarly, there is nothing in the casefile which leads to the conclusion that the contested decision is likely to prevent DSD from disposing of packaging throughout Germany.

211. In addition, since the applicant did not rely on Article 86(2) EC in the administrative proceedings, the Commission cannot be accused of not having given reasons in that regard in its decision.

212. Consequently, the third plea must be dismissed.

213. It follows from the above that the action must be dismissed in its entirety.

Costs

214. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its pleadings, and the Commission, Landbell and BellandVision have applied for costs, the applicant must be ordered to pay, in addition to its own costs, those of the Commission, Landbell and BellandVision, including those relating to the interlocutory proceedings. Vfw, which has not applied for costs, shall bear its own costs, including those relating to the interlocutory proceedings.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
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JURCIT	11997E082 : 11997E086-P2 : 31962R0017-A03 : 32001D0463 :
CONCERNS	Confirms 32001D0463 -
SUB	Competition ; Rules applying to undertakings ; Dominant position
AUTLANG	German
MISCINF	POURVOI: C-385/07
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
NOTES	Idot, Laurence: Environnement et système de collecte de déchets, Europe 2007 Juillet no 188 p.21-22 ; Prieto, Catherine: Selon le TPICE, constitue à la fois un abus d'exploitation et un abus d'éviction le fait d'exiger de ses clients une redevance pour la totalité des emballages commercialisés avec logo, nonobstant la preuve de services fournis partiellement par un tiers, Concurrences : revue des droits de la concurrence 2007 no 3 p.94-95 ; Prieto, Catherine: Droit spécial du contrat. Redevances déconnectées de la réalité de la prestation: double abus de position dominante par exploitation des clients et par éviction des concurrents, Revue des contrats 2007 p.1181-1184
PROCEDU	Action for annulment - unfounded
DATES	of document: 24/05/2007 of application: 05/07/2001

Case T-289/01

Der Grüne Punkt – Duales System Deutschland GmbH

v

Commission of the European Communities

(Competition – Agreements, decisions and concerted practices – Collection and recovery system for packaging marketed in Germany bearing the Der Grüne Punkt logo – Decision granting exemption – Obligations imposed by the Commission to ensure competition – Exclusivity granted by the system operator to the collection undertakings used – Restriction of competition – Need to guarantee the access of competitors to the collection facilities used by the system operator – Commitments given by the system operator)

Summary of the Judgment

1. *Competition – Agreements, decisions and concerted practices – Not allowed – Exemption – Commitment given during the administrative proceedings*

   (Art. 81 EC)

2. *Competition – Agreements, decisions and concerted practices – Not allowed – Exemption – Conditions*

3. *Competition – Agreements, decisions and concerted practices – Not allowed – Exemption – Conditions*

   (Art. 81(1) and (3) EC; Council Regulation No 17, Art. 8(1))

4. *Competition – Community rules – Application by national courts*

   (Art. 81(1) EC)

5. *Competition – Undertakings entrusted with the operation of services of general economic interest*

   (Art. 86(2) EC)

1. A commitment given by an undertaking during the administrative proceedings to address the concerns voiced in such proceedings by the Commission has the effect of clarifying the content of the agreements notified for the purposes of obtaining negative clearance or exemption under Article 81 EC, by showing the Commission the way in which that undertaking intends to act in the future. The Commission is thus entitled to take account of that commitment in adopting its decision, and it is not the task of the Court of First Instance to examine the legality of that decision in the light of a right which the undertaking waived during the administrative proceedings.

   (see paras 87-89)

2. Where facilities belonging to the contractual partners of an undertaking which handles the greater part of demand form a bottleneck for that undertaking's competitors, the Commission may oblige that undertaking, as a condition for granting negative clearance or an exemption under Article 81 EC, to allow shared use of those facilities between itself and its competitors, since otherwise the latter would be deprived of any real opportunity of entering, and remaining on, the market in question.

   (see paras 107, 112-113)

3. Article 8(1) of Regulation No 17 provides that conditions and obligations may be attached to decisions granting exemption without stipulating under what conditions the Commission must choose a particular one of those possibilities. In addition, since Article 81(3) constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article 81(1) EC, the Commission enjoys a large measure of discretion in relation to the detailed rules to which it may subject the exemption, while at the same time having to act within the limits imposed upon its competence by Article 81 EC.

   The fact that, in certain cases, the Commission has preferred to impose conditions rather than obligations is not sufficient, in itself, to call into question the possibility provided for in Regulation No 17 of coupling a decision granting exemption with obligations rather than conditions.

(see paras 153-154)

4. Where national courts rule on agreements or practices which are already the subject of a decision by the Commission, acting within the competence conferred upon it to enforce the Community competition rules, they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.

(see para. 197)

5. Even if an undertaking managing a collection and recovery system for sales packaging is entrusted with a service of general economic interest within the meaning of Article 86(2) EC, the fact that the Commission has imposed an obligation on it not to impede collection undertakings from concluding with that undertaking's competitors contracts authorising them to use their bins and other collection and sorting facilities for packaging and to apply those agreements does not in any way prove that the attainment, on economically acceptable conditions, of the take-back and recovery service entrusted to that system is threatened.

(see paras 207-208)

Judgment of the Court of First Instance (First Chamber)
First Instance (First Chamber)First Instance (First Chamber)2007. Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities. Competition - Agreements, decisions and concerted practices - Collection and recovery system for packaging marketed in Germany bearing the Der Grüne Punkt logo - Decision granting exemption - Obligations imposed by the Commission to ensure competition - Exclusivity granted by the system operator to the collection undertakings used - Restriction of competition - Need to guarantee the access of competitors to the collection facilities used by the system operator - Commitments given by the system operator. Case T-289/01.

In Case T289/01,

Der Grüne Punkt - Duales System Deutschland GmbH , formerly Der Grüne Punkt - Duales System Deutschland AG, established in Cologne (Germany), represented by W. Deselaers, B. Meyring and E. Wagner, lawyers,

applicant,

v

Commission of the European Communities , represented initially by S. Rating, and subsequently by P. Oliver, H. Gading and M. Schneider, and finally by W. Mölls and R. Sauer, acting as Agents,

defendant,

supported by

Landbell AG für Rückhol-Systeme , established in Mayence (Germany), represented by A. Rinne and A. Walz, lawyers,

intervener,

APPLICATION for annulment of Article 3 of Commission Decision 2001/837/EC of 17 September 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP/34493 - DSD, COMP/37366 - Hofman + DSD, COMP/37299 - Edelhoff + DSD, COMP/37291 - Rechmann + DSD, COMP/37288 - ARGE and five other undertakings + DSD, COMP/37287 - AWG and five other undertakings + DSD, COMP/37526 - Feldhaus + DSD, COMP/37254 - Nehlsen + DSD, COMP/37252 - Schönmakers + DSD, COMP/37250 - Altvater + DSD, COMP/37246 - DASS + DSD, COMP/37245 - Scheele + DSD, COMP/37244 - SAK + DSD, COMP/37243 - Fischer + DSD, COMP/37242 - Trienekens + DSD, COMP/37267 - Interseroh + DSD) (OJ 2001 L 319, p. 1), or, in the alternative, annulment of that decision in its entirety and of the applicant's commitment reproduced in recital 72 of that decision.

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

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges,

Registrar: K. Andova, Administrator,

having regard to the written procedure and further to the hearing on 11 and 12 July 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant, Der Grüne Punkt - Duales System Deutschland GmbH, to bear three quarters of its own costs, three quarters of the costs incurred by the Commission, and the costs incurred by Landbell AG RückholSysteme;

3. Orders the Commission to bear a quarter of its own costs and a quarter of the costs incurred by the applicant.

Law

A - Ordinance on the avoidance of packaging waste

1. On 12 June 1991 the German Government adopted the Verordnung über die Vermeidung von Verpackungsabfällen (Ordinance on the avoidance of packaging waste (BGBl. 1991 I, p. 1234)), the amended version of which - applicable in the present case - entered into force on 28 August 1998 (the Ordinance' or the Packaging Ordinance'). That ordinance is intended to prevent and reduce the impact of packaging waste on the environment. For that purpose it requires manufacturers and distributors to take back and recover used sales packaging outside the public waste disposal system.

2. Under Paragraph 3(1) of the Ordinance, sales packaging (packaging') is packaging which is provided as a unit at the point of sale and passes to the final consumer. It also includes packaging used by trades, restaurants and other service providers which enables or supports the handing over of goods to final consumers (service packaging), and non-returnable tableware and cutlery.

3. Paragraph 3(7) of the Ordinance defines the manufacturer as someone who manufactures packaging, packaging materials or products from which packaging is directly made, or who imports packaging into German territory. Paragraph 3(8) of the Ordinance provides that distributor is someone who puts into circulation, regardless of the marketing stage, packaging, packaging materials or products from which packaging is directly made, or packaged goods. The mail-order trade may also be a distributor within the meaning of the Ordinance. Lastly, a final consumer is principally defined in Paragraph 3(10) of the Ordinance as someone who does not resell the goods in the form in which they are delivered to him.

4. The obligations to take back and recover which are imposed on manufacturers and distributors under the Ordinance can be met in two ways.

5. First, pursuant to Paragraph 6(1) and (2) of the Ordinance, manufacturers and distributors are obliged to take back from final consumers used sales packaging, free of charge at, or in the immediate vicinity of the actual point of sale and to recover it (the self-management solution'). The distributor's take-back obligation is limited to packaging of the type, shape and size, and of the goods which are part of his range. In the case of distributors with a sales area of less than 200 square metres, the take-back obligation applies only to packaging for the brands sold by the distributor (fourth and fifth sentences of Paragraph 6(1) of the Ordinance). Under the third sentence of Paragraph 6(1) of the Ordinance, in a self-management solution, the distributor must draw the attention of the final consumer by means of clearly visible and legible signs' to the fact that the packaging may be returned.

6. Second, in accordance with the first sentence of Paragraph 6(3) of the Ordinance, manufacturers and distributors may participate in a system which guarantees the regular collection, throughout the distributor's sales territory, of used sales packaging from the final consumer or in the vicinity of the final consumer in order for them to be recovered (the exemption system'). Manufacturers and distributors participating in an exemption system are exonerated from their take-back and recovery obligations in respect of all packaging covered by that system. Pursuant to the second sentence of point 4(2) of Annex I to Paragraph 6 of the Ordinance, manufacturers and distributors have

to make it known that they are participating in an exemption system by marking packaging or by other suitable means'. They can thus make such participation known on the packaging or use other measures, such as informing customers at the point of sale or by a package leaflet, for example.

7. Pursuant to the 11th sentence of Paragraph 6(3) of the Ordinance, exemption systems need to be approved by the competent authorities in the Länder concerned. To be approved, those systems must, inter alia, cover the territory of at least one Land , ensure regular collections reaching the final consumer and have signed agreements with the local bodies responsible for waste management. Any undertaking which satisfies those conditions in a Land is entitled to organise an authorised exemption system in that Land.

8. Since 1 January 2000 both self-management solutions and exemption systems are subject to the same recovery rates. Those rates, which are laid down in Annex I to the Ordinance, vary depending on the packaging material. Compliance with the takeback and recovery obligations is ensured, in the case of selfmanagement solutions, by certificates provided by independent experts and, in the case of exemption systems, by the provision of verifiable data on the quantities of packaging collected and recovered.

9. In addition, the ninth sentence of Paragraph 6(1) of the Ordinance states that, if a distributor does not comply with his takeback and recovery obligations by means of a selfmanagement solution, he must do so by means of an exemption system.

10. In that regard, in their observations of 24 May 2000, sent to the Commission in the context of the administrative proceedings (the observations of the German authorities'), the German authorities stated that the Packaging Ordinance allowed distributors to combine the taking back of packaging in the vicinity of his business, in the context of a self-management solution, and the collection of packaging in the vicinity of the final consumer, in the context of an exemption system, by participating in the exemption system for only part of the packaging which it had put on the market.

11. In the observations of the German authorities it was also stated that, if the distributor chose to participate in an exemption system for all the packaging which he marketed, he was no longer subject to the obligations laid down in Paragraph 6(1) and (2), which meant that a subsequent individual waste collection solution was not possible. However, if the distributor chose to participate from the outset in a selfmanagement solution, subsequent participation in an exemption system was possible if the recovery rate was not achieved in the context of the individual waste disposal.

B - The exemption system of Der Grüne Punkt - Duales System Deutschland GmbH, the Trade Mark Agreement and the Service Agreement

12. Since 1991, Der Grüne Punkt - Duales System Deutschland GmbH (the applicant' or DSD') is the only undertaking which operates a Germany-wide exemption system (the DSD system'). For that reason, in 1993, DSD was approved by the competent authorities in all of the Länder .

13. In order to be able to take part in the DSD system, manufacturers and distributors have to sign a contract with DSD granting them the right to use the Der Grüne Punkt logo, which is the collective trade mark Der Grüne Punkt of which DSD is the proprietor. In return, the manufacturers and distributors concerned pay a royalty to DSD. The Trade Mark Agreement is the subjectmatter of Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding under Article 82 EC (Case COMP D3/34493 - DSD (OJ 2001 L 166, p. 1)). That decision was the subject of an action for annulment brought by applicant in Case T151/01 DSD v Commission.

14. Under the DSD system, the applicant neither collects nor takes back used packaging itself, but subcontracts that service to collection undertakings. The relations between DSD and those undertakings are governed by a standard agreement, amended on a number of occasions, which seeks

to create and operate a system to collect and sort packaging (the Service Agreement'). Once sorted, that material is transported to a recycling plant to be recovered.

Facts at the origin of the dispute

15. On 2 September 1992 DSD notified the Commission of its Statutes and also of a number of agreements, including the Service Agreement - the only agreement which is relevant in the present case - with a view to obtaining negative clearance or, failing that, a decision granting exemption.

16. On 27 March 1997 the Commission published the notice in the Official Journal of the European Communities (OJ 1997 C 100, p. 4), pursuant to Article 19(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English Special Edition 195962, p. 87) in which it stated its intention to take a favourable view of the notified agreements.

17. In that notice, the Commission stated, inter alia, that DSD had given a series of commitments to it, including a commitment not to oblige collection undertakings to work exclusively for DSD and to refrain from obliging those undertakings to use containers or other collection facilities exclusively for the performance of the Service Agreement. DSD had however stated that that second commitment did not apply when the use of the containers and collection facilities by third parties was incompatible with the permission given by the public authorities', or when the Packaging Ordinance or other legislation determined otherwise, or when for other reasons it would have been unreasonable to permit them to be used, related, for example, to the use of dangerous substances. DSD also stated that it was able to take account of the use of containers and other collection facilities by third parties in the calculation of the remuneration of collection undertakings (recitals 66 and 67 of the notice in the Official Journal, and recitals 71 and 134 of the contested decision).

18. Following the publication of that notice in the Official Journal, the Commission received observations from interested third parties concerning different aspects of the application of the Service Agreement. Those third parties submitted that, in practice, and contrary to the commitments referred to above, DSD did not allow them unimpeded access to the collection facilities used by DSD's contractual partners (recitals 76 and 77 of the contested decision). In the contested decision, the Commission thus states that DSD had requested that its contractual partners be permitted to use those facilities only with its authorisation. This formed one of the grounds for complaint lodged under Article 82 EC by the Vereinigung für Wertstoffrecycling (VfW'), and was also the subjectmatter of an action brought before the Landgericht Köln (Cologne Regional Court, Germany) (recitals 57 and 136 of the contested decision).

19. In that case DSD brought an action, on the basis of the German law on unfair competition, against a selfmanagement solution, namely VfW, which was trying to use, free of charge, the collection facilities used by the DSD system in certain German hospitals. That case gave rise to the judgment of the Landgericht Köln of 18 March 1997 in which DSD was successful in so far as the German court found unlawful the free, shared use of the collection facilities belonging to the DSD system. In that judgment, the Landgericht Köln also stated that, in the light of the circumstances of the case, adequate compensation for such shared use could be determined only if VfW paid directly to DSD a sort of royalty in return for such use of those collection facilities.

20. In that context, the Commission pointed out to DSD by letter of 21 August 1997 that conduct consisting of preventing third parties from using the collection facilities of its contractual partners could fall within the scope of Article 82 EC and it stressed the importance that such conduct could have in respect of the exemption procedure, in so far as, in accordance with the fourth condition laid down in Article 81(3) EC, an agreement notified for exemption purposes cannot afford the possibility of eliminating competition in respect of a substantial part of the products in question.

21. After the Commission had put forward its view, DSD gave the following commitment in order to address the preliminary concerns expressed by that institution in its letter of 21 August 1997 (recitals 58, 72 and 137 of the contested decision):

DSD is prepared to refrain from seeking to restrict use in the manner referred to in the judgment of the [Landgericht Köln] of 18 March 1997 in [the] particular case of VfW and in comparable cases. DSD may however pursue claims for information and settlement against collectors in a contractual relationship with DSD.'

The contested decision

22. On 17 September 2001 the Commission adopted Decision 2001/837/EC relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Cases COMP/34493 - DSD, COMP/37366 - Hofman + DSD, COMP/37299 - Edelhoff + DSD, COMP/37291 - Rechmann + DSD, COMP/37288 - ARGE and five other undertakings + DSD, COMP/37287 - AWG and five other undertakings + DSD, COMP/37526 - Feldhaus + DSD, COMP/37254 - Nehlsen + DSD, COMP/37252 - Schönmakers + DSD, COMP/37250 - Altvater + DSD, COMP/37246 - DASS + DSD, COMP/37245 - Scheele + DSD, COMP/37244 - SAK + DSD, COMP/37243 - Fischer + DSD, COMP/37242 - Trienekens + DSD, COMP/37267 - Interseroh + DSD) (OJ 2001 L 319, p. 1; the contested decision' or the decision').

23. The assessment made by the Commission in the contested decision commences with the application made by DSD to obtain negative clearance or, failing that, a decision granting exemption in respect of the Service Agreement.

A - The contractual relations between DSD and the collection undertakings

24. DSD does not itself collect packaging but employs collection undertakings with which it concludes a Service Agreement. Pursuant to Paragraph 1 of that standard agreement, DSD entrusts each collection undertaking with the exclusive task of collecting and sorting packaging in a certain district in accordance with an exemption system and this for a duration of around 15 years (the exclusivity clause in favour of the collection undertaking' or the exclusivity clause').

25. The packaging is either collected in containers placed close to the households of the consumers concerned or removed or emptied from plastic bags or bins which are provided to consumers by the collection undertaking. That undertaking owns the containers and the packaging deposited therein or which it has collected. The sorting of the collected material is the responsibility of the collection undertakings and is generally done in a specialised sorting centre. Each collection undertaking is remunerated by DSD according to the weight of each type of material, the cost of treatment of the sorted waste and the success rate of the collection (recitals 32, 45 and 51 of the contested decision).

26. The contested decision incidentally observes that collection undertakings usually also collect printed matter (newspapers and magazines) at the same time as packaging made of paper a nd card. However, since that printed matter, which accounts for about 75% of that type of material, does not form part of the DSD system, DSD does not pay for its collection (recital 32 of the contested decision).

B - Assessment relating to Article 81(1) EC

27. In the context of that assessment, the contested decision concerns two aspects of the Service Agreement.

1. The exclusivity clause in favour of the collection undertaking

28. First, the contested decision states that the effect of the exclusivity clause in favour of the collection undertaking, which is inserted into all Service Agreements concluded between DSD

and its contractual partners, is to prevent other collection undertakings from offering their services to DSD (recitals 122 to 124 of the contested decision).

29. In order to analyse that clause in the light of Article 81(1) EC the Commission examines, first of all, the situation of the demand on the German market for collecting and sorting packaging from consumers (the market for collection from consumers'). In that regard, the contested decision states that DSD deals with approximately 70% of packaging capable of being collected in Germany and at least 80% of the demand in the market for collection from consumers. DSD's influence is therefore decisive both at national level, where it constitutes the only available exemption system, and in the 500 areas covered by Service Agreements (recitals 126 and 127 of the contested decision).

30. On the supply side, the contested decision points out, next, that numerous actors offer collection services. The contested decision also states that primarily for reasons of spatial organisation and collection logistics, it is unlikely at present that an additional collection system for private final consumers will be set up alongside that already established by DSD'. The decision states, on the contrary, that given the infrastructure bottleneck at the point of collection from households, it is surely more realistic to suppose that a potentially competing exemption system or selfmanagement arrangement would cooperate with those collectors who already provided collection services for DSD under a Service Agreement'. Thus, for the Commission, it is only at certain collection points deemed equivalent to private households, such as hospitals or canteens, subject to certain conditions relating to collection logistics and types of packaging, that collection undertakings other than the contractual partners of DSD might be able to conceive installing additional collection containers to those used by the DSD system. It is considered in the decision, however, that such opportunities are of relatively limited economic importance and that it is unlikely, therefore, that any appreciable new opportunities for excluded undertakings will arise during the lifetime of the Agreement in the contracting areas covered by the DSD Service Agreement (recitals 127 and 128 of the contested decision).

31. In addition, the decision states that, in an assessment of the effect of these exclusivity obligations on competition, a decisive factor is their duration, given that the longer that duration, the more that clause has the long-lasting effect of excluding other collection undertakings which are not contractual partners of DSD from the possibility of offering their services to meet the demand of the most important German exemption system (recitals 129 and 130 of the contested decision).

32. Following that analysis, the Commission notes that the access of collection undertakings to the market for collection from consumers is greatly obstructed; this goes a considerable way towards partitioning off a substantial part of the common market. Consequently, the exclusivity clause in favour of the collection undertaking constitutes a restriction of competition for the purposes of Article 81(1) EC (recital 132 of the contested decision). When questioned on that point at the hearing, DSD stated that it did not dispute that analysis.

2. Access to the facilities of collection undertakings

33. Second, the contested decision examines the extent to which competitors with DSD may have access to the facilities of collection undertakings. In that regard, the Commission points out that, in its view, there would be a restriction of competition for the purposes of Article 81(1) EC if the Service Agreement was so designed that it excluded competitors with DSD from access to the collection infrastructure' (recital 133 of the contested decision).

34. In support of that claim, the decision states, first, that the infrastructure for collection in the vicinity of households forms a bottleneck, so that [the facilities of the collection undertakings are] especially important in terms of competition law'. Thus, the decision states that that type of collection is carried out, in general, directly at all households in the local authority's area

(collection systems), with the exception of a few cases where waste is brought voluntarily by the public (waste collection centres). The decision also states that, for logistical reasons collection points at households, if they are to be served at optimum cost, have usually to be served by only a limited number of collectors. In addition, the decision points out that only one container can be placed at each collection point for each type of material (such as glass, paper or lightweight packaging), for reasons of space and the established habits of final consumers in respect of collection. Such facts constitute the main reason why there is usually only one household refuse and reusable materials collection from households, which is carried out by just one collector (recital 133 of the contested decision, read in conjunction with recitals 92 and 93 thereof). Second, the decision draws attention to the fact that objections were put forward on competition grounds following the publication of the notice in the Official Journal. The Commission refers here to the fact that, on that occasion, several interested third parties stated that, contrary to a first series of commitments given by DSD (see paragraph 17), that undertaking did not allow third parties to access the collection facilities of its contractual partners freely by requiring them to agree to share the use of those facilities (recital 133 of the contested decision, read in conjunction with recitals 76 and 77 of that decision).

35. In that context, the contested decision draws attention, first, to the fact that DSD had claimed that joint use of the collection facilities of DSD's contractual partners by third parties should be possible only if DSD had authorised it. The decision states, however, that, following the Commission's letter of 21 August 1997, which pointed out to DSD that such conduct could fall within the scope of Article 82 EC, DSD had decided no longer to insist that third parties obtain its authorisation in order to be able to use the collection facilities of its contractual partners (see paragraphs 20 and 21). That decision also states that there would also be a difficulty if DSD were to demand payment for such use directly from third parties, or to claim that it ought to have a say in the negotiation by collectors and third parties of an appropriate payment for the joint use of collection containers'. Nonetheless, the decision takes care to point out that, in the case of the shared use of the facilities of its contractual partners, DSD remains free to negotiate a reduction of the royalty paid to those undertakings and it may also ensure that it is not charged for any service provided for a third party (recitals 136 to 138 of the contested decision).

36. In the light of those commitments and that information, the Commission considers that the Service Agreement does not confer any exclusivity on DSD, and that collection undertakings are free to offer their services to competitors with DSD. The decision also points out that it does not, therefore, follow from the Service Agreement that competitors with DSD are denied access to the collection infrastructure, so that there is no restriction of competition here within the meaning of Article 81(1) [EC]' (recitals 134 and 139 of the contested decision).

C - Assessment relating to Article 81(3) EC

37. In order to declare the provisions of Article 81(1) EC inapplicable to the Service Agreement, the contested decision examines the exclusivity clause in favour of the collection undertaking in the light of the conditions laid down in Article 81(3) EC.

38. In that context, the contested decision considers that that clause contributes to improving the production of goods and to promoting technical or economic progress because it enables environmental objectives to be met (recitals 142 to 146 of the contested decision), while reserving a fair share of the resulting benefit to consumers (recitals 147 to 149 of the contested decision).

39. Similarly, as regards whether or not the exclusivity clause laid down in the Service Agreement is indispensable, the contested decision points out that the putting in place of the DSD system requires considerable investments from the collection undertakings, which need to be able to obtain certain guarantees from DSD as regards the duration of the agreement in order to be able to recoup

and obtain a profit from those investments. After examination, the Commission considers it necessary, however, to reduce the initial duration laid down for the exclusivity clause by setting it a termination date of 31 December 2003 (recitals 150 to 157 of the contested decision).

40. Finally, the contested decision examines the question whether the exclusivity clause is not likely to eliminate competition on the market for collection from consumers. In that regard, the Commission starts by pointing out that collection undertakings excluded from the DSD system remain free to offer their services to firms wishing to manage their own waste. Such arrangements are possible at least in respect of certain combinations of sales packaging and collection points on the margins of the market for collection from consumers (recital 159 of the contested decision).

41. In addition, the Commission notes that the market for collection from consumers is characterised by the fact that it is economically more advantageous to entrust the whole of a designated area to just one collection undertaking and that it is, in many cases, rather less profitable to have several collection facilities for household collection for reasons of spatial economics, collection logistics and traditions of waste collection established among consumers. For the Commission, the containers used for collecting, which are situated close to households, thus form a bottleneck. It thus considers it realistic to expect that exemption schemes competing with the DSD system and some self-management solutions will often work together with the collection undertakings which work for DSD. That analysis enables the Commission to draw attention to the need for the contracting parties of DSD to share the use of the collection facilities, given that free and unimpeded access to the collection infrastructure set up by collectors contracted to DSD under a Service Agreement is therefore a vital condition of more intense demand-side competition for collection and sorting services for [household packaging] and more intense competition on the upstream market in the organisation of the take-back and recovery of [packaging from consumers]' (recital 162 of the contested decision). The decision observes, in that regard, that the Service Agreement does not tie the collection undertakings exclusively to DSD and that DSD has given several commitments, including one to refrain from requiring collection undertakings to use collection facilities solely for the purposes of the Service Agreement and not to seek to restrain third parties from using those collection facilities in the case of shared use (recitals 158 to 163 of the contested decision).

D - Obligations imposed by the Commission to be attached to the decision granting exemption

42. In order to ensure that the anticipated effects on competition do in fact take place and that the tests for exemption in Article 81(3) EC are accordingly satisfied, the Commission considers it necessary to attach obligations to its decision to exempt the Service Agreement under Article 8 of Regulation No 17 (recital 164 of the contested decision).

43. The first obligation is imposed on DSD in Article 3(a) of the contested decision, according to which DSD shall not impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging'.

44. The second obligation is defined in Article 3(b) of the decision and states that where collectors conclude agreements with competitors with DSD providing for the joint use of containers or other facilities for the collection and sorting of used sales packaging, DSD may not require that they inform DSD of volumes of packaging not collected for the DSD system'.

45. In order to explain in what respect such obligations have to be imposed notwithstanding DSD's commitment to authorise its competitors to use the collection facilities, the contested decision refers to the vital importance of unimpeded access to those facilities for the existence of competition and the qualifications made by DSD in relation to the implementation of one of the commitments set out in recital 71 (recital 164 of the contested decision).

E - Conclusions

46. On the basis of the commitments given by DSD and the obligations attached to the decision, the contested decision concludes by stating that free and unimpeded access to the collection infrastructures is possible in practice. According to the decision, there is realistic scope for entry to the market for collection from consumers both for exemption systems competing with the DSD system and for individual collection systems. That scope will also allow the conditions to be established which are necessary for the intensification of competition on the upstream market in the organisation of the take-back and recovery of packaging from consumers (recitals 176 to 178 of the contested decision).

47. Consequently, the contested decision states that the exclusivity clause in favour of the collection undertaking, contained in the Service Agreement, satisfies the test for the application of Article 81(3) EC (recital 179 of the contested decision). In Article 2 of the contested decision, the Commission thus states that acting under Article 81(3) [EC]..., the Commission declares Article 81(1) [EC]... inapplicable to individual Service Agreements containing an exclusivity clause running no further than the end of 2003' and that this exemption shall run from 1 January 1996 to 31 December 2003'.

48. The two obligations mentioned above (see paragraphs 43 and 44) are attached to that exemption, as laid down in Article 3 of the decision, in order, first, to ensure access to the collection infrastructures of DSD's partners in the Service Agreement, and to prevent the elimination of competition on the relevant markets and, second, to enable DSD's competitors to make unrestricted use of the quantities of packaging collected for them in the context of that shared use of the collection facilities. These obligations are indispensable in order to prevent the elimination of competition on the relevant markets, and constitute a clarification of the commitments given by DSD which helps to increase their legal certainty (recital 182 of the contested decision).

49. Finally, the contested decision states that, if it proves from a decision of a German court of last resort that, contrary to the Commission's view, the use by third parties of the collection facilities of Service Contract collection undertakings is not compatible with the Packaging Ordinance, there would then have been a major change in the facts basic to the making of the decision, and the Commission would reconsider the requirements for the applicability of Article 81(3) EC to the Service Agreement, and would if necessary revoke the declaration of exemption (recital 183 of the contested decision).

F - Operative part

50. Article 1 of the operative part sets out the Commission's position on DSD's constitution and the Guarantee Agreements which had been notified by DSD at the same time as the Service Agreement:

On the basis of the facts in its possession and of the commitments given by DSD, the Commission finds that there are no grounds under Article 81(1) [EC] and Article 53(1) of the EEA Agreement for action on its part in respect of the Constitution of DSD or the Guarantee Agreements.'

51. Article 2 of the contested decision exempts the Service Agreement:

Acting under Article 81(3) [EC] and Article 53(3) of the EEA Agreement, the Commission declares Article 81(1) [EC] and Article 53(1) of the EEA Agreement inapplicable to individual Service Agreements containing an exclusivity clause running no further than the end of 2003.

This exemption shall run from 1 January 1996 to 31 December 2003.'

52. In Article 3 of the decision, the Commission attaches two obligations to that exemption:

The following obligations are attached to the declaration of exemption in Article 2:

(a) DSD shall not impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging.

(b) Where collectors conclude agreements with competitors with DSD providing for the joint use of containers or other facilities for the collection and sorting of used sales packaging, DSD may not require that they inform DSD of volumes of packaging not collected for the DSD system.'

Procedure and forms of order sought

53. By application lodged at the Registry of the Court of First Instance on 27 November 2001, the applicant brought an action seeking annulment of the contested decision, under the fourth paragraph of Article 230 EC.

54. By application registered at the Registry of the Court of First Instance on 26 February 2002, Landbell AG für Rückhol-Systeme (Landbell'), an exemption system in competition with DSD, sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. That application for leave to intervene was notified to the parties, which submitted their observations within the prescribed period.

55. By order of 17 June 2002, the Court of First Instance (Fifth Chamber) granted Landbell leave to intervene and it submitted its observations on 9 October 2002.

56. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, sent the parties a number of questions to be answered orally at the hearing.

57. The parties presented oral argument and answered the questions put by the Court at the hearing on 11 and 12 July 2006.

58. The applicant claims that the Court should:

- annul Article 3(a) and (b) of the contested decision;

- in the alternative, annul the contested decision in its entirety;

- annul DSD's commitment reproduced in recital 72 of the contested decision;

- order the Commission to pay the costs.

59. The Commission contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

60. Landbell claims that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

Law

61. The applicant raises four pleas in law in support of its action. The first plea alleges that the obligation laid down in Article 3(a) of the contested decision infringes Article 81(3) EC and the principle of proportionality. The second plea alleges that that obligation infringes Article 86(2) EC. The third plea alleges that the obligation laid down in Article 3(b) of the contested decision infringes Article 81(3) and Article 86(2) EC. The fourth plea, linked to the application for annulment of the applicant's commitment referred to in recital 72 of the contested decision,

alleges infringement of the fundamental right of access to justice.

A - The first plea, alleging that the obligation laid down in Article 3(a) of the contested decision infringes Article 81(3) EC and the principle of proportionality

62. The applicant claims that the obligation laid down in Article 3(a) of the contested decision (the first obligation'), according to which DSD shall not impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging', infringes Article 81(3) EC and the principle of proportionality. That plea is essentially divided into three parts.

63. First, the applicant claims that the first obligation is not objectively necessary in the light of Article 81(3) EC since the shared use of the collection and sorting facilities (the collection facilities') is not indispensable for the activity of DSD's competitors. At the very least, the applicant submits that the contested decision does not provide sufficient reasoning on that point.

64. Second, the applicant claims, in response to the arguments raised in the statement in defence, that the alleged threat of infringement of Article 81(1) EC or Article 82 EC claimed by the Commission is speculative and cannot justify the first obligation, which - in any case - can only seek to prevent the elimination of competition on the market in which a restriction of competition has been found beforehand.

65. Third, the applicant submits that the first obligation is disproportionate and alleges (i) that the shared use of the collection facilities imposed by that obligation is contrary to the Packaging Ordinance; (ii) that the first obligation leads to a distortion of competition to its detriment; (iii) that the obligation at issue adversely affects the specific subject-matter of the mark Der Grüne Punkt; and (iv) that it infringes its fundamental right of access to justice.

66. Before expounding those arguments the applicant first states why it is necessary to obtain its agreement in the case of shared use of the collection facilities.

67. Those reasons need to be examined before assessing the three parts of the first plea.

1. The need to obtain DSD's agreement to share the use of the collection facilities

a) Arguments of the parties

68. The applicant submits that, even though it is not the legal owner of the collection facilities referred to in the first obligation, those facilities must nevertheless be considered to be facilities which belong to DSD given that (i) it finances them; (ii) they are an integral part of the DSD system and; (iii) they bear the mark Der Grüne Punkt. Consequently, any shared use of the facilities by collection undertakings which have concluded a service agreement with DSD should be subject to the applicant's agreement.

69. In order to establish the need to obtain that agreement, the applicant puts forward, first, the fact that it financed the collection facilities used by the DSD system. In that regard, the applicant bases its arguments, inter alia, on Article 7(1) of the Service Agreement, according to which the remuneration paid by DSD to the collection undertaking constitutes the consideration for all the services supplied by that undertaking as regards, inter alia, the provision of collection containers, the transport and the sorting of packaging and the availability of the waste. The applicant also relies on a judgment of the Landgericht Köln of 18 March 1997, stating that a competitor of DSD benefits from the DSD system in the case of shared use of the collection facilities and that such use is possible only after obtaining [DSD's] agreement (in return for payment)'. The applicant also cites the principle laid down in Article 242 of the Bürgerliches Gesetzbuch (German Civil Code; the BGB') that contractual obligations should be performed in good faith imposing on contractors the obligation to take particular precaution in long-term contractual relations involving

close economic cooperation.

70. Similarly, it is necessary to obtain the applicant's agreement in the case of shared use of the collection facilities in order to enable it to respect its obligations under the Packaging Ordinance, both in terms of the need to ensure that the whole territory is covered and the need to comply with the recovery rates and to prove the volume flows for each Land (second sentence of Paragraph 10 of the Service Agreement; points 1.1 and 1.5.1 of the fourth agreement amending the Service Agreement and the judgment of the Verwaltungsgericht Gieen (Administrative Court, Gieen, Germany) of 31 January 2001). That agreement is also required to ensure that the packaging forming part of the DSD system and bearing the logo Der Grüne Punkt is actually brought by the consumer to the corresponding system, namely to the collection facilities bearing that logo.

71. The Commission and Landbell point out that the financing of the collection facilities is a logical consequence of the Service Agreement, which determines the services requested and the remuneration paid in consideration. In addition, the applicant did not invoke Article 242 BGB during the administrative proceedings and its current position is contrary to that which it adopted in that context. In addition, the obligations under the Ordinance apply to DSD in the same way as they apply to any other operator placed in the same position and the affixing of the mark Der Grüne Punkt to the collection facilities is of no importance to the consumer, who essentially associates those facilities with the type of material to be recovered. Landbell also claims that all the local authorities of the Land Hessen accepted that their exemption systems use the same collection facilities as those used under the DSD system.

b) Findings of the Court

72. It is apparent from the contested decision that, during the administrative proceedings, DSD gave a commitment to the Commission not to require collection undertakings to work exclusively for the DSD system and to refrain from requiring those undertakings to use their own collection facilities exclusively for the performance of the Service Agreement (see paragraph 17). Similarly, DSD also gave a commitment to the Commission to refrain from making the use by third parties of the collection facilities of DSD's contractual partners subject to its agreement (see paragraph 21).

73. Those commitments concern, first, the collection undertakings, which are DSD's contractual partners and, second, the undertakings wishing to have access to the collection facilities of DSD's contractual partners. They address the concerns expressed by the Commission in the context of the administrative proceedings in respect of both the possible application of Article 81(1) EC to the Service Agreement, if it were found to contain an exclusivity clause in DSD's favour in respect of third party access to the collection facilities (see paragraph 35), and the possible application of Article 82 EC, if it were established that DSD's wish to subject the shared use of the collection facilities to its agreement falls within Article 82 EC (see paragraph 20).

74. In order to address those concerns DSD proposed the abovementioned commitments. The commitment reproduced in recital 72 of the contested decision is particularly illustrative in that regard, since it was proposed in order to address the Commission's concern regarding DSD's initial demand that the shared use by third parties of the collection facilities of its contractual partners should be subject to its agreement (recitals 57, 58, 136 and 137 of the contested decision). That commitment was also intended to reassure the Commission by showing it that DSD had waived its right to bring actions to restrict use of the type described in the judgment of the Landgericht Köln of 18 March 1997, which had been brought by DSD on the basis of the German law on unfair competition against a competitor which was seeking to use certain collection facilities of the DSD system free of charge.

75. It should be pointed out that the commitments proposed by DSD were taken into account by the Commission in assessing the Service Agreement notified by DSD. That is true both in the examination of any restriction of competition under Article 81(1) EC concerning the access of collection undertakings to the facilities (see paragraphs 33 to 36, recitals 133 to 140 of the contested decision), and in the analysis under Article 81(3) EC in respect of assessing the possibility of maintaining competition (see paragraph 41; recitals 158 to 163 of the contested decision). In the contested decision the Commission refers expressly, by way of example, to the commitments in concluding that the Service Agreement does not tie the collection undertakings exclusively to DSD and that the collection undertakings may therefore propose their services to DSD's competitors both freely and without unnecessary obstacles (see paragraph 46, and recital 176 of the contested decision).

76. After the administrative proceedings, the applicant has nevertheless submitted, before the Court, that any shared use of the collection facilities of its contractual partners requires its agreement.

77. First, the applicant claims that that requirement results from the fact that it participated in the financing of the collection facilities used by the DSD system through the remuneration paid under the Service Agreement. It must be pointed out, in that regard, that the DSD system is the first approved exemption system in the whole of Germany and that its importance is considerable in that country, in so far as it represents approximately 70% of packaging capable of being collected in Germany and at least 80% of the demand in the German market for collection from consumers (see paragraph 29). It thus goes without saying that DSD is the first and primary, if not only, source of revenue for collection undertakings in respect of the collection and sorting of packaging.

78. However, the applicant does not dispute that it is the task of the collection undertakings and not of DSD to make the necessary investments for the collection and sorting of packaging (recital 151 of the contested decision). Similarly, it does not dispute that the sorting facilities which did not exist until then required considerable investments from the collection undertakings (recital 53 of the contested decision). It is also to enable those undertakings to redeem their investments, which have been estimated at ten billion German marks (DEM) during the lifetime of the Service Agreement, that the Commission accepted that the DSD exclusivity clause in favour of the collection undertakings should be quite substantial in duration (see paragraph 39). That duration thus seeks to ensure the profitability of investments made by collection undertakings and not to enable DSD to assert a right to monitor the use of those investments.

79. In addition, examination of the Service Agreement shows that DSD does not bear the risks related to the investments necessary to implement the DSD system by means other than the abovementioned exclusivity clause. Thus, DSD is not responsible for the risks incurred by collection undertakings in using the system (Paragraph 5(1) of the Service Agreement). Similarly, in the event of termination of the Service Agreement, DSD neither repays the investment of the collection undertakings nor pays damages for it (Paragraph 9(3) and (4) of the Service Agreement). In addition, it is apparent from Paragraph 7(1) of the Service Agreement that the fee paid by DSD to its contractual parties is proportional to the weight of the packaging collected, which means that, if a collection undertaking stops collecting packaging for DSD, the latter does not have to remunerate that undertaking for investments made.

80. Furthermore, DSD does not take into account the fact that, in the case of shared use, the Commission expressly recognised, in the contested decision, that it had the right to ensure that it is not charged for any service provided by the collection undertakings for a third party and, consequently, authorises DSD to reduce the remuneration payable to its contractual partners (see paragraph 35). That makes it possible to guarantee DSD that shared use will not be at its cost in terms of remuneration paid to the collection undertakings. There can thus be no free usage'

of the collection facilities, as was the case in the judgment of the Landgericht Köln, at a time when the German Packaging Ordinance had not yet been revised and when DSD was not in a position to reduce its payments to the collection undertakings in proportion to the shared use of the collection facilities.

81. Finally, as regards the argument based on Article 242 BGB, which in the applicant's view imposes obligations on contractual partners to take particular precaution - although it is difficult to perceive in what way they could show the need for DSD to agree to shared use - the Court can only find that, since that argument based on German law was not raised during the administrative proceedings, the Commission cannot be criticised for not having taken it into account when adopting the contested decision.

82. Consequently, the fact that DSD was the first exemption system to call on the services of collection undertakings and that it is the primary, if not the only, source of revenue for those undertakings is not sufficient to establish DSD's right to give its agreement in the case of shared use.

83. Second, the applicant submits that its agreement is necessary in the case of shared use of the collection facilities in order to enable it to comply with the obligations resulting from the Packaging Ordinance and to ensure that packaging which forms part of the DSD system is effectively put back into that system by the consumer.

84. In that regard, it should be pointed out that the obligations resulting from the Ordinance apply to DSD as they do to any other exemption system operator. In addition, the provisions of the Service Agreement relied on by DSD do not establish DSD's right to make the shared use of the collection facilities of its contractual partners subject to its agreement. Thus, the second sentence of Paragraph 10 of the Service Agreement does not concern the case of shared use of the collection facilities but that of an amendment to the organisation of the DSD system and that provision merely states that a different organisation of that system requires the agreement of the contracting parties and the local authority concerned. As will be explained below, shared use does not prevent the DSD system from satisfying its obligations under the Ordinance (see paragraphs 161 to 170). Equally, points 1.1 and 1.5.1 of the fourth amending agreement do not concern packaging, which is the only relevant item in the present case, but additional materials which are not packaging'. In addition, in the judgment of 31 January 2001 the Verwaltungsgericht Gieen did not examine the need for DSD to agree to shared use of the collection facilities but merely found that the LahnDillKreis (LahnDill district) had to come to an agreement with the applicant on a collection and recovery system that they had set up and which did not constitute a system consistent with Paragraph 6(3) of the Packaging Ordinance.

85. Moreover, in respect of the alleged need to preserve the role played by the mark Der Grüne Punkt at the stage of collecting the packaging, it should be noted that it is apparent from the documents before the Court that numerous collection facilities do not bear that mark (see paragraph 189). In addition, consumers do not associate the bins with that mark but with the type of packaging (sales packaging) and, in particular, the type of material (lightweight materials, paper/card, glass etc.) to be placed in the different types of collection facilities. The example of the joint collection of printed matter (newspapers and magazines) and packaging made of paper and card, given in the contested decision, illustrates the possibility of a shared use of the collection facilities without the need to take account of any affixing of the mark Der Grüne Punkt to those facilities (see paragraph 26).

86. Therefore, the fact that DSD was the first exemption system to integrate the collection facilities in its system or the first system to use the mark Der Grüne Punkt to identify its system is not sufficient to establish its right to make shared use subject to its approval.

87. In any event, even supposing that the applicant could rely on a right to give its approval for the shared use by third parties of the collection facilities of its contractual partners - which, as is apparent from the preceding paragraphs, is in no way established - the Court cannot but find that, during the administrative proceedings, the applicant stated that it had waived its claim to such a right. Subject to a specific argument relating to the commitment reproduced in recital 72 of the decision - which will subsequently be examined (see paragraph 218 et seq.) - the applicant does not challenge the validity or the legality of the different commitments put forward during the administrative proceedings to address the concerns voiced by the Commission.

88. Those commitments had the effect of clarifying the content of the Service Agreement notified by DSD, for the purposes of obtaining negative clearance or an exemption, by showing the Commission the way in which DSD intended to act in the future. The Commission thus legitimately took account of those commitments in its assessment in such a way that DSD obtained the decision granting exemption which it sought. Therefore, the Commission was not obliged to take a stance on whether or not DSD has the right to make the shared use of the collection facilities subject to its agreement, given that, in its commitments, that undertaking had agreed to refrain from opposing such shared use.

89. Consequently, the Commission rightly adopted the contested decision without taking into account DSD's alleged right to oppose shared use, because commitments had been given to that effect by DSD to address the problems identified by the Commission. Therefore, it is not the task of the Court to examine the legality of that decision in the light of a right which the applicant had waived.

2. The first part, alleging the lack of need to share the use of the collection facilities

a) Arguments of the parties

90. By analogy with the case-law on essential facilities (Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission (Magill ') [1995] ECR I743, paragraphs 53 and 54; Case C7/97 Bronner [1998] ECR I7791, paragraph 41; Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 European Night Services and Others v Commission [1998] ECR II3141), the applicant claims that the shared use, imposed by the first obligation, must be indispensable for the activity of DSD's competitors, which is not so in the present case.

91. In relation to exemption systems, the applicant submits that those systems can access approximately 70% of the market without resorting to shared use. It states that approximately 70% of the packaging treated under its system (packaging made of glass, most packaging made of paper and card, and lightweight packaging in the South of Germany) is collected by voluntary collection systems, namely either by means of containers placed at designated sites to that effect or by means of waste collection centres. Those systems are the rule and not an ad hoc' solution, as pointed out in the decision (see paragraph 34). It is therefore sufficient that competitor collection systems install their own containers to avoid having to resort to shared use. The applicant also gives the example of the blue bag', used in April 1998 by Landbell to collect certain types of packaging in the Lahn-Dill-Kreis, to illustrate that a separate collection system from the DSD system may be put in place without difficulty. In addition, it is apparent from the Order of the Verwaltungsgerichtshof Kassel (Higher Administrative Court, Kassel, Germany) of 20 August 1999 that competing collection systems could be used alongside each other', which means that they could use their own collection facilities.

92. In relation to selfmanagement solutions, the applicant points out that such systems cannot, generally speaking, collect packaging in collection facilities situated close to private households, as would however be possible as a result of the first obligation. That prohibition is decisive in terms of respecting the recovery rates laid down in the Ordinance. By way of exception, the applicant acknowledges that selfmanagement solutions may collect packaging from, or close to, private

households in marginal cases, namely from small craft undertakings, small businesses and industrialists and mailorder companies (see the observations of the German authorities, p. 7). However, in those two periphery fields, selfmanagement solutions already use their own collection facilities and shared use is thus not necessary.

93. Finally, the applicant submits that the decision infringes Article 253 EC by not stating why shared use is indispensable for the activity of DSD's competitors. As regards collection facilities, the decision should contain studies on the structure of the market and on the alleged restrictions of competition in order to establish how shared use is indispensable. In that regard, the applicant points out, in recital 160 of the contested decision, which concerns the spatial economics, collection logistics and traditions of waste collection established among consumers (see paragraph 41), that the Commission does not base its findings on variable facts. Similarly, merely stating in that same recital that the duplication of collection facilities is economically difficult in many cases' is not sufficient. In respect of sorting facilities, the applicant notes that the decision does not contain any reasons explaining why their use needs to be shared, unless that reason is the general indication, in recital 182 of the contested decision, that such use is necessary to prevent the elimination of competition.

94. The Commission considers that the reference made to the case-law on essential facilities is inappropriate given that the collection facilities do not belong to DSD and that third parties must be able to use them without its agreement. In the present case, it should be considered, rather, that the decision grants an exemption under Article 81(3) EC to a restriction of competition by attaching to that exemption an obligation aimed at ensuring that competition is maintained. In that regard, the decision states, in recitals 133 to 139 (see paragraphs 33 to 36), the reasons why the access of DSD's competitors to collection facilities is essential. Equally, the exclusivity clause linking DSD to the collection undertakings, examined in recitals 128, 160 and 162 of the contested decision, would restrict the arrival of competitors on the market considerably (see paragraphs 30 and 40). The Commission claims, essentially, that if the first obligation was not imposed, the exclusivity clause uniting the applicant and the collection undertakings would have the effect of preventing the entry of DSD's competitors into the market for collection from consumers. Consequently, the contested decision is sufficiently reasoned in that regard.

95. As regards the criticism concerning the shared use of the collection facilities for exemption systems, the Commission and Landbell submit that such use is necessary to enable effective competition. Landbell also states that, from the beginning, the DSD system has shared the communal collection facilities which existed for collecting packaging made of paper, card and glass.

96. As regards the criticism in relation to the shared use of collection facilities for selfmanagement solutions, the Commission observes that such use is envisageable only where there is an overlap between the collection points of the selfmanagement solutions and those of the DSD system under national law. Therefore, the Commission observes that the first obligation applies to situations where selfmanagement solutions are authorised to collect from consumers. In such a case, the Commission states that shared use will occur only where the collection points may be equipped with one facility only. Furthermore, the Commission notes that, in respect of packaging arising from the mailorder trade, selfmanagement solutions will only need to share use where the turnover of their customers is so low that it would not be economically viable to install collection containers at a reasonable distance' from the place of establishment of those customers.

97. As regards the criticism of the lack of reasoning as to why shared use of the sorting facilities is necessary, the Commission raises the point that the applicant does not take into account the fact that, in the case of shared use of the collection facilities, it is obviously necessary to sort packaging together.

b) Findings of the Court

98. By way of a reference to the Magill case-law, which concerns a situation in which the party concerned had an incontestable power of disposal over the facilities at issue - which is not the case here (see paragraphs 87 to 89) - the applicant submits, in essence, that the first obligation must be annulled in so far as it imposes the shared use of the collection facilities, including the sorting facilities, even though it is not necessary to enable the activity of exemption systems and selfmanagement solutions and without sufficient reasons under Article 253 EC.

99. In order to examine those arguments, it should first be noted that, in recital 182 of the contested decision, the Commission states clearly that the purpose of the first obligation, under which DSD may not prohibit collection undertakings from concluding contracts with DSD's competitors authorising those competitors to use their containers and other collection and sorting facilities, is to prevent the elimination of competition on the relevant markets', namely the market for collecting packaging from consumers and the upstream market in the organisation of the take-back and recovery of packaging from consumers (see paragraph 48, recital 182 of the contested decision, in conjunction with paragraph 46 and recital 176 of the contested decision for identification of the relevant markets).

100. In addition, as regards the meaning of the term organisations competing with DSD' in the first obligation, a distinction must be made between the situation of exemption systems, which indisputably compete with DSD on the two markets referred to, and selfmanagement solutions, which have only a marginal impact on those markets, given that they must, in principle, collect packaging at the point of sale or in the vicinity of that point and not from final consumers (see paragraphs 5 and 6).

i) The need for shared use in respect of competing exemption systems

101. In essence, it is considered in the contested decision that the different types of facilities used by the DSD system throughout Germany form a bottleneck to which access is necessary to enable other exemption systems to compete with DSD on the market for collection of packaging from consumers and, consequently, to be active on the upstream market in the organisation of the take-back and recovery of packaging from consumers.

102. For that purpose, the facilities covered by the first obligation are more precisely defined as the containers or other facilities for the collection and sorting of packaging' of the collection undertakings which have concluded a service agreement with DSD. Those facilities are also referred to in the contested decision as collection infrastructures' (recitals 162, 164, 171 and 176 of the contested decision) or under the general term collection facilities' (recitals 164 and 182 of the contested decision). According to that decision, at issue are containers placed close to the households of the consumers on a site provided for that purpose and the infrastructures necessary to collect the plastic bags or to empty the bins which have been distributed to consumers by the collection undertaking (recital 32 of the contested decision).

103. Similarly, in so far as the sorting of the material is the responsibility of the collection undertakings, the notion of collection facilities also includes specialised centres in which that sorting is generally carried out. That explanation, set out in recital 32 of the decision, makes it possible to understand why the shared use of collection facilities also concerns sorting facilities. The collection phase is only the first stage in the process of recovering packaging. The sorting stage is logically the next stage in that process and the necessary corollary. Therefore, as of the moment when the collection undertakings may collect the packaging belonging to the DSD system and the packaging belonging to other exemption systems, those undertakings may also sort the quantities collected on behalf of those different systems. The applicant is well aware of that since the Service Agreement envisages both the collection and sorting of packaging. It is also for that reason that

the Commission considers that the market for collection of packaging from consumers includes both the collection of packaging and the sorting of it according to its use, which are two different activities requiring different infrastructures, but which constitute a single market as a result of the fact that DSD requires both of those services together (recital 87 of the contested decision).

104. It can thus not be claimed that the contested decision does not contain sufficient reasons for the inclusion of sorting facilities in the general term collection facilities and the complaint put forward in that regard by the applicant must be rejected.

105. In order to establish the need to provide for shared use of the collection facilities to enable exemption schemes competing with DSD to gain access to, and to remain on, the markets for collection and the organisation of the take back and recovery from consumers, the decision examines the role played by the collection undertakings in the context of an exemption system and the characteristics specific to collection facilities.

106. As regards collection undertakings, the decision rightly points out that it is economically advantageous to entrust the task to one collector in each designated area since the collection services from consumers are characterised by marked network effects and effects of scale and scope (recital 160 of the contested decision). Thus, the fact that DSD contracts a single collection undertaking for a specific area makes it easier to obtain the authorisation and information necessary to satisfy the applicable legislation and enables the collection of packaging in the whole of the area concerned without the need to contract several companies.

107. The decision also rightly points out that for reasons of spatial organisation and collection logistics it is quite unlikely that another collection system will target the collection undertakings which do not participate in the DSD system, which represents 80% of the demand on the market for collection from consumers (recital 128 of the contested decision). The fact that 80% of packaging capable of being collected from consumers is already covered by a network of collection undertakings authorised by the local authorities makes it much more difficult to put another network in place alongside DSD. It is on that basis that the Commission considers that the duplication of the network put in place by the collection undertakings forming part of the DSD system seems quite unlikely.

108. As regards the collection facilities as such, the contested decision rightly points out that there are considerations of spatial economics, collection logistics and traditions of waste collection established among consumers which make it economically difficult in many cases to duplicate the arrangements for collection from consumers (recital 160 of the contested decision). That is understandable inasmuch as the duplication of facilities is neither in the interests of the public authorities, which issue the necessary approval and authorisation, nor in the interests of the consumers, whose cooperation is required in order for exemption systems to work, since they are the ones who place the packaging in the bag to be collected, in the bin to be emptied or in the relevant container.

109. From that point of view, asking consumers to fill two or more bags with packaging not depending on the material but on the exemption system used, or asking them to store in their homes two or more different containers to be emptied depending on the system used would be counterproductive, or even incompatible with the way in which competition is organised when the manufacturer or distributor of packaging decides to engage several exemption systems to be sure that the packaging is taken back and recovered (see Case T151/01 DSD v Commission [2007] ECR II0000, paragraphs 129 to 139, in which the Court sets out the content of the explanations given at the hearing in respect of the functional workings of systems combining several exemption systems to ensure that packaging is taken back and recovered). It is in that way that the term traditions of waste collection established among consumers' (recitals 93 and 160 of the contested decision) needs to be understood. Those consumers wish to contribute to improving the environment but in a way which produces the least

possible inconvenience for them.

110. Similarly, the multiplication of systems for collecting bags and emptying containers, just as the multiplication of containers or of sites provided to enable consumers to dispose of packaging close to their homes, is not economically rational in so far as available space is limited (recital 93 of the contested decision) and in so far as those same containers may be used by two or more exemption systems in the same way as is currently practised as regards, first, packaging made of paper and card which is collected under the DSD system and, second, printed matter (newspapers and magazines) which is collected by the municipal areas (recital 32 of the contested decision). The Commission was therefore entitled to take spatial economics and the nature of collection facilities into consideration when assessing under what conditions it was possible to enable exemption systems to gain access to consumers.

111. DSD is perfectly aware of those sociological and economic considerations and took account of them when setting up its system. From the outset, DSD decided to use the preexisting communal collection facilities to collect packaging made of paper, card and glass. Those preexisting facilities thus enabled the DSD system to be able to be set up quickly and efficiently in order to reach easily the consumers who were already used to using the sites provided for handing in that type of packaging.

112. It is apparent from the above that the contested decision sets out, to the requisite legal standard, the reasons why the facilities of the collection undertakings which have concluded a Service Agreement with DSD form a bottleneck for the exemption systems in competition with DSD, including Landbell in particular.

113. In those circumstances, allowing DSD to prevent collection undertakings from concluding and applying agreements with DSD's competitors would effectively deprive those competitors of any real opportunity of entering, and remaining on, the market for collection from consumers and the Commission may legitimately conclude that shared use is necessary to prevent the elimination of competition on that market.

114. That conclusion is not called into question in the arguments raised by the applicant to criticise the need for exemption systems to share use.

115. Thus, the fact that 70% of the weight of the packaging collected by the applicant is collected by means of packaging being taken voluntarily to a container or a waste collection centre and not by bag collection or bin emptying systems does not call the above reasoning into question, namely that both collection facilities used by the voluntary collection systems and the collection infrastructures used by the takeback system constitute a bottleneck which the exemption systems in competition with DSD must be able to access in order to penetrate the market for collection from consumers.

116. Similarly, the example of the blue bag' set up by Landbell in the LahnDillKreis, submitted by the applicant as an example of how an independent takeback system may be set up, cannot hide the fact that that example did not concern a Land but merely a district and thus prevented authorisation as an exemption system of any kind, that it was a pilot project put in place with the support of the local authorities and that DSD brought an action against that system. In addition, with effect from the decision, Landbell was in fact able to enter the market for collection from consumers as an exemption system for the Land Hessen, where Landbell uses, with the agreement of the undertakings at issue and the local authorities concerned, the same collection facilities as those which are used by the DSD system.

117. Finally, the quotation of a passage from the Order of the Verwaltungsgerichtshof Kassel of 20 August 1999, which envisages the setting-up of exemption systems alongside each other', does not lead to the conclusion that separate collection facilities must be used by competing exemption

systems.

118. It follows from the above that the contested decision establishes, to the requisite legal standard, as regards the Commission's obligations under Article 81 EC and the duty to give reasons, why shared use of the collection facilities, including the sorting facilities, of undertakings which have concluded an agreement with DSD is necessary to enable competing exemption systems to penetrate the market for collection from consumers, and consequently to be active on the upstream market in the organisation of the take-back and recovery of packaging from consumers.

119. Consequently, the applicant's arguments alleging the erroneous or insufficient reasoning of the contested decision as regards the need to guarantee shared use to maintain competition between exemption systems must be rejected.

ii) The alleged need for shared use in respect of selfmanagement solutions

120. As DSD is an authorised exemption system in all of the German Länder , it is clear that the term organisations competing with DSD' referred to in the first obligation refers, primarily, to all competing exemption systems, that is to say all the systems authorised by the German authorities to take back and recover packaging from consumers. The question does arise, however, as to whether that term also includes self-management solutions. In that regard, the applicant submits that shared use is not necessary for self-management solutions, although the Commission states in its submissions that the first obligation applies to selfmanagement solutions where they are authorised to collect directly from consumers.

121. The Court considers that, for the following reasons, the first obligation must be interpreted as meaning that the term organisations competing with DSD' includes only exemption systems and not selfmanagement solutions.

122. First of all, it is incontestable that selfmanagement solutions must, in principle, collect packaging at, or in the vicinity of, the point of sale and not from consumers. Such an interpretation is based on the wording of the Packaging Ordinance (see paragraphs 5 and 6). It is also based on the observations of the German authorities submitted to the Commission during the administrative proceedings, from which it is apparent that the quotas which have to be met are to be met exclusively by taking back sales packaging at, or in the immediate vicinity of, the actual point of sale and that any additional collections organised near private dwellings may not count towards these quotas' (observations of the German authorities, pages 3 to 6, and recital 15 of the contested decision). In that regard, it cannot be claimed that selfmanagement solutions and exemption systems are in direct competition as regards collection from consumers.

123. Next, it should be noted that the parties no longer challenge that, by way of exception from that principle, selfmanagement solutions may play a role on the margins of the market for collection of packaging from consumers and, consequently, on the upstream market in the organisation of the take-back and recovery of packaging from consumers. Thus, in the context of the definition of the market for collection, the Commission states that, if the view set out by the German authorities should prevail (see paragraph 122), selfmanagement arrangements will exert demand only on the margin of this market, particularly in respect of collection points deemed equivalent to private households, or in the case of delivery to the final consumer' (recital 87 of the contested decision, read in conjunction with recital 15 of that decision, see also recital 159 of the contested decision). Similarly, the Commission states, in response to DSD's submission that collection from consumers was not possible in the context of selfmanagement solutions, that it is not disputed, however, that even self-managers must collect packaging from the vicinity of the final consumer if the goods are delivered to the final consumer's address, as is the case for example with mail order or deliveries by small traders' (recital 167 of the contested decision).

124. In addition, in their pleadings, the parties agree that the intervention possibilities of a selfmanagement solution on the market for collection from consumers are restricted to two cases of overlap defined in the Packaging Ordinance. The first of those cases concerns mail-order companies which use a selfmanagement solution. Under the sixth sentence of Paragraph 6(1) of the Packaging Ordinance, in the case of mail-order measures shall be put in place to ensure the taking back of packaging at an acceptable distance from the final consumer'. That means that the notion of taking back from the point of sale, which, in principle, characterises the selfmanagement solution, must be able to be applied here in the vicinity of the consumer. The second case concerns the situation where the addressee of the packaging is treated as a consumer in the Ordinance. It is thus apparent from the second sentence of Paragraph 3(10) of the Ordinance that cafes, hotels, canteens, government offices, barracks, hospitals, educational establishments, charitable organisations, the offices of professional people, agricultural undertakings and craft enterprises, excluding print shops and other paper-using businesses, which can have their packaging material disposed of at the rate normally associated with private households by way of traditional means of collection for paper, card, board and other lightweight packaging and containers no greater than 1 100 litres for each group of material' are considered to be consumers.

125. Finally, by contrast with the exemption systems competing with DSD, in respect of which the decision states why the collection undertakings which are contractual partners of DSD and their collection facilities constitute a bottleneck, the Commission does not explain why it is necessary for self-management solutions to have access to those undertakings and to their facilities in order to maintain the competition on the relevant markets.

126. On the contrary, in its analysis of the condition concerning the maintenance of competition (see paragraph 40), the Commission states that collection undertakings excluded from the DSD system remain free to offer their services to firms wishing to manage their own waste' and explains that such arrangements are possible at least in respect of certain combinations of sales packaging and collection points on the margins of the market for collection from consumers' (recital 159 of the contested decision, with a reference to recital 87 thereof). That explanation supports the conclusion that the Commission was not concerned, or in any case had ceased to be in view of the commitments given by DSD (recital 163 of the contested decision), with the possibility for selfmanagement solutions to find a collection undertaking to take back and recover packaging from consumers in the cases of overlap laid down in the Ordinance.

127. Such an analysis is confirmed by the fact that the Commission points out, in the context of the assessment of the sensitivity for competition of the exclusivity clause in favour of the collection undertakings (see paragraph 30), that there are only a few particular collection points deemed equivalent to private households, such as hospitals or canteens, which subject to certain conditions relating to collection logistics and types of packaging might conceivably be able to entrust the work to other collectors, which would involve installing additional containers for the purpose' (recital 128 of the contested decision). That means that it appears possible, in those cases, for two collection systems to coexist.

128. By contrast with exemption systems, which have to meet strict conditions in respect of territorial coverage, selfmanagement solutions may confine themselves to taking back packaging from where it is marketed. Thus, although it appears difficult, for the reasons given above (see paragraphs 105 to 113), to duplicate all of the facilities necessary for an exemption system, it is easier for a selfmanagement solution to ensure that a second facility is put in a given place to enable it to collect the packaging which belongs to its system.

129. Consequently, in the absence of explanations as to why shared use could be necessary for self-management solutions in order to prevent the elimination of competition on the relevant markets', it is apparent

from the above that the term organisations competing with DSD' used in the first obligation must be interpreted as meaning that selfmanagement solutions are not included, but only exemption systems competing with DSD.

130. Such an interpretation of the term organisations competing with DSD' is also confirmed in a passage in the decision in which it is expressly stated that shared use of collection facilities by competing systems' does not concern selfmanagement solutions. To dismiss an argument raised by DSD against the sharing of the containers by competing systems, the Commission states that that argument relates only to the question whether self-managers are entitled to collect or buy in packaging from the vicinity of the final customer, and does not concern the question of the joint use of receptacles by competing systems' (see footnote 16 in recital 169 of the contested decision). That quotation, which contrasts self-management solutions and competing systems, clearly excludes self-management solutions from the shared use of collection facilities, which is thus restricted to competing systems, namely exemption systems competing with DSD.

131. In that context, it is not necessary to respond to the applicant's arguments concerning the unlawfulness of the contested decision in so far as the first obligation relates to selfmanagement solutions.

132. Similarly, the Court cannot take into account certain arguments raised by the Commission at the rejoinder stage, according to which shared use could be necessary in the case of low turnover, in so far as concerns self-management solutions which deal with packaging supplied in the course of mailorder, and where a single collection facility may be installed, in a hospital for example, in so far as concerns collection points treated as consumers. Those arguments do not appear in the contested decision (the turnover) or contradict it (the hospital) and the arguments raised by the Commission in the course of the proceedings cannot remedy the insufficiency of the reasoning in the contested decision in that regard (see, to that effect, Joined Cases C329/93, C62/95 and C63/95 Germany and Others v Commission [1996] ECR I5151, paragraphs 47 and 48, and Case T93/02 Confédération nationale du Crédit mutual v Commission [2005] ECR II143, paragraph 126).

3. The second part, alleging that it is impossible to impose an obligation to remedy a possible infringement of Article 81(1) EC and Article 82 EC

a) Arguments of the parties

133. In response to the argument raised in the statement in defence (see paragraph 94), the applicant submits that the possible infringement of Article 81(1) EC or Article 82 EC alleged by the Commission is purely speculative and cannot justify the first obligation which - in any event - can seek only to prevent the elimination of competition on the market on which a restriction of competition has been found, namely the market for collection from consumers.

134. First, the applicant observes that the only restriction of competition identified in the decision, within the meaning of Article 81(1) EC, is to be found in the exclusivity clause concluded by DSD in favour of the collection undertaking (see paragraphs 28 to 32). That restriction concerns the market for collection from consumers and prevents other collection companies from offering their services to DSD, which has the effect of appreciably reducing competition between the collection undertakings in the designated area (recitals 123, 124 and 140 of the contested decision). That restriction has, however, been exempted by the Commission under Article 81(3) EC (see paragraphs 37 to 41), in particular inasmuch as it was not likely to eliminate competition on the market for collection from consumers (recitals 158 and 178 of the contested decision). In those circumstances, the applicant submits that the first obligation, whose stated objective is to enable competitors to access the upstream market in the organisation of collection from consumers (recitals 162 and 177 of the contested decision), is not related to the abovementioned restriction of competition,

which does not concern DSD's competitors on the organisation market, but those of the collection undertakings which are contractual partners with DSD. The first obligation is thus not likely to intensify the competition on the market for collection from consumers.

135. Second, the applicant states that the Commission cannot impose an obligation in order to prevent an alleged threat of restriction of competition or abuse on a secondary market, namely the market in the organisation of the collection from consumers, on which no restriction of competition within the meaning of Article 81(1) EC has been found or, a fortiori, exempted under Article 81(3) EC. In that regard, the applicant points out that, in the decision, the Commission states clearly that the Service Agreement does not confer any exclusivity in DSD's favour in respect of access to the collection facilities of its contractual partners (see paragraph 36). Similarly, the Commission states that there is no restriction of competition as regards the organisation market (recital 86 of the contested decision). The applicant also submits that there is no evidence to suggest that DSD is likely to enter into such a commitment of exclusivity with its contractual partners or to impose that exclusivity unilaterally. In those circumstances, the market which needs to be taken into account for the application of Article 81(3) EC must be identical to that examined in relation to Article 81(1) EC. In addition, just like the object of the examination under Article 81(3) EC, the possibility of imposing an obligation under Article 8(1) of Regulation No 17 is also limited by the restriction of competition found on the basis of Article 81(1) EC. Article 8 of Regulation No 17 can thus not serve as a legal basis for the imposition of an obligation for the purpose of dealing with an alleged problem of competition.

136. Third, the applicant considers that, even if the Commission could impose an obligation in a decision granting exemption in order to prevent a restriction of fictitious competition on a secondary market, it was not entitled to do so in the form of an obligation, which is a wholly separate measure (Article 15(2)(b) of Regulation No 17), but only in the form of a condition making that agreement eligible for exemption' (Joined Cases T79/95 and T80/95 SNCF and British Railways v Commission [1996] ECR II1491, paragraph 63 et seq.). That is confirmed by the previous practice of the Commission (quoted in the reply, footnotes 20 and 21), which has almost always coupled its decisions granting exemption with conditions and not obligations, if, and in so far as, it considers a particular form of action to be necessary to prevent the elimination of competition for the purposes of Article 81(3) EC.

137. The Commission submits, as a preliminary point, that the above line of argument is inadmissible in that it is a new plea in law produced out of time for the purpose of Article 48(2) of the Rules of Procedure of the Court of First Instance. In addition, the Commission states that the purpose of the first obligation is to guarantee the commitments given by DSD in order to remedy certain problems identified during the administrative proceedings and certain ambiguities inherent in those commitments. What is important is thus whether the conduct from which DSD agreed to refrain was capable of being examined in the light of Article 81(1) EC. In the decision, the Commission voices its concerns in that regard, which not only relate to the exclusivity clause in favour of the collection undertakings but also the question of the access of competitors to the facilities of the collection undertakings which are contractual partners with DSD. In addition, the Commission notes that its assessment, in the context of Article 81 EC, must not be restricted only to the market for collection from consumers, which in any case has two aspects - the offering of services by collection undertakings on the one hand, and the demand for services by DSD and the other exemption systems on the other - but may also concern the possible repercussions of the Service Agreement on the upstream market in organisation.

b) Findings of the Court

i) Admissibility

138. In response to the Commission's application that DSD's line of argument stated above be declared inadmissible since it constitutes a new plea in law produced out of time for the purposes of Article 48(2) of the Rules of Procedure, it should be pointed out that, although that provision does prohibit new pleas in law from being produced in the course of proceedings, a plea which constitutes an amplification of a submission previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. The same applies to a submission made in support of a plea in law (see, inter alia, Case T231/99 Joynson v Commission [2002] ECR II2085, paragraph 156).

139. In the present case, the line of argument put forward by DSD in the reply merely continues the arguments raised in the application in support of the plea of the unlawfulness of the first obligation in the light of Article 81 EC. In addition, those arguments merely respond to those raised by the Commission in the defence in order to relocate the aim of the action around the finding that the contested decision grants an exemption under Article 81(3) EC to a restriction of competition by attaching to that exemption an obligation based on the need to protect competition. It should be pointed out, in particular, that the applicant's contention that the first obligation infringes Article 8 of Regulation No 17, submitted for the first time in the reply, is closely linked to that of the infringement of Article 81(3) EC presented in the first plea, given that that plea challenges the legality of the first obligation in the light of the applicable law and that it is precisely Article 8 of Regulation No 17 which enables the Commission to couple a decision granting exemption under Article 81(3) EC with an obligation.

140. In any event, the Commission had the opportunity, in the rejoinder and at the hearing, to submit its comments on what it considers to be a new plea.

141. It follows from the above that the Court must reject the Commission's application for a declaration of inadmissibility of the arguments raised by the applicant as regards the possibility of imposing an obligation to eliminate a possible threat of infringement of Article 81(1) EC and Article 82 EC.

ii) Substance

142. It is thus necessary to examine the arguments raised by the applicant alleging that the Commission was not able, in the present case, to attach to the decision granting exemption, which was adopted on the basis of Article 81(3) EC, an obligation imposed under Article 8 of Regulation No 17.

143. Under Article 81(3) EC, the provisions of Article 81(1) EC may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress (first condition), while allowing consumers a fair share of the resulting benefit (second condition), which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives (third condition) and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question (fourth condition).

144. In addition, Article 8(1) of Regulation No 17 enables the Commission to couple a decision granting exemption under Article 81(3) EC with conditions and obligations.

145. In that context, it should be pointed out, first, that the way in which the applicant presents the contested decision is incorrect. At all the stages of the Commission's assessment under Article 81 EC, the contested decision also considered the question of access to the facilities of the collection undertakings and was not restricted to examining solely the effects on competition of the exclusivity clause for collection undertakings.

146. That is true both of the assessment relating to Article 81(1) EC (recitals 28 to 32 and 33

to 36 of the contested decision), and the assessment relating to Article 81(3) EC (see recitals 37 to 39 in relation to the first three conditions of applicability of that provision of the Treaty, where the analysis focuses on the collection undertakings, and recitals 40 and 41, in which the condition relating to maintaining competition is examined not only in respect of the collection undertakings, but also, and especially, in respect of the exemption systems competing with DSD).

147. It is only in the explanations given by the Commission to justify the obligations attached to the decision granting exemption pursuant to Article 8 of Regulation No 17 that the decision merely refers to the need to guarantee the access of DSD's competitors to the facilities of the collection undertakings which had concluded a service agreement with DSD, and it does so in order to counter the applicant's reservations in respect of one of the com mitments reproduced in recital 71 and to avoid the elimination of competition on the market for collection from consumers and on the upstream market in the organisation of the takeback and recovery of packaging from consumers (see paragraphs 42 and 45).

148. In addition, in its arguments, the applicant makes an artificial distinction between the market for collection from consumers, which it seeks to restrict to the collection undertakings whose services are used by DSD and to collection undertakings which have not concluded a Service Agreement with DSD, and the market in the organisation of the take-back and recovery of packaging from consumers, which concerns DSD and its competitors. In reality, as stated in the contested decision (see paragraph 41), what is important is rather the question whether or not the exemption systems competing with DSD must have access to the collection facilities of DSD's contractual partners in order to be able to enter the market for collection of packaging from consumers and, consequently, to be active on the upstream market in the organisation of the take-back and recovery of packaging from consumers.

149. Therefore, it cannot be alleged that the decision granting exemption concerns only the restriction of competition identified in the assessment relating to Article 81(1) EC, namely the exclusivity clause in favour of the collection undertakings. That decision concerns the whole of the Service Agreement notified by DSD whose conditions of application were clarified by the various commitments given by that undertaking.

150. It is therefore necessary to take account of the fact that the Commission agreed to exempt the Service Agreement because DSD assured it, inter alia, that no provision of that agreement was capable of binding the collection undertakings to DSD and that it would not bring any actions against third parties to restrict use in the case of shared use. Those assurances are decisive since they enable the Commission to find that the exemption condition linked to the maintenance of competition is, in the present case, satisfied. In that regard, it should be pointed out that, in the absence of such assurances, the Commission clearly stated during the administrative proceedings that it had no intention of authorising or exempting the Service Agreement, but was considering either finding that the existence of a possible barrier to the access of competitors with DSD to the collection facilities of DSD's contractual partners constituted a restriction of competition as such (see paragraph 33), or considering whether DSD's conduct seeking to prevent its competitors from accessing those facilities might fall under Article 82 EC (see paragraph 35).

151. Consequently, since the Commission adopted the decision granting exemption on the basis of both its assessment of the exclusivity clause in favour of the collection undertakings and in the light of the need to maintain competition in such a way that the exemption systems in competition with DSD have the possibility of gaining access to the collection facilities of DSD's contractual partners (see paragraphs 118 and 128), the Commission did not infringe Article 81(3) EC and Article 8 of Regulation No 17 by adopting the first obligation.

152. Finally, the applicant submits that, even if the Commission could impose a duty on DSD in the contested decision, it could do so only in the form of a condition and not as an obligation,

on the ground that the legal consequences attached to an obligation are more severe than those attached to a condition. Pursuant to Article 8(3)(b) of Regulation No 17, the Commission may revoke or amend its decision or prohibit specified acts by the parties where they commit a breach of any obligation attached to the decision, and pursuant to Article 15(2)(b) of that regulation the Commission could impose a fine if the applicant committed a breach of any obligation.

153. However, it is necessary to point out that Article 8(1) of Regulation No 17 provides that conditions and obligations may be attached to decisions granting exemption without stipulating under what conditions the Commission must choose a particular one of those possibilities. In addition, since Article 81(3) constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article 81(1) EC, the Commission enjoys a large measure of discretion in relation to the detailed rules to which it may subject the exemption, while at the same time having to act within the limits imposed upon its competence by Article 81 EC (Case 17/74 Transocean Marine Paint v Commission [1974] ECR 1063, paragraph 16).

154. The fact that the Commission preferred to impose conditions rather than obligations in other cases is not sufficient, in itself, to call into question the possibility provided for in Regulation No 17 of coupling a decision granting exemption with obligations rather than conditions.

155. It follows from the above that the Commission did not infringe Article 81(3) EC and Article 8 of Regulation No 17 by attaching to the decision granting exemption an obligation concerning the need to guarantee the shared use by exemption systems competing with DSD of the collection facilities of the undertakings used by the DSD system.

4. The third part, alleging infringement of the principle of proportionality

156. Even supposing that the shared use of the collection facilities is necessary to enable competition to be maintained, the applicant submits, however, that the first obligation is none the less disproportionate because, first, it infringes the Packaging Ordinance, second, it leads to a distortion of competition to the detriment of DSD, third, it unduly impairs the mark Der Grüne Punkt and, fourth, it infringes DSD's fundamental right of access to justice.

a) The alleged infringement of the Packaging Ordinance

Arguments of the parties

157. The applicant submits that the first obligation is disproportionate because the shared use of DSD's collection facilities is incompatible with the principle of responsibility for the product laid down in the Packaging Ordinance. That principle requires manufacturers and distributors of packaging to achieve the recovery rates in respect of the packaging which they have put on the market' (first sentence of point 1(1) of Annex I to Paragraph 6 of the Ordinance). In addition, in the case of participation in an exemption system, the manufacturer's or distributor's responsibility for that packaging is transferred to the operator of that system which is required to recover the packaging fed into the system' (second sentence of Paragraph 6(3) of the Ordinance) and to achieve the recovery rates in respect of packaging for which manufacturers and distributors participate in [its] system' (second sentence of point 1(1) of Annex I to Paragraph 6 of the Ordinance). As a result of that approach, which is based on specific packaging, it is unlawful to buy packaging from other systems to achieve the recovery rates laid down in the Ordinance. In that respect, the applicant submits that the systems in competition with its own should, in principle, meet their obligations to take back and recover with their own collection facilities, termed collection facilities of the system' (see the seventh indent of point 3(3) of Annex I to the Ordinance).

158. Thus, in the case of shared use of collection facilities by two competing systems, the allocation to one or the other of those systems of a specific type of packaging is not, as a general rule,

possible. In that regard, the applicant states that the allocation of the volumes of packaging... to different systems on a polluterpays basis if they are shared by means of quotas', mentioned in the contested decision (recital 170), requires expensive and complicated sorting analysis. In addition, the example of paper and card used by the Commission gave rise to unfair results, in so far as the share of the volume collected, constituted by packaging attributed to DSD and determined by the sorting analysis, was initially 25%, although the share of the packaging actually licensed by DSD was significantly lower than that quota. In DSD's view, such a general solution for all packaging is unacceptable.

159. In addition, the applicant submits that the Ordinance makes any shared use of collection facilities by selfmanagement solutions unlawful. As a general rule, they cannot collect packaging in the vicinity of consumers. Therefore, in submitting that DSD cannot rely on the Packaging Ordinance with regard to its contractual partners (recital 167 of the contested decision), the Commission failed to have regard to the fact that the Ordinance also pursues the objective of protecting the applicant from distortions of competition.

160. The Commission submits that the way in which the applicant presents the Ordinance is inaccurate given that the recovery rates are not based on specific types of packaging or on the total volume of packaging put on the market, but on the quantity of packaging collected by the relevant system. Landbell submits that the shared use of the collection facilities is, in any event, compatible with the Packaging Ordinance, the amendment of which in 1998 sought to increase competition between exemption systems.

Findings of the Court

161. The applicant submits, in essence, that the shared use of the collection facilities of undertakings which have concluded a Service Agreement with DSD has the effect of preventing it from taking back and recovering the packaging which has been attributed to it specifically by the manufacturer or the distributor of the packaging concerned in accordance with the principle of responsibility for the product laid down in the Packaging Ordinance. Therefore, by preventing DSD from opposing shared use, the first obligation disproportionately infringes the rights and obligations which DSD derives from that ordinance.

162. At the hearing, the parties were questioned about the ways in which the exemption systems and self-management solutions function, in order to enlighten the Court as to the part played by the packaging as such, which the applicant refers to as specific packaging', in meeting the obligations to take back and recover imposed by the Ordinance. Their explanations enabled the Court to make the following findings.

163. First, the recovery rates established in Annex I to Paragraph 6 of the Packaging Ordinance are calculated as a percentage of the total of the marketed material which is actually taken back and recovered and not according to the number or type of packaging concerned. Point 1(1) of Annex I to Paragraph 6 of the Ordinance thus states that manufacturers and distributors of packaging must meet the requirements relating to the recovery of the packaging which they have marketed and that the same applies to operators of exemption systems for packaging in respect of which manufacturers and distributors participate in those systems. In that regard, it is stated in point 1(2) of Annex I to Paragraph 6 of the Ordinance that the quantities of relevant packaging are determined as a percentage of the total', whether it concerns packaging marketed by the manufacturer or by the distributor or packaging in respect of which the manufacturer or the distributor participates in an exemption system. In addition, since 1 January 2000, selfmanagement solutions and exemption systems have been subject to the same recovery rates per material (recital 21 of the contested decision).

164. Moreover, it is apparent from the fourth and fifth sentences of Paragraph 6(1) of the Ordinance

that the take-back and recovery obligations on distributors with a sales area greater than 200 m2 include product packaging bearing marks which they do not sell in so far as that packaging is the same type, shape and size as that in their range. Thus, the recovery rate of those distributors is not calculated in relation to packaging actually put on the market, but on the basis of packaging which is similar in terms of type, shape and size.

165. Second, it follows from the above that the division of the quantities of packaging between the different systems, decided by the manufacturer or the distributor of packaging, does not concern predetermined quantities of packaging, but totals of the material which correspond to that packaging. That means, in practice, that where a packaging manufacturer decides to entrust to DSD the take back and recovery of half of the plastic packaging which it markets in Germany, DSD assumes the responsibility of taking back and recovering a quantity of material corresponding to half of that packaging. In order to achieve the recovery rates laid down in the Ordinance, DSD must therefore show the German authorities that it has submitted for recovery 60% of the total amount of plastic entrusted to it by that manufacturer (60% is the recovery rate applicable to plastic). Similarly, if the manufacturer can show that it has placed on DSD the burden of its obligation to take back and recover in respect of half of the quantity of plastic marketed, the manufacturer must also prove that it took back and recovered the remaining quantity of the material, corresponding to the other half, by means of a selfmanagement solution or another exemption system.

166. In addition, it should be pointed out that it is perfectly possible, as stated in recital 170 of the decision, to divide up, by means of quotas, the quantities collected by collection facilities between different systems. The applicant's own example in respect of packaging made of paper and card, which is collected by the DSD system at the same time as printed matter (newspapers and magazines), shows that collection facilities may be shared without any problems. The applicant can thus not seek to prohibit its competitors from using a technique which it uses itself. In addition, at the hearing, Landbell referred to the existence of a compensation agreement, adopted following the decision, which allows different system operators to share the quantities of material recovered by the collection undertakings to which they have recourse depending on the quantities of the material which they are responsible for under the contracts signed with manufacturers and distributors of packaging.

167. In any case, DSD's claim that the division of the quantities collected of packaging made of paper, card and printed matter (newspapers and magazines) would be complicated and expensive is not sufficient to call into question the proportionality of the first obligation in light of the Packaging Ordinance. Even supposing that to be the case, it should be noted that complexity and cost are not criteria which make it possible to establish an infringement of the Ordinance and that such criteria cannot, as such, justify conduct which is likely to lead to the elimination of competition on the relevant markets. In addition, in the present case, the decision states expressly that the first obligation does not prevent DSD from reducing the fees paid to the collection undertakings in the case of shared use of collection facilities in order to ensure that it is not charged for any service provided for a third party (see paragraph 35). Therefore, in the case of shared use, DSD could make sure that the fee payable to the collection undertaking takes account only of the take-back and recovery service supplied for the benefit of the DSD system and that the fee does not finance a service supplied for the benefit of another system.

168. Similarly, no reliable evidence has been adduced in support of DSD's assertion that the quota technique used for packaging made of paper, card and printed matter led to unfair results for it. In any case, the shared use advocated in the decision is not likely to undermine DSD's interests, for the very reason that the objective of such a provision is to guarantee each exemption system the possibility of collecting the packaging attributed to it by the relevant manufacturers and distributors. It is also to guarantee that objective that the Commission imposes the second obligation on DSD

(see paragraphs 213 to 217).

169. Consequently, since the competition between systems does not take place on the basis of the attribution of specific packaging but on the basis of an allocation of totals of material corresponding to that packaging, the first obligation cannot be considered to be disproportionate, contrary to the applicant's claim.

170. It follows from the above that the first obligation cannot be considered to be disproportionate because it is contrary to the Packaging Ordinance.

171. Finally, as regards the applicant's claim that it could, on the basis of the Ordinance, oppose the sharing with self-management solutions of the collection facilities used by the DSD system, it should be pointed out that the Court has held that the term organisations competing with DSD', used to define the field of application of the first obligation, should be interpreted as including only systems in respect of which the contested decision considered that it was necessary to guarantee the shared use of the collection facilities, namely exemption systems competing with DSD (see paragraph 129). In those circumstances, the first obligation has no bearing on DSD's possible ability to rely on the Ordinance to oppose such shared use with selfmanagement solutions.

b) The likelihood of distortion of competition to the detriment of DSD

Arguments of the parties

172. The applicant submits that the first obligation is disproportionate because it enables its competitors to target the most profitable collection facilities by leaving it with the most expensive ones. Such free-riding is also open, without restriction, to selfmanagement solutions, which do not have any obligations as regards the territory to be covered, in respect of the areas of overlap with exemption systems, namely collection points treated as households and packaging sold by mail order. Other exemption schemes could also lead to free-riding to the detriment of the applicant and conflicts of interest might arise in the case of shared use of collection facilities, given that DSD could no longer regulate in detail the organisation of its system as it does at present. In addition, the applicant relies on the observations of the German authorities, which refer to the risk of exemption systems becoming less efficient and distortions of competition arising within the meaning of Article 7(1) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) if selfmanagement solutions... could, independently of the region of distribution of the packaging, choose the place where, possibly restricted regionally to important collection points, they collect or buy waste packaging'.

173. The Commission, supported by Landbell, challenges the alleged threat which the first obligation constitutes for the DSD system. As the Packaging Ordinance applies in the same way to all exemption systems, none of those systems may restrict itself to the allegedly more lucrative sectors. Equally, self-management solutions must, in principle, collect their packaging from where it is delivered to the consumer and the structure of their collection points differs, for that reason, from that of exemption systems.

Findings of the Court

174. Contrary to the applicant's submission, the shared use of collection facilities does not have the effect of enabling exemption systems competing with DSD to favour, within the same Land , the most profitable zones to the detriment of others which remain the responsibility of the DSD system. All exemption systems are subject to the same obligations, whether it be the obligation of territorial coverage, the obligation to comply with recovery rates or the obligation to prove volume flows.

175. In any case, the decision states expressly that the first obligation does not prevent DSD

from reducing, in consequence, the fees paid to collection undertakings (see paragraph 35).

176. In addition, as regards the alleged incompatibility of the shared use of the collection facilities with Article 7(1) of Directive 94/62, which provides that the systems aimed at assuring the return and collection of packaging are to be designed so as to avoid barriers to trade or distortions of competition, it should be pointed out that the contested decision seeks precisely to guarantee the conditions of competition on the relevant markets and in conformity with the objectives of the Ordinance, the amendment of which in 1998 sought to enable the development of competition between exemption systems (recital 169 of the contested decision).

177. It follows from the above that the first obligation cannot be regarded as disproportionate in that it could entail a risk of distortion of competition to the detriment of the applicant.

178. In addition, as regards the alleged competition risk that the first obligation could represent in the case of shared use of collection facilities between the contractual partners of DSD and selfmanagement solutions, it should be recalled that the Court has found above that the term organisations competing with DSD', used to define the field of application of the first obligation, should be interpreted as including only systems in respect of which the contested decision considered that it was necessary to guarantee the shared use of the collection facilities, namely exemption systems competing with DSD. In those circumstances, the first obligation cannot have any bearing on the relations between DSD and the selfmanagement solutions.

c) The alleged adverse effect on the function of the mark Der Grüne Punkt

- Arguments of the parties

179. The applicant submits that the first obligation is disproportionate because it adversely affects the indication-of-origin of the mark Der Grüne Punkt, which is to identify the take-back and recovery service of the DSD system and not that of another system. The applicant points out that its mark is registered in Germany as a collective mark affixed to the packaging of the manufacturers and distributors which participate in the DSD system and as an individual mark affixed to the collection facilities used by the DSD system. In particular, the indication-of-origin of the collective mark Der Grüne Punkt has been recognised by several German courts (judgment of the Bundespatentgericht (Federal Patent Court, Germany) of 18 September 1996, which considers that the mark indicates the ecological commitment of the manufacturer; judgment of the Landgericht Hamburg (Hamburg Regional Court, Germany), of 23 December 1996, and the judgment of the Kammergericht Berlin (Court of Appeal, Berlin, Germany) of 14 June 1994, which consider that the mark makes people aware of participation in the DSD system; judgment of the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany) of 8 May 1998, which refers to the vital importance of the mark as a result of its dissemination and the fact that it is well known; and the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 15 March 2001, which takes the view that the manufacturers and distributors indicate their participation in the DSD system by affixing the mark to their packaging). In the present case, the applicant submits that the shared use of collection facilities adversely affects both the collective and individual marks Der Grüne Punkt, in so far as the consumer knows, because of advertising, that packaging which bears that mark is part of the DSD system and not part of a rival system and that it is to be returned to the collection facilities of the DSD system which, generally speaking, also bear the mark Der Grüne Punkt. However, in the case of shared use of collection facilities, the organisation of the take-back and recovery of packaging collected by the DSD system is, in part, carried out - contrary to the consumer's expectations - by organisations competing with DSD. The shared use of collection facilities forming part of the DSD system thus has the effect of misleading consumers.

180. The applicant adds that the first obligation forces it to encourage competition by granting

its competitors a free, compulsory licence to affix the mark Der Grüne Punkt on collection facilities. It claims that such a licence is unlawful since it infringes the principles applicable in that context (Article 21 of the Agreement on TradeRelated Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (Annex 1C of the Agreement Establishing the World Trade Organisation), approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1 and 214), and the Opinion 1/94 of the Court of Justice [1994] (ECR I5267).

181. As a preliminary point, the Commission submits that certain complaints raised by the applicant do not concern the Service Agreement, which is the subject-matter of the contested decision, but the Trade Mark Agreement, which is the subjectmatter of Decision 2001/463 and thus does not have to be examined in the context of the present case. The Commission states that the applicant appears to want to claim an exclusive right over the use of the collection facilities due to the fact that it authorises their owners to affix the logo Der Grüne Punkt on their facilities. That cannot be accepted. That would mean that a collection undertaking which affixes the Der Grüne Punkt logo on a packaging collection van could use that van only when transporting packaging for the DSD system and not for other waste. Not only does the Service Agreement not contain a provision capable of supporting that reasoning, but the answers given by collection undertakings to requests for information sent by the Commission show, in particular, that those undertakings use their vehicles for other orders. The applicant can thus not rely on the exclusive right which it claims to have. In addition, the Commission states that the consumer is not misled when he puts packaging bearing the Der Grüne Punkt logo in a collection facility which is part of the DSD system since the question of shared use has no bearing on his conduct. Furthermore, the final user of the take- back and recovery service offered by the DSD system is not the consumer but the manufacturer or distributor of the packaging. Therefore, there is no proof that the deception alleged by the applicant adversely affects the mark Der Grüne Punkt.

182. As regards the compulsory licence, the Commission claims that the applicant fails to stipulate who exactly the decision forces to grant a licence. The applicant remains free to authorise collection undertakings to use its mark by affixing it to their containers, or to recommend it to them and, also, to withdraw such authorisation from them.

Findings of the Court

183. In essence, the applicant alleges that the first obligation infringes the principle of proportionality because shared use adversely affects the mark Der Grüne Punk, by which its services may be distinguished from those offered by other undertakings. By allowing for access to the collection facilities put in place by the collection undertakings, which are already used by the DSD system, the exemption systems competing with DSD also benefit from the fact that the mark is well known to consumers, who would be mistaken if they were to place their packaging into facilities which they believed to be part of the DSD system and not part of a system of one of its competitors.

184. It must be found, however, that that line of argument cannot succeed.

185. First, the Service Agreement does not prevent a collection undertaking which is a contractual partner of DSD from offering its collection facilities to a competitor system of the DSD system. Under the Service Agreement, it is stated only that when promoting the system, collection undertakings shall display, in an appropriate and visible manner, the Der Grüne Punk logo conferred by DSD, for example by printing it on writing paper, on its advertisements and on collection bins and on vehicles and equipment used in the running of the system' (the fourth sentence of the first subparagraph of Paragraph 2(5)) and that use of the Der Grüne Punkt logo is free for collection undertakings' (third subparagraph of Paragraph 2(5)). The fact that DSD authorises collection undertakings

to affix, free of charge, the mark Der Grüne Punkt to their collection facilities is not sufficient for DSD to claim that it has exclusive use of those facilities. On the contrary, it is apparent from the Service Agreement that the affixing of that logo serves no other purpose than to state for promotional purposes' that the facility concerned is part of the DSD system.

186. The provisions of the Service Agreement concerning the mark Der Grüne Punkt do not prove that the affixing of that mark to a collection facility has the effect of preventing that facility from serving other purposes.

187. Second, no provision of the Packaging Ordinance imposes an obligation to make the system used visible on collection facilities. A fortiori, no provision of the Ordinance establishes that collection facilities which are identified is such a way must be reserved to a single system in order to prevent consumers from mistaking the system responsible for taking back and recovering the packaging deposited there. In addition, as regards the importance to be given to the affixing of the Der Grüne Punkt logo on packaging - one of the possibilities laid down in the second sentence of point 4(2) of Annex I to Paragraph 6 of the Ordinance to inform consumers that the packaging at issue is part of an exemption system (see paragraph 6) - the Court held in the judgment in Case T151/01 DSD v Commission , paragraph 133, that, as of the moment when the recovery rates laid down in the Ordinance are achieved and the quantities of packaging are divided between the systems on the basis of the mass of material concerned and not by reference to the packaging as such, whether it bears the Der Grüne Punkt logo or not, that logo ceases to have the role or importance which the applicant claims. Thus, a manufacturer or distributor of packaging which decides to entrust DSD with the taking back and recovery of part of the packaging which it markets in Germany and to deal personally with the taking back and recovery of the other part of that packaging, by means of a self-management solution or by assigning it to another exemption system, must merely divide the quantities of materials between the different systems concerned and comply with the conditions for identification laid down in the Ordinance without worrying about a specific definition of the conduct of the final consumer as claimed by the applicant.

188. In that regard, the provisions of the Ordinance do not establish that the affixing of the mark Der Grüne Punkt to a collection facility or to packaging intended to be recovered by the DSD system has the effect of preventing the shared use of collection facilities.

189. Third, it is also apparent from the documents before the Court that not all of the collection facilities used by the DSD system bear the Der Grüne Punkt logo. It is thus legitimate to think that, when depositing packaging in the collection facilities, consumers do not associate those installations with the mark Der Grüne Punkt, but with the type of packaging (sales packaging) and especially with the type of material which it is made of (lightweight materials, paper/card, glass etc.) to be deposited in the different kinds of collection facilities. In that regard, the applicant does not show that the consumer attaches importance to the fact that DSD and not another exemption system is in charge of the taking back and disposal of the packaging. Admittedly, consumers may have concerns about the environment, but, in so far as all exemption systems are subject to the same obligations, the question as to which system will actually deal with the taking back and recovery does not appear to be decisive. None of those obligations is affected by the shared use of existing collection facilities. Similarly, the applicant does not dispute that packaging made of paper and card is collected in the same facilities as printed matter (newspapers and magazines), which is the responsibility of the local authorities and not the DSD system. The applicant does not claim, in that regard, that, as a result of the possible affixing of the mark Der Grüne Punkt to those installations, consumers would think that the DSD system assumes responsibility for the collection and recovery of printed matter.

190. Consequently, it may be sufficient, to avoid any risk of confusion for consumers, to indicate

on shared collection facilities that packaging is recuperated for both the DSD system and for one or more other competing exemption systems and not be necessary to prohibit any shared use of those collection facilities as claimed by the applicant.

191. Finally, neither the first obligation nor the technical constraints of the shared use of collection facilities requires that the organisations competing with DSD be authorised by it to use the mark Der Grüne Punkt. It is thus conceivable that shared collection facilities have no logo or indication at all or, on the other hand, that every system be equipped with a means of identifying itself with that mark. Therefore, it cannot be claimed that the first obligation requires DSD to grant, free of charge, a compulsory licence to use the mark Der Grüne Punkt.

192. It follows from the above that the first obligation cannot be regarded as disproportionate by excessively impairing the role played by the mark Der Grüne Punkt in the context of the DSD system.

d) The effect of the first obligation on the right of access to the national courts

Arguments of the parties

193. The applicant states that the first obligation prohibits it from preventing' collection undertakings from concluding shared-use agreements with its competitors. Such an obstacle in their way could be constituted by the bringing of an action by DSD against those collection undertakings before the national authorities or courts in order to claim that the shared use of collection facilities is incompatible with the Ordinance. In that case, the first obligation would thus be incompatible with the fundamental right of access to justice laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 Johnston [1986] ECR 1651, paragraphs 17 and 18, and Case T111/96 ITT Promedia v Commission [1998] ECR II2937, paragraph 60).

194. The Commission states that the first obligation in no way prevents the applicant from referring to a German administrative court the question of the compatibility of the shared use of the collection facilities with the Packaging Ordinance (see, to that effect, the judgments of the Verwaltungsgerichtshof Kassel of 20 August 1999 and of the Verwaltungsgericht Gieen of 31 January 2001). It is, however, the task of the Community judicature to examine the legality of the commitment and of the obligations.

Findings of the Court

195. In essence, the applicant alleges that the first obligation prevents it from claiming before the German national courts and authorities that the shared use of the collection facilities is contrary to the Ordinance.

196. The first obligation cannot be interpreted in that way. It requires DSD not to prevent the shared use of the collection facilities by competitor exemption systems. The Court has found above that that obligation was consistent with Article 81(3) EC and Article 8 of Regulation No 17 (see paragraph 151) because it was necessary to enable competition to be maintained on the market for collection from consumers and the market for the organisation of the taking back and recovery of packaging from consumers.

197. However, the first obligation does not prevent DSD from bringing an action before a national court or authority to oppose the shared use of collection facilities imposed on it in the context of the decision granting exemption. DSD thus retains the right to oppose the shared use of the collection facilities of its contractual partners by alleging infringement of the German Packaging Ordinance or other national provisions. However, although DSD has that possibility, it cannot disregard the fact that the Commission might then consider that such action infringes the obligation imposed on it in order to secure the decision granting exemption and in accordance with the applicable

provisions of Community law. In addition, when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance (Case C344/98 Masterfoods and HB [2000] ECR I11369, paragraph 52).

198. The fundamental right of access to justice claimed by DSD can thus not authorise it to disregard a decision adopted on the basis of Community law.

199. It follows from the above that the first obligation cannot be considered to be disproportionate by allegedly depriving DSD of the right to bring an action before the national courts and authorities.

5. Conclusions on the first plea in law

200. It is apparent from the above that the first obligation prevents the applicant from impeding the access of competing exemption systems to the collection facilities of its contractual partners. That obligation is based on the Commission's intention to guarantee systems competing with DSD access to the market for collection from consumers and, consequently, to the market for the organisation of the taking back and recovery from consumers. None of the arguments submitted by the applicant in the context of the first plea is capable of calling that conclusion into question.

201. Consequently, the first plea must be dismissed in its entirety in respect of exemption systems.

202. In addition, in order to respond to DSD's arguments in that regard, the Court considers it necessary to recall (see paragraph 121) that the term organisations competing with DSD' used to define the field of application of the first obligation does not include selfmanagement solutions, since it is apparent from the contested decision that those systems only play a peripheral role on the relevant markets and that they have, in those cases of overlap, sufficient possibilities at their disposal for gaining access to collection undertakings or collection facilities other than those used by the DSD system.

203. Consequently, since the first obligation does not concern selfmanagement solutions, it is not necessary to rule any further on the arguments raised by the applicant in that regard.

B - The second plea in law, alleging that the obligation laid down in Article 3(a) of the contested decision infringes Article 86(2) EC

1. Arguments of the parties

204. The applicant states that it collects and recovers packaging all over Germany, including unattractive rural regions, and does so as a means of protecting the environment. It also points out that the DSD system was approved by the competent authorities in all of the Länder . According to the applicant, such approval has the effect of entrusting it with a service of general economic interest within the meaning of Article 86(2) EC. In that regard, the applicant states that the fact that any operator of an exemption system may be approved by the authorities of a Land is irrelevant, since Article 86(2) EC refers only to the assumption of a service of general economic interest and not to the existence of special or exclusive rights within the meaning of Article 86(1) EC. In that respect, the applicant submits that the attainment of the guarantee obligations to which DSD is subject (regular collection throughout the country, recovery rates and proof of volume flows) would be threatened by the shared use of collection facilities laid down in the first obligation, since that obligation is likely to call into question the approval of the DSD system. In addition, such shared use would lead to distortions of competition to the d etriment of DSD by enabling organisations competing with DSD to free-ride on its system. Consequently, the rules on competition laid down in Article 81 EC should not apply to the present case in so far as they impede the accomplishment of the specific task entrusted to DSD.

205. The Commission and Landbell state that the applicant does not adduce any evidence of the

threat represented by shared use to its activity or an alleged task covered by a service of general economic interest, since that shared use does not bother the collection undertakings used by DSD in any way. Landbell also states that serving unattractive rural regions forms an integral part of the service sought by the clients of exemption systems. They want to be able to benefit from a collection throughout the whole of the territory concerned in order to be freed of their own obligations under the Ordinance.

2. Findings of the Court

206. Under Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. That article also states that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

207. In the present case, it must be pointed out that, even supposing that the applicant is entrusted with a service of general economic interest within the meaning of Article 86(2) EC and in the same way as all exemption systems approved by the authorities of the Länder , the fact remains that the risk of that task being called into question as a result of the contested decision has not been shown.

208. Contrary to the applicant's claim in the context of the present plea in law, the obligation imposed on DSD not to impede collection undertakings from concluding with DSD's competitors contracts authorising them to use their bins and other collection and sorting facilities for packaging and to apply those agreements in no way proves that the contested decision threatens the attainment, on economically acceptable conditions, of the take back and recovery service entrusted in the DSD system.

209. In particular, none of the documents before the Court leads to the conclusion that as a result of the contested decision DSD will no longer be able to collect packaging on a regular basis throughout Germany, to achieve the recovery rates imposed by the Ordinance, or to furnish proof of the quantities required under that ordinance. Similarly, the Court has already found, in the context of the first plea, that the applicant had not shown that the implementation of the first obligation was likely to lead to distortions of competition to its detriment.

210. Consequently, the second plea in law must be dismissed.

C - The third plea, alleging that the obligation laid down in Article 3(b) of the contested decision infringes Article 81(3) EC and Article 86(2) EC

211. The applicant submits that the obligation laid down in Article 3(b) of the contested decision (the second obligation'), according to which, where collectors conclude agreements with competitors with DSD providing for the joint use of containers or other facilities for the collection and sorting of used sales packaging, DSD may not require that they inform DSD of volumes of packaging not collected for the DSD system', infringes Article 81(3) EC and Article 86(2) EC. It refers, in that respect, to the arguments previously raised in the context of the first and second pleas.

212. In addition, the applicant observes that, in the Packaging Ordinance, the German authorities require it to recover the quantity of packaging actually collected' (see part 1(5) of Annex I to Paragraph 6 of the Ordinance), and that, to furnish the proof of that quantity, it requests collection undertakings to inform it on a monthly basis of the quantities collected'. However, the second obligation calls for DSD not to require those collection undertakings to provide it with proof relating to volumes of packaging not collected for the DSD system' in the case of shared use of

collection facilities. According to the contested decision, that obligation is necessary in order to ensure that... where there is joint use of collection facilities, competitors with DSD should be able to make unrestricted use of packaging collected for them' (recital 182 of the contested decision). In that regard, the applicant states that the purpose of the second obligation is to ensure that, in the case of shared use, the quantities collected are not used to establish the proof of volume flows treated by DSD but are, on the contrary, attributed to competitors. However, that obligation should not exclude the possibility for DSD to request collection undertakings to provide it with information relating to the whole of the packaging collected in the collection facilities in order to be able to furnish the proof of the quantities collected.

213. The Court points out, first, that the applicant does not set out, in its third plea, any new or specific arguments which are capable of showing how the second obligation infringes Article 81(3) EC and Article 86(2) EC. In those circumstances, the third plea must be dismissed for the same reasons as those given in the context of the first and second pleas.

214. In addition, the Court notes that, at the hearing, the Commission and DSD agreed on the interpretation to be given to the content of the second obligation defined by Article 3(b) of the contested decision.

215. Thus, in the light of the pleadings and the answers given by the parties to the questions asked at the hearing, the Court considers that although, under the second obligation, DSD cannot request collection undertakings to provide it with information on the quantities of packaging which have been collected in the context of a competitor exemption system, DSD is, however, still able to request those undertakings to provide it with the information required for it to be able to furnish the proof of the quantities collected by the DSD system. That right to information is also laid down explicitly in recital 175 of the contested decision.

216. When questioned on that point at the hearing, the Commission stated that the second obligation did not prevent the applicant from knowing the total quantity of packaging collected by the collection undertakings or the part of that packaging attributable to DSD; what is important is that DSD does not seek to attribute to itself quantities of packaging collected by those collection undertakings for a competitor system. The Commission's stance in that regard is in line with that of the applicant (see paragraph 212).

217. In those circumstances, the second obligation must be interpreted as meaning, first, that DSD cannot require that collection undertakings which are its contractual partners under the Service Agreement attribute to it quantities of packaging collected for a competitor system and, second, that that obligation does not prevent DSD from knowing the total quantity of packaging collected by collection undertakings and the part of that packaging which is attributable to DSD.

D - The fourth plea in law, linked to the application for annulment of the commitment laid down in recital 72 of the contested decision and alleging infringement of the fundamental right of access to justice

1. Arguments of the parties

218. The applicant observes that, at the Commission's request, it gave the commitment to refrain from seeking to restrict use in the manner referred to in the judgment of the Cologne Regional Court of 18 March 1997 in [the] particular case of VfW' (recital 72 of the contested decision), following an action brought by DSD to oppose the free use of the collection facilities of the DSD system by VfW. According to the applicant, that commitment is incompatible with the fundamental right of free access to justice (ITT Promedia v Commission , paragraph 60). That infringement is all the more serious because an action for an injunction brought by DSD against one of its contractual partners is not manifestly unfounded' and thus abusive under German law (ITT Promedia

v Commission , paragraph 56). It is apparent from the judgment of the Landgericht Köln that DSD could legitimately bring proceedings, on the basis of the German law on unfair competition, to prevent VfW from using, free of charge, the collection facilities financed by DSD. According to that judgment, the shared use of those collection facilities requires DSD's approval and payment of a sort of royalty' directly to DSD.

219. The Commission, supported by Landbell, states that the applicant criticises a commitment given in response to the observations addressed to the Commission by several third parties, according to which DSD, contrary to the commitment reproduced in recital 71 of the contested decision, did not allow free access to the collection facilities of its contractual partners. The Commission thus states that if the applicant cannot prevent collection undertakings from authorising the shared use of their facilities, it can not have the right to prohibit a competitor from that shared use.

2. Findings of the Court

220. Following the publication of the notice in the Official Journal announcing the Commission's intention to declare itself in favour of the various agreements relating to the DSD system, several interested third parties made comments to the Commission stating that, contrary to the commitments given by DSD during the administrative proceedings in relation to the opportunity for third parties to gain free access to the collection facilities of its contractual partners, DSD brought proceedings challenging the shared use of those facilities. Thus, the judgment of the Landgericht Köln of 18 March 1997 showed clearly DSD's intention to oppose a self-management system, namely VfW, wishing to gain free access to the collection facilities used by the DSD system in certain German hospitals.

221. In that regard, the Commission informed DSD, by letter of 21 August 1997, that conduct consisting of preventing third parties from using the collection facilities of its contractual partners could fall within the ambit of Article 82 EC and it stressed the significance of such conduct for the exemption procedure in so far as, under the fourth condition laid down in Article 81(3) EC, an agreement notified for the purpose of exemption must not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

222. Following that statement of position, DSD gave the following commitment - set out in recital 72 of the contested decision - in order to address the concerns raised by the Commission in its letter of 21 August 1997:

DSD is prepared to refrain from seeking to restrict use in the manner referred to in the judgment of the Cologne Regional Court of 18 March 1997 in [the] particular case of VfW and in comparable cases. DSD may however pursue claims for information and settlement against collectors in a contractual relationship with DSD.'

223. It cannot be alleged that such a commitment constitutes an infringement of DSD's right of access to justice. DSD proposed that commitment to the Commission without any constraint in order to prevent it from taking further action following its letter of 21 August 1997. Therefore, in accordance with the principle that it is possible to waive a right, and with full knowledge of the facts, DSD essentially informed the Commission, of its own volition, that it was waiving its right to bring an action before the German courts to the agreements likely to take effect between the collection undertakings which have concluded a Service Agreement with DSD and the various systems which might be interested in the shared use of their collection facilities.

224. Moreover, DSD's waiver in the commitment set out in recital 72 was not made without anything in return from the Commission.

225. Thus, it is incontestable that the Commission did not initiate proceedings under Article

82 EC following the commitment given by DSD, unlike in the case of the Trade Mark Agreement where the Commission initiated such proceedings following the observations on the notice in the Official Journal submitted by interested third parties.

226. Similarly, it is not disputed that the Commission took account of the commitment given by DSD in refraining from examining in further detail the existence of a possible competition problem as regards, for example, the access of self-management solutions to the collection facilities in hospitals in Germany or in other market sectors. Such an analysis could have been necessary to enable the Commission to examine the effect which DSD's conduct could have had in the context of the case which gave rise to the judgment of the Landgericht Köln of 18 March 1997 on its analysis of the Service Agreement under Article 81(1) and (3) EC. In the present case, the Commission's analysis, in that regard, remained vague, even though the decision states that it appears conceivable for a hospital to have several collection facilities on its premises (recital 128 of the contested decision). That assertion cannot be presumed from the results that a detailed analysis of the conditions of competition in the field of the collection of packaging delivered to hospitals might have produced.

227. In those circumstances, the Commission was rightly able to find, in the light of Article 81(3) EC and Article 8 of Regulation No 17, that it could not be content with just the commitment given by DSD in relation to the access of exemption systems to the collection facilities of DSD's contractual partners but that it had to go further and couple the decision granting exemption with an obligation making it possible to guarantee that the Service Agreement was not going to enable DSD to eliminate the competition on the relevant markets.

228. In that regard, the fact that the first obligation does not concern selfmanagement solutions because it is not necessary to guarantee the access of those systems to the collection facilities of DSD's contractual partners on account of the alternative solutions offered by the collection undertakings which have not concluded a Service Agreement with DSD (see paragraphs 120 to 129 and recital 159 of the contested decision) cannot lead to the conclusion that the commitment set out in recital 72 of the contested decision is unlawful because it does not respond to a competition problem identified in the contested decision. That commitment responds to different reasoning from that which led the Commission to adopt the first obligation. Although that obligation seeks to guarantee the attainment of the fourth condition laid down in Article 81(3) EC, namely to ensure that the Service Agreement does not eliminate competition on the relevant markets, the commitment seeks merely to facilitate the Commission's task when it issues a negative clearance or an exemption. As is pointed out in paragraphs 225 and 226 above, the commitment given by DSD enabled the Commission to avoid analysing questions which could, as such, have called into question the contested decision or have given rise to the initiation of a proceeding under Article 82 EC.

229. If follows from the above that the commitment given by the applicant reproduced in recital 72 of the contested decision does not adversely affect its right of access to justice in so far as it was adopted by DSD in full knowledge of the facts in order to cause the Commission to stop examining questions which might give rise to a proceeding under Article 82 EC or call into question its analysis in the context of Article 81 EC.

230. Consequently, the fourth plea in law must be dismissed.

231. It follows from all the above that the action must be dismissed in its entirety both in so far as it concerns the first and second obligations and in so far as it concerns the contested decision as a whole or merely the commitment reproduced in recital 72 of the contested decision.

Costs

232. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article

87(3) of the Rules of Procedure provides that where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the present case, the Court considers that the interpretation of the first obligation, to the effect that it concerns only exemption systems competing with DSD and not self-management solutions, and of the second obligation partially upholds the claims made by that applicant on those points. Consequently, the Court will make an equitable assessment of the case in holding that the Commission is to bear a quarter of the applicant's costs and a quarter of its own costs. The applicant is to bear three quarters of its own costs, three quarters of the costs incurred by the Commission, and the costs incurred by Landbell.

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NOTES Barbier de La Serre, Eric: Conséquences d'un engagement sur les droits contentieux d'une partie, Revue Lamy de la Concurrence : droit, économie, régulation 2007 no 12 p.89-90 ; Treacy, Pat ; Pinckney, Richard: On the dot, Competition Law Insight 2007 Vol.6 Issue 7 p.9-10 ; Idot, Laurence: Environnement et système de collecte de déchets, Europe 2007 Juillet no 188 p.21-22 ; Sarrazin, Cyril: Le Tribunal confirme la décision de la Commission d'exempter, sous conditions, le système de collecte et de valorisation d'emballages DSD, Concurrences : revue des droits de la concurrence 2007 no 3 p.89-90

PROCEDU Action for annulment - unfounded

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Case T-201/04

Microsoft Corp.

v

Commission of the European Communities

(Competition – Abuse of dominant position – Client PC operating systems – Work group server operating systems – Streaming media players – Decision finding infringements of Article 82 EC – Refusal of the dominant undertaking to supply and authorise the use of interoperability information – Supply by the dominant undertaking of its client PC operating system conditional on the simultaneous acquisition of its media player – Remedies – Appointment of an independent monitoring trustee – Fine – Determination of the amount – Proportionality)

Summary of the Judgment

1. *Competition – Administrative procedure – Commission decision finding an infringement – Decision requiring a complex economic or technical assessment*

   (Arts 81 EC and 82 EC)

2. *Procedure – Application initiating proceedings – Reply – Formal requirements*

   (Statute of the Court of Justice, Art. 21; Rules of Procedure of the Court of First Instance, Art. 44(1)(c))

3. *Competition – Dominant position – Abuse – Definition – Obligations on the dominant undertaking*

   (Art. 82 EC)

4. *Competition – Dominant position – Abuse – Definition – Obligations on the dominant undertaking*

   (Art. 82 EC)

5. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

   (Art. 82 EC)

6. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

   (Art. 82 EC)

7. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

   (Art. 82 EC)

8. *Competition – Dominant position – Relevant market – Definition – Criteria*

   (Art. 82 EC; Commission Notice 97/C 372/03)

9. *Competition – Dominant position – Abuse – Leveraging*

(Art. 82 EC)

10. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

(Art. 82 EC)

11. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

(Art. 82 EC)

12. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

(Art. 82 EC)

13. *International agreements – Community agreements – Primacy only over secondary legislation – Consequences for interpretation of Community law – Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

14. *Competition – Dominant position – Abuse – Refusal to grant a licence for the use of a product covered by intellectual property rights*

(Art. 82 EC)

15. *Competition – Dominant position – Abuse – Tying*

(Art. 82 EC)

16. *Competition – Dominant position – Abuse – Tying*

(Art. 82 EC)

17. *Competition – Dominant position – Abuse – Tying*

(Art. 82 EC)

18. *Competition – Dominant position – Abuse – Tying*

(Art. 82 EC)

19. *Competition – Dominant position – Abuse – Definition – Obligations on the dominant undertaking – Competition on the basis of merit*

(Art. 82 EC)

20. *Actions for annulment – Pleas in law – Not possible to rely on WTO agreements to challenge the lawfulness of a Community act – Exceptions*

(Art. 230 EC)

21. *Competition – Administrative procedure – Commission decision finding an infringement – Remedies*

(Art. 82 EC; Council Regulation No 17, Arts 3, 14 and 16)

22. *Competition – Fines – Amount – Determination – Criteria*

(Art. 82 EC)

1. Although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.

   Likewise, in so far as a Commission decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's.

   However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.

   (see paras 87-89, 379, 482, 564)

2. Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application.

   Furthermore, it is not for the Court 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 instrumental function.

   The Court may take into account only those documents annexed to the application which support or supplement matters of fact or of law expressly set out in the body of the procedural documents by the applicant or defendant.

   That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance also applies to the conditions for admissibility of a reply, which according to Article 47(1) of the Rules of Procedure is intended to supplement the application.

   (see paras 94-95, 99, 483)

3. Article 82 EC deals with the conduct of one or more economic operators involving the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.

   Furthermore, whilst the finding of a dominant position does not in itself imply any criticism of the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market.

   (see para. 229)

4. In proceedings brought on the basis of Article 82 EC, the Commission may define the concept of 'interoperability' as the capacity for two software products to exchange information and to use that information mutually in order to allow each of those software products to function in all the ways envisaged, without being bound by the definition given by Directive 91/250 on the legal protection of computer programs, from which it does not depart.

In that context, the Commission may determine the 'degree of interoperability' of software products by reference to what, in its view, is necessary, in the light of Article 82 EC, in order to enable developers of work group server operating systems competing with the dominant developer to remain viably on the market. Should it be established that the existing degree of interoperability does not enable those developers to remain viably on the market, it follows that the maintenance of effective competition on that market is being hindered.

In requiring, by way of remedy, that an undertaking in a dominant position disclose the interoperability information, the Commission refers to a detailed technical description of certain rules of interconnection and interaction that can be used within the work group networks to deliver work group services. That description does not extend to the way in which the undertaking implements those rules, in particular, to the internal structure or to the source code of its products.

The degree of interoperability thus required by the Commission enables competing operating systems to interoperate with the dominant undertaking's domain architecture on an equal footing in order to be able to compete viably with the latter's operating systems. It does not entail making competitors' products work in exactly the same way as its own and does not enable its competitors to clone or reproduce its products or certain features of those products.

(see paras 192, 206, 225, 227-228, 230, 234, 236-238, 241, 259, 374-375)

5. In a decision penalising the refusal by a dominant undertaking to provide competing undertakings with interoperability information of software products, the Commission may refrain from making a finding on the issue whether the dominant undertaking's communication protocols or the specifications of those protocols are covered by intellectual property rights and assume that the undertaking is able to rely on such rights. Thus the Commission may proceed on the premiss that the refusal to supply interoperability information might not be a mere refusal to supply a product or a service indispensable to the exercise of a specific activity but a refusal to license intellectual property rights. The Commission thus chooses the strictest legal test and therefore the one most favourable to the accused dominant undertaking. In such a situation, it is therefore necessary to ascertain whether the criteria which determine when an undertaking in a dominant position can be required to grant a licence relating to intellectual property rights are satisfied.

(see paras 283-284, 290)

6. Although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position within the meaning of Article 82 EC unless it is objectively justified.

The refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC.

It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market.

The following circumstances, in particular, must be considered to be exceptional: in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.

Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is objectively justified.

Finally, in order that a refusal to give access to a product or service indispensable to the exercise of a particular activity may be considered abusive, it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service. The fact that the indispensable product or service is not marketed separately does not exclude from the outset the possibility of identifying a separate market. It is sufficient that a potential market or even a hypothetical market can be identified. Such is the case where the products or services are indispensable to the conduct of a particular business activity and where there is an actual demand for them on the part of undertakings which seek to carry on that business. It is decisive that two different stages of production are identified and that they are interconnected in that the upstream product is indispensable for supply of the downstream product.

(see paras 319, 331-335, 691, 1336)

7. For the purposes of application of Article 82 EC to the refusal of a dominant undertaking to grant a licence in the market for work group server operating systems, the 'interoperability information' must be regarded as being 'indispensable', inter alia because the interoperability is of significant competitive importance in that market, even if their lack of availability leads to competition being eliminated only gradually and not immediately.

(see paras 381, 428)

8. As stated in the Commission Notice on the definition of the relevant market for the purposes of Community competition law, '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. That means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

With respect to operating systems, the Commission may correctly find that there is a market for work group server operating systems which is separate from the market for client PC operating systems.

(see paras 484-485, 531)

9. Where, in the context of proceedings relating to the application of Article 82 EC, the Commission takes issue with an undertaking for having used, by leveraging, its quasi-monopoly on a product market to influence a second product market, the abusive conduct alleged against the undertaking has its origin in its dominant position on the first product market. Thus, even if the Commission were wrongly to have considered that the undertaking was in a dominant position on the second product market, that could not of itself suffice to support a finding that the Commission was wrong to conclude that there had been an abuse of a dominant position.

(see para. 559)

10. For the purposes of application of Article 82 EC, the expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.

In the case of a refusal by a dominant undertaking to grant a licence on the work group server operating systems market, the Commission has all the more reason to apply Article 82 EC before the elimination of competition has become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse.

It is not necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.

(see paras 561-563, 593)

11. The fact that the dominant undertaking's conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in 'limiting production, markets or technical developments to the … prejudice of consumers'.

The circumstance relating to the appearance of a new product cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure.

(see paras 643, 647, 664)

12. Although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

The mere fact that a product is covered by intellectual property rights cannot constitute objective justification to refuse to grant a licence. If the mere fact of holding intellectual property rights could in itself constitute objective justification for such a refusal, the exception established by the case-law could never apply.

It is for the dominant undertaking which maintains that the granting of access to third parties to technology covered by intellectual property rights would have a significant negative impact on its incentives to innovate to support it with arguments and evidence.

(see paras 688-690, 697, 1144)

13. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. That principle of consistent interpretation applies only where an international agreement prevails over the provision of Community law concerned. Since an international agreement, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC.

Moreover, in a situation where the Commission is required to apply Article 82 EC to the factual and legal circumstances of a particular case and in which it must be presumed, in the absence of proof to the contrary, that the conclusions which it reached in that regard are the only ones that it could validly adopt, the Commission is not, strictly speaking, required to make a choice between several possible constructions of a text of Community law.

(see paras 797-799)

14. Where the Commission is penalising infringement of Article 82 EC and orders an undertaking in a dominant position to disclose 'interoperability information' to undertakings wishing to develop and distribute work group server operating systems and to allow them to use that information 'subject to the application of reasonable and non-discriminatory conditions', there is nothing to prevent the undertaking from giving access to that information through a licence if the information relates to a technology covered by a patent or by another form of intellectual property right.

The fact that there is a requirement that the conditions to which any licences are subject be reasonable and non-discriminatory does not mean that the dominant undertaking must impose the same conditions on every undertaking seeking such licences. It is not precluded that the conditions may be adapted to the specific situation of each of those undertakings and vary, for example, according to the extent of the information to which they seek access or the type of products in which they intend to implement the information.

(see paras 808, 810-811)

15. In order to determine whether the conduct of the dominant undertaking constitutes abusive tying, the Commission is entitled to base its finding on the following factors: first, the tying and tied products are two separate products; second, the undertaking concerned is dominant in the market for the tying product; third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and fourth, the practice in question forecloses competition. The Commission also takes into account the fact that the tying is not objectively justified.

Such justification may not be inferred from the advantages arising from the fact that tying ensures a uniform presence of the product on the market. Such a result cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

Since the list of abusive practices set out in the second paragraph of Article 82 EC is not exhaustive, bundling by an undertaking in a dominant position may also infringe Article 82 EC where it does not correspond to the example given in Article 82(d) EC. Accordingly, in order to establish the existence of abusive bundling, the Commission is entitled to rely on Article 82 EC in its entirety and not exclusively on Article 82(d) EC.

(see paras 842-843, 852, 859-861, 1151-1152)

16. The distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand. In the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying.

Complementary products can constitute separate products for the purposes of Article 82 EC.

The fact that there are on the market independent companies specialising in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product.

The fact that tying takes the form of the technical integration of one product in another does not have the consequence that, for the purpose of assessing its impact on the market, that integration cannot be qualified as the bundling of two separate products.

Moreover, even when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute abuse within the meaning of Article 82 EC, unless it is objectively justified.

Client PC operating systems, on the one hand, and streaming media players, on the other hand, constitute two separate products for the purposes of Article 82 EC, in the light of the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also the dominant undertaking's commercial practice on the market for client PC operating systems.

(see paras 917-918, 921-922, 925, 927, 933, 935, 942, 1341)

17. It does not follow from either Article 82(d) EC or the case-law that consumers must necessarily pay a certain price for the tied product in order for it to be concluded that they are subject to supplementary obligations within the meaning of that provision.

Moreover, neither Article 82(d) EC nor the case-law on bundling requires that consumers must be forced to use the tied product or prevented from using the same product supplied by a competitor of the dominant undertaking in order for the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations to be capable of being regarded as satisfied.

(see paras 969-970)

18. While it is true that neither Article 82(d) EC nor, more generally, Article 82 EC contains any reference to the anti-competitive effect of bundling, the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition.

For the purposes of applying Article 82 EC to bundling, although the Commission may examine the actual effects which tying has had on the market and the way in which that market is likely to evolve, rather than merely considering – as it normally does in cases of abusive tying – that the tying has by its nature a foreclosure effect, does not mean that it adopted a new legal theory.

The fact that an undertaking in a dominant position in the market for client PC operating systems bundles the streaming media player with the client PC operating system – the operating system pre-installed on the great majority of client PCs sold throughout the world – without the possibility of removing that media player from the operating system, allows the media player to benefit from the ubiquity of that operating system on client PCs, which cannot be counterbalanced by the other methods of distributing media players. Thus, owing to the bundling, the media player enjoys an unparalleled presence on client PCs throughout the world, because it thereby allows that media player automatically to achieve a level of market penetration corresponding to that of the dominant undertaking's client PC operating system, without having to compete on the merits with competing products. Such a tied sale is moreover capable of having an appreciable impact on content providers and software designers, since the market for streaming media players is characterised by significant indirect network effects.

(see paras 867, 1035-1036, 1038, 1058, 1060-1061)

19. Article 82 EC is intended to prohibit a dominant undertaking from strengthening its position by recourse to means other than those based on competition on the merits.

(see para. 1070)

20. Given their nature and structure, agreements of the World Trade Organisation (WTO) are not in principle among the rules in the light of which the Community judicature is to review the legality of measures adopted by the Community institutions. It is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Community judicature must review the legality of the Community measure in question in the light of the WTO rules.

There is nothing in the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to prevent the competition authorities of the members of the WTO from imposing remedies which limit or regulate the exploitation of intellectual property rights held by an undertaking in a dominant position where that undertaking exercises those rights in an anti-competitive manner. Thus, it follows expressly from Article 40(2) of the TRIPS Agreement that the members of the WTO are entitled to regulate the abusive use of such rights in order to avoid effects which harm competition.

(see paras 801-802, 1189-1190, 1192)

21. When the Commission finds in a decision that an undertaking has infringed Article 82 EC, that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision. Where remedies are provided for in the decision, the undertaking concerned is required to implement them – and to assume all the costs associated with their implementation –, failing which it exposes itself to liability for periodic penalty payments imposed pursuant to Article 16 of Regulation No 17.

The Commission it is not entitled to delegate to a third party the powers of investigation and enforcement conferred on it by Regulation No 17. On the other hand, it is entitled to monitor the implementation by the undertaking concerned of the remedies ordered in an infringement decision and to ensure that the other measures necessary to put an end to the anti-competitive effects of the infringement are fully implemented without delay. For those purposes, it is entitled to use the powers of investigation provided for in Article 14 of Regulation No 17 and, where necessary, to use an external expert in order, inter alia, to resolve technical issues.

Moreover, where the Commission decides to obtain the assistance of an external expert it may communicate to that expert any information and documents which it may have obtained in the exercise of its powers of investigation under Article 14 of Regulation No 17.

By establishing a monitoring mechanism involving the appointment of an independent monitoring trustee required to act on his own initiative and upon application by third parties, whose role is not limited to putting questions to the undertaking concerned and reporting the answers to the Commission, who has access to information, documents, premises and employees and also to the source code of its relevant products, without limit in time, the Commission goes far beyond the situation in which it retains its own external expert to provide advice when it investigates the implementation of remedies.

There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies.

It is for the Commission, in its capacity as authority responsible for applying the Community competition rules, to pursue the implementation of infringement decisions in an independent, objective and impartial manner. It would be incompatible with its responsibility in that regard for the effective implementation of Community law to depend on or be influenced by the willingness or the capacity of the addressee of the decision to bear such costs.

Moreover, the Commission does not have unlimited discretion when formulating remedies to be imposed on undertakings for the purpose of putting an end to an infringement. In the context of the application of Article 3 of Regulation No 17, the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.

(see paras 1256, 1264-1266, 1268-1270, 1274-1276)

22. In the case of an undertaking which has been found to have committed two abuses of a dominant position, the Commission may, in order to assess the gravity of the infringement for the purposes of determining the amount of the fine, take account of the fact that those two abuses form part of a leveraging strategy whereby the dominant position on one product market is used to extend that dominant position to other adjacent markets.

In such a case, the Commission may take a single starting point for the fine for the two abuses, without having to explain what that amount represented or how it was apportioned between the two types of abuse.

The obligation to state reasons does not require the Commission to indicate in its decision the figures relating to the method of calculating the fines.

The Commission may apply a weighting to that amount to ensure that the fine was sufficiently deterrent and to reflect the dominant undertaking's significant economic capacity. In that regard, the possibility cannot be precluded that the undertaking might commit the same type of infringement in future with other products.

(see paras 1344, 1352, 1360-1361, 1363)

Judgment of the Court of First Instance (Grand Chamber)
First Instance (Grand Chamber)First Instance (Grand Chamber)September 2007. Microsoft Corp. v Commission of the European Communities. Competition - Abuse of dominant position - Client PC operating systems - Work group server operating systems - Streaming media players - Decision finding infringements of Article 82 EC - Refusal of the dominant undertaking to supply and authorise the use of interoperability information - Supply by the dominant undertaking of its client PC operating system conditional on the simultaneous acquisition of its media player - Remedies - Appointment of an independent monitoring trustee - Fine - Determination of the amount - Proportionality. Case T-201/04.

In Case T-201/04,

Microsoft Corp., established in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I. Forrester QC,

applicant,

supported by

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace, Illinois (United States), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

DMDsecure.com BV, established in Amsterdam (Netherlands),

MPS Broadband AB, established in Stockholm (Sweden),

Pace Micro Technology plc, established in Shipley, West Yorkshire (United Kingdom),

Quantel Ltd, established in Newbury, Berkshire (United Kingdom),

Tandberg Television Ltd, established in Southampton, Hampshire (United Kingdom),

represented by J. Bourgeois, lawyer,

Association for Competitive Technology, Inc., established in Washington, DC (United States), represented by L. Ruessmann and P. Hecker, lawyers, and K. Bacon, Barrister,

TeamSystem SpA, established in Pesaro (Italy),

Mamut ASA, established in Oslo (Norway),

represented by G. Berrisch, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H. Brokelmann and R. Allendesalazar Corcho, lawyers,

interveners,

v

Commission of the European Communities, represented initially by R. Wainwright, F. Castillo de la Torre, P. Hellström and A. Whelan, acting as Agents, and subsequently by F. Castillo de la Torre, P. Hellström and A. Whelan,

defendant,

supported by

Software & Information Industry Association, established in Washington, DC, represented by J. Flynn QC, C. Simpson and T. Vinje, Solicitors, and D. Paemen, N. Dodoo and M. Dolmans, lawyers, Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

Audiobanner.com, established in Los Angeles, California (United States), represented by L. Alvizar Ceballos, lawyer,

European Committee for Interoperable Systems (ECIS), established in Brussels (Belgium), represented by D. Paemen, N. Dodoo and M. Dolmans, lawyers, and J. Flynn QC,

interveners,

APPLICATION for annulment of Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corp. (Case COMP/C3/37.792 - Microsoft) (OJ 2007 L 32, p. 23) or, in the alternative, annulment or reduction of the fine imposed on the applicant in that decision,

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

composed of: B. Vesterdorf, President, M. Jaeger, J. Pirrung, R. GarcíaValdecasas, V. Tiili, J. Azizi, J.D. Cooke, A.W.H. Meij, N.J. Forwood, E. Martins Ribeiro, I. Wiszniewska-Biaecka, V. Vadapalas and I. Labucka, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 24, 25, 26, 27 and 28 April 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Grand Chamber)

hereby:

1. Annuls Article 7 of Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corp. (Case COMP/C-3/37.792 - Microsoft), in so far as:

- it orders Microsoft to submit a proposal for the establishment of a mechanism which is to include a monitoring trustee with the power to have access, independently of the Commission, to Microsoft's assistance, information, documents, premises and employees and to the source code of the relevant Microsoft products;

- it requires that the proposal for the establishment of that mechanism provide that all the costs associated with the appointment of the monitoring trustee, including his remuneration, be borne by Microsoft; and

- it reserves to the Commission the right to impose by way of decision a mechanism such as that referred to in the first and second indents above;

2. Dismisses the remainder of the application;

3. Orders Microsoft to bear 80% of its own costs and to pay 80% of the Commission's costs, with the exception of the costs incurred by the Commission in connection with the intervention of The Computing Technology Industry Association, Inc., Association for Competitive Technology, Inc., TeamSystem SpA, Mamut ASA, DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc,

Quantel Ltd, Tandberg Television Ltd and Exor AB;

4. Orders Microsoft to bear its own costs and to pay the Commission's costs relating to the interim measures proceedings in Case T201/04 R, with the exception of the costs incurred by the Commission in connection with the intervention of The Computing Technology Industry Association, Association for Competitive Technology, TeamSystem, Mamut, DMDsecure.com, MPS Broadband, Pace Micro Technology, Quantel, Tandberg Television and Exor;

5. Orders Microsoft to pay the costs of Software & Information Industry Association, Free Software Foundation Europe, Audiobanner.com and European Committee for Interoperable Systems (ECIS), including those relating to the interim measures proceedings;

6. Orders the Commission to bear 20% of its own costs and to pay 20% of Microsoft's costs, with the exception of the costs incurred by Microsoft in connection with the intervention of Software & Information Industry Association, Free Software Foundation Europe, Audiobanner.com and ECIS;

7. Orders The Computing Technology Industry Association, Association for Competitive Technology, TeamSystem, Mamut, DMDsecure.com, MPS Broadband, Pace Micro Technology, Quantel, Tandberg Television and Exor to bear their own costs, including those relating to the interim measures proceedings.

Background to the dispute

1. Microsoft Corp., a company established in Redmond, Washington (United States), designs, develops and markets a wide variety of software products for different kinds of computing devices. Those software products include, in particular, operating systems for client personal computers (client PCs'), operating systems for work group servers and streaming media players. Microsoft also provides technical assistance for its various products.

2. On 15 September 1998, Mr Green, a Vice-President of Sun Microsystems, Inc. (Sun'), a company established in Palo Alto, California (United States) which supplies, in particular, servers and server operating systems, wrote to Mr Maritz, a Vice-President of Microsoft, as follows:

We are writing to you to request that Microsoft provide [Sun] with the complete information required to allow Sun to provide native support for COM objects on Solaris.

We also request that Microsoft provide [Sun] with the complete information required to allow [Sun] to provide native support for the complete set of Active Directory technologies on Solaris.

We believe it is in the industry's best interest that applications written to execute on Solaris be able to seamlessly communicate via COM and/or Active Directory with the Windows operating systems and/or with Windows-based software.

We believe that Microsoft should include a reference implementation and such other information as is necessary to insure, without reverse engineering, that COM objects and the complete set of Active Directory technologies will run in full compatible fashion on Solaris. We think it necessary that such information be provided for the full range of COM objects as well as for the full set of Active Directory technologies currently on the market. We also think it necessary that such information be provided in a timely manner and on a continuing basis for COM objects and Active Directory technologies which are to be released to the market in the future.'

3. That letter will be referred to below as the letter of 15 September 1998'.

4. By letter of 6 October 1998, Mr Maritz replied to the letter of 15 September 1998. In his letter, he said:

Thank you for your interest in working with Windows. We have some mutual customers using our products, and I think it is great you are interested in opening up your system to interoperate with Windows. Microsoft has always believed in helping software developers, including [its] competitors, build the best possible products and interoperability for [its] platform.

You may not realise that the information you requested on how to interoperate with COM and the Active Directory technologies is already published and available to you and every other software developer in the world via the Microsoft Developer Network (MSDN) Universal product. MSDN contains comprehensive information about the services and interfaces of the Windows platform and is a great source of information for developers interested in writing to or interoperating with Windows. In fact, Sun currently has 32 active licenses for the MSDN Universal subscription. Furthermore, as your company has done in the past, I assume you will be sending a significant number of people to attend our Professional Developers Conference in Denver October 11 - October 15, 1998. This will be another venue to get the technical information you are seeking in order to work with our systems technologies. Some of the 23 Sun employees that attend[ed] last year[']s conference should be able to provide you with their comments on the quality and depth of information discussed at these Professional Developers Conferences.

You will be pleased to know that there is already a reference implementation of COM on Solaris. This implementation of COM on Solaris is a fully supported binary available from Microsoft. Source code for COM can be licensed from other sources including Software AG.

Regarding the Active Directory, we have no plans to port [it] to Solaris. However, to satisfy our mutual customers there are many methods with varying levels of functionality in order to interoperate with the Active Directory. For example, you can use the standard LDAP to access the Windows NT Server Active Directory from Solaris.

If after attending [the Professional Developers Conference] and reading through all the public MSDN content you should require some additional support, our Developer Relations Group has account managers who strive to help developers who need additional support for Microsoft's platforms. I have asked Marshall Goldberg, the Lead Program Manager, to make himself available should you need it...'

5. Mr Maritz's letter of 6 October 1998 will be referred to below as the letter of 6 October 1998'.

6. On 10 December 1998, Sun lodged a complaint with the Commission pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87).

7. Sun's complaint related to Microsoft's refusal to give it the information and technology necessary to allow its work group server operating systems to interoperate with the Windows client PC operating system.

8. On 2 August 2000, the Commission sent Microsoft a first statement of objections (the first statement of objections'), which related in effect to questions concerning the interoperability of Windows client PC operating systems and other suppliers' server operating systems (client/server interoperability).

9. Microsoft responded to the first statement of objections on 17 November 2000.

10. In the meantime, in February 2000, the Commission, acting on its own initiative, launched an investigation relating, particularly, to Microsoft's Windows 2000 generation of client PC and work group server operating systems and to the integration by Microsoft of its Windows Media Player in its Windows client PC operating system. The client PC operating system in the Windows 2000 range was intended for professional use and was called Windows 2000 Professional', whereas the server operating systems in that range were presented under the three following versions: Windows

2000 Server, Windows 2000 Advanced Server and Windows 2000 Datacenter Server.

11. That investigation concluded on 29 August 2001, when the Commission sent Microsoft a second statement of objections (the second statement of objections'), in which it reiterated its previous objections concerning client/server interoperability. The Commission also addressed certain questions relating to interoperability between work group servers (server/server interoperability). In addition, the Commission raised a number of questions concerning the integration of Windows Media Player in the Windows client PC operating system.

12. Microsoft responded to the second statement of objections on 16 November 2001.

13. In December 2001, Microsoft sent the Commission a report containing the results and the analysis of a survey carried out by Mercer Management Consulting (Mercer').

14. Between April and June 2003, the Commission conducted a wide-ranging market enquiry, sending a series of requests for information to a number of companies and associations pursuant to Article 11 of Regulation No 17 (the 2003 market enquiry').

15. On 6 August 2003, the Commission sent Microsoft a third statement of objections, which was, according to the Commission, intended to supplement the two earlier statements of objections and to indicate the remedies it proposed to order (the third statement of objections').

16. By letter of 17 October 2003, Microsoft responded to the third statement of objections.

17. On 31 October 2003, Microsoft sent the Commission a report containing the results and the analysis of two further surveys conducted by Mercer.

18. A hearing was held by the Commission on 12, 13 and 14 November 2003.

19. On 1 December 2003, Microsoft presented supplemental observations on the third statement of objections.

20. On 24 March 2004, the Commission adopted Decision 2007/53/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corp. (Case COMP/C-3.37.792 - Microsoft) (OJ 2007 L 32, p. 23; the contested decision').

The contested decision

21. In the contested decision, the Commission finds that Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area (EEA) by twice abusing a dominant position.

22. The Commission first identifies three separate worldwide product markets and considers that Microsoft had a dominant position on two of them. It then finds that Microsoft had engaged in two kinds of abusive conduct. As a result it imposes a fine and a number of remedies on Microsoft.

I - Relevant product markets and geographic market

23. The contested decision identifies three separate product markets, namely the markets for, respectively, client PC operating systems (recitals 324 to 342 to the contested decision), work group server operating systems (recitals 343 to 401 to the contested decision) and streaming media players (recitals 402 to 425 to the contested decision).

24. The first market defined in the contested decision is the market for client PC operating systems. Operating systems are defined as system software' which controls the basic functions of the computer and enables the user to make use of the computer and run application software on it (recital 37 to the contested decision). Client PCs are defined as general-purpose computers designed for use by one person at a time and capable of being connected to a network (recital 45 to the contested

decision).

25. As regards the second market, the contested decision defines work group server operating systems as operating systems designed and marketed to deliver collectively basic infrastructure services' to relatively small numbers of client PCs connected to small or medium-sized networks (recitals 53 and 345 to the contested decision).

26. The contested decision identifies, more particularly, three types of services. These are, first, the sharing of files stored on servers, second, the sharing of printers and, third, the administration of groups and users, that is to say, the administration of the means whereby those concerned can access network services (recitals 53 and 345 to the contested decision). This last type of services is that of ensuring that users have access to and make use of the network resources in a secure manner, first, by authenticating users and second, by checking that they are authorised to perform a particular action (recital 54 to the contested decision). The contested decision states that, in order to provide for the efficient storing and checking of group and user administration information, work group server operating systems rely extensively on directory service' technologies (recital 55 to the contested decision). The directory service included in Microsoft's Windows 2000 Server operating system is called Active Directory' (recital 149 to the contested decision).

27. According to the contested decision, the three types of services described above are closely interrelated in work group server operating systems. They may be broadly described as a single service', but viewed from two different perspectives, namely that of the user (file and print services) and that of the network administrator (group and user administration services) (recital 56 to the contested decision). The contested decision characterises those different services as work group services'.

28. The third market identified in the contested decision is the streaming media player market. Media players are defin ed as software products capable of reading audio and video content in digital form, that is to say, of decoding the corresponding data and translating them into instructions for the hardware (for example, loudspeakers or a display) (recital 60 to the contested decision). Streaming media players are capable of reading audio and video content streamed' across the Internet (recital 63 to the contested decision).

29. As regards the relevant geographic market, the Commission finds in the contested decision, as stated at paragraph 22 above, that it has a worldwide dimension for each of the three product markets (recital 427 to the contested decision).

II - Dominant position

30. In the contested decision, the Commission finds that Microsoft has had a dominant position on the client PC operating systems market since at least 1996 and also on the work group server operating systems market since 2002 (recitals 429 to 541 to the contested decision).

31. As regards the client PC operating systems market, the Commission relies essentially on the following factors to arrive at that conclusion:

- Microsoft's market shares are over 90% (recitals 430 to 435 to the contested decision);

- Microsoft's market power has enjoyed an enduring stability and continuity' (recital 436 to the contested decision);

- there are significant barriers to market entry, owing to indirect network effects (recitals 448 to 464 to the contested decision);

- those network effects derive, first, from the fact that users like platforms on which they can use a large number of applications and, second, from the fact that software designers write applications for the client PC operating systems that are the most popular among users (recitals 449 and 450 to the contested decision).

32. The Commission states at recital 472 to the contested decision that that dominant position presents extraordinary features' in that Windows is not only a dominant product on the market for client PC operating systems but, in addition, is the de facto standard' for those systems.

33. As regards the work group server operating systems market, the Commission relies, in substance, on the following factors:

- Microsoft's market share is, at a conservative estimate, at least 60% (recitals 473 to 499 to the contested decision);

- the position of Microsoft's three main competitors on that market is as follows: Novell, with its NetWare software, has 10 to 25%; vendors of Linux products have a market share of 5 to 15%; and vendors of UNIX products have a market share of 5 to 15% (recitals 503, 507 and 512 to the contested decision);

- the work group server operating systems market is characterised by the existence of significant entry barriers, owing in particular to network effects and to Microsoft's refusal to disclose interoperability information (recitals 515 to 525 to the contested decision);

- there are close commercial and technological links between the latter market and the client PC operating systems market (recitals 526 to 540 to the contested decision).

34. Linux is an open source' operating system released under the GNU GPL (General Public Licence)'. Strictly speaking, it is only a code base, called the kernel', which performs a limited number of services specific to an operating system. It may, however, be linked to other layers of software to form a Linux operating system' (recital 87 to the contested decision). Linux is used in particular as the basis for work group server operating systems (recital 101 to the contested decision) and is thus present on the work group server operating systems market in conjunction with Samba software, which is also released under the GNU GPL' licence (recitals 506 and 598 to the contested decision).

35. UNIX' designates a number of operating systems that share certain common features (recital 42 to the contested decision). Sun has developed a UNIX-based work group server operating system called Solaris' (recital 97 to the contested decision).

III - Abuse of a dominant position

A - Refusal to supply and authorise the use of interoperability information

36. The first abusive conduct in which Microsoft is found to have engaged consists in its refusal to supply its competitors with interoperability information' and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating systems market, between October 1998 and the date of notification of the contested decision (Article 2(a) of the contested decision). That conduct is described at recitals 546 to 791 to the contested decision.

37. For the purposes of the contested decision, interoperability information' is the complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems and ... used by Windows work group servers to deliver file and print services and group and user administrative services, including the Windows domain controller services, Active Directory services and group Policy services to Windows work group networks' (Article 1(1) of the contested decision).

38. Windows work group network' is defined as any group of Windows client PCs and Windows work group servers linked together via a computer network' (Article 1(7) of the contested decision).

39. A protocol' is defined as a set of rules of interconnection and interaction between various instances of Windows work group server operating systems and Windows client PC operating systems running on different computers in a Windows work group network' (Article 1(2) of the contested decision).

40. In the contested decision, the Commission emphasises that the refusal in question does not relate to Microsoft's source code', but only to specifications of the protocols concerned, that is to say, to a detailed description of what the software in question must achieve, in contrast to the implementations, consisting in the implementation of the code on the computer (recitals 24 and 569 to the contested decision). It states, in particular, that it does not contemplate ordering Microsoft to allow copying of Windows by third parties' (recital 572 to the contested decision).

41. The Commission further considers that Microsoft's refusal to Sun is part of a general pattern of conduct (recitals 573 to 577 to the contested decision). It also asserts that Microsoft's conduct involves a disruption of previous, higher levels of supply (recitals 578 to 584 to the contested decision), causes a risk of elimination of competition on the work group server operating systems (recitals 585 to 692 to the contested decision) and has a negative effect on technical development and on consumer welfare (recitals 693 to 708 to the contested decision).

42. Last, the Commission rejects Microsoft's arguments that its refusal is objectively justified (recitals 709 to 778 to the contested decision).

B - Tying of the Windows client PC operating system and Windows Media Player

43. The second abusive conduct in which Microsoft is found to have engaged consists in the fact that from May 1999 to the date of notification of the contested decision Microsoft made the availability of the Windows client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software (Article 2(b) of the contested decision). That conduct is described at recitals 792 to 989 to the contested decision.

44. In the contested decision, the Commission considers that that conduct satisfies the conditions for a finding of a tying abuse for the purposes of Article 82 EC (recitals 794 to 954 to the contested decision). First, it reiterates that Microsoft has a dominant position on the client PC operating systems market (recital 799 to the contested decision). Second, it considers that streaming media players and client PC operating systems constitute separate products (recitals 800 to 825 to the contested decision). Third, it asserts that Microsoft does not give consumers the opportunity to buy Windows without Windows Media Player (recitals 826 to 834 to the contested decision). Fourth, it contends that the tying in question restricts competition on the media players market (recitals 835 to 954 to the contested decision).

45. Last, the Commission rejects Microsoft's arguments to the effect that, first, the tying in question produces efficiency gains capable of offsetting the anti-competitive effects identified in the contested decision (recitals 955 to 970 to the contested decision) and, second, Microsoft had no interest in anti-competitive' tying (recitals 971 to 977 to the contested decision).

IV - Fine and remedies

46. In respect of the two abuses identified in the contested decision, a fine of EUR 497 196 304 is imposed (Article 3 of the contested decision).

47. Furthermore, the first paragraph of Article 4 of the contested decision requires that Microsoft bring an end to the infringement referred to in Article 2, in accordance with Articles 5 and 6 of that decision. Microsoft must also refrain from repeating any act or conduct that might have the same or equivalent object or effect to those abuses (second paragraph of Article 4 of the contested decision).

48. By way of remedy for the abusive refusal referred to in Article 2(a) of the contested decision, Article 5 of that decision provides as follows:

(a) Microsoft... shall, within 120 days of the date of notification of [the contested decision], make the interoperability information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the interoperability information by such undertakings for the purpose of developing and distributing work group server operating system products;

(b) Microsoft... shall ensure that the interoperability information made available is kept updated on an ongoing basis and in a timely manner;

(c) Microsoft... shall, within 120 days of the date of notification of [the contested decision], set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the interoperability information; as regards this evaluation mechanism, Microsoft... may impose reasonable and non-discriminatory conditions to ensure that access to the interoperability information is granted for evaluation purposes only;

...'

49. By way of remedy for the abusive tying referred to in Article 2(b) of the contested decision, Article 6 of that decision orders Microsoft to offer, within 90 days of the date of notification of that decision, a full-functioning version of the Windows client PC operating system which does not incorporate Windows Media Player, although Microsoft retains the right to offer a bundle of the Windows client PC operating system and Windows Media Player.

50. Last, Article 7 of the contested decision provides:

Within 30 days of the date of notification of [the contested decision], Microsoft... shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring [Microsoft's] compliance with [the contested decision]. That mechanism shall include a monitoring trustee who shall be independent from Microsoft...

In case the Commission considers [Microsoft's] proposed monitoring mechanism not suitable it retains the right to impose such a mechanism by way of a decision.'

Proceedings for violation of United States antitrust law

51. In parallel with the Commission's investigation, Microsoft was the subject of an investigation for violation of the United States antitrust legislation.

52. In 1998, the United States of America, 20 States and the District of Columbia brought proceedings against Microsoft under the Sherman Act. Their complaints concerned the measures taken by Microsoft against Netscape's Internet Navigator and Sun's Java technologies. The States concerned also brought actions against Microsoft for violation of their own antitrust legislation.

53. After the United States Court of Appeals for the District of Columbia Circuit (the Court of Appeals'), on appeal by Microsoft against the judgment of 3 April 2000 of the United States District Court for the District of Columbia (the District Court'), had given its judgment on 28 June 2001, Microsoft reached a settlement with the United States Department of Justice and the Attorneys General of nine States (the United States settlement') in November 2001, in which two types of commitment were given by Microsoft.

54. First, Microsoft agreed to draw up the specifications of the communication protocols used by the Windows server operating systems in order to interoperate', that is to say, to make them compatible with the Windows client PC operating systems and to grant third parties licences relating to those specifications on specific conditions.

55. Second, the United States settlement provides that Microsoft must allow original equipment manufacturers (OEMs') and end users to activate or to eliminate access to its middleware. Windows Media Player is one of the products in that category, as defined in the United States settlement. Those provisions are intended to ensure that suppliers of media software can develop and distribute products that function properly with Windows.

56. Those provisions were confirmed by a judgment of the District Court of 1 November 2002.

57. On 30 June 2004, the Court of Appeals, on appeal by the State of Massachusetts, affirmed the judgment of the District Court of 1 November 2002.

58. Pursuant to the United States settlement, the Microsoft Communications Protocol Program (the MCPP') was set up in August 2002.

Procedure

59. By application lodged at the Registry of the Court of First Instance on 7 June 2004, Microsoft brought the present action.

60. By separate document lodged at the Court Registry on 25 June 2004, Microsoft lodged an application under Article 242 EC for suspension of operation of Article 4, Article 5(a) to (c) and Article 6(a) of the contested decision.

61. By order of 22 December 2004 in Case T201/04 R Microsoft v Commission [2004] ECR II4463, the President of the Court dismissed that application and reserved the costs.

62. By order of 9 March 2005, the President of the Fourth Chamber of the Court granted the following associations and companies leave to intervene in the proceedings in support of the form of order sought by Microsoft:

- The Computing Technology Industry Association, Inc. (CompTIA');

- DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd and Tandberg Television Ltd (DMDsecure and Others');

- Association for Competitive Technology, Inc. (ACT');

- TeamSystem SpA and Mamut ASA;

- Exor AB.

63. By the same order, the President of the Fourth Chamber of the Court granted the following associations and companies leave to intervene in the proceedings in support of the form of order sought by the Commission:

- Software & Information Industry Association (SIIA');

- Free Software Foundation Europe eV (FSFE');

- Audiobanner.com, trading as VideoBanner';

- RealNetworks, Inc.

64. By letters of 13 December 2004, 9 March, 27 June and 9 August 2005, Microsoft requested that certain confidential matters in the application, the defence, the reply, Microsoft's observations on the statements in intervention and the rejoinder not be communicated to the interveners. The applicant produced a non-confidential version of those procedural documents and only those non-confidential texts were furnished to the interveners referred to in paragraphs 62 and 63 above. Those interveners raised no objections in that regard.

65. The interveners referred to in paragraphs 62 and 63 above lodged their own statements in intervention within the prescribed period. The main parties submitted their observations on those statements in intervention on 13 June 2005.

66. By order of 28 April 2005 in Case T201/04 Microsoft v Commission [2005] ECR II1491, the President of the Fourth Chamber granted the European Committee for Interoperable Systems (ECIS) leave to intervene in the proceedings in support of the form of order sought by the Commission. As that association's application to intervene was lodged after expiry of the period referred to in Article 116(6) of the Rules of Procedure of the Court, it was ordered to submit its observations during the oral procedure, on the basis of the Report for the Hearing, with which it was provided.

67. By decision of the Plenary Conference of 11 May 2005, the case was referred to the Fourth Chamber, Extended Composition, of the Court of First Instance.

68. By decision of the Plenary Conference of 7 July 2005, the case was referred to the Grand Chamber of the Court of First Instance and assigned to a new Judge-Rapporteur.

69. By order of the President of the Grand Chamber of 16 January 2006, RealNetworks was removed from the case as intervener in support of the form of order sought by the Commission.

70. On 1 February 2006, the parties were invited by the Court to attend an informal meeting before the President of the Grand Chamber and the Judge-Rapporteur with a view to finalising the arrangements for the hearing. That meeting took place at the Court on 10 March 2006.

71. Upon hearing the Judge-Rapporteur, the Court of First Instance (Grand Chamber) decided to open the oral procedure and, pursuant to Article 64 of its Rules of Procedure, invited the main parties to produce certain documents and to answer a series of questions. They complied with those requests within the prescribed period.

72. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 24, 25, 26, 27 and 28 April 2006.

73. At the hearing, Microsoft was requested by the Court to lodge a copy of the requests for information sent by the Commission in connection with the 2003 market enquiry, concerning the question of media players, and of the answers to those requests for information, and also of the reports containing the results and analysis of the surveys conducted by Mercer (the Mercer reports'). Microsoft produced those various documents within the prescribed periods.

74. By letter from the Court of 3 May 2006, Microsoft was requested to produce a copy of the other requests for information issued by the Commission in connection with the 2003 market enquiry and of the replies to those requests. Microsoft complied with that request within the prescribed period.

75. The President of the Grand Chamber closed the oral procedure by decision of 22 June 2006.

Forms of order sought by the parties

76. Microsoft claims that the Court should:

- annul the contested decision;

- in the alternative, annul or substantially reduce the fine;

- order the Commission to pay the costs;

- order SIIA, FSFE and Audiobanner.com to pay the costs relating to their intervention.

77. The Commission contends that the Court should:

- dismiss the action;

- order Microsoft to pay the costs.

78. CompTIA, ACT, TeamSystem and Mamut claim that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

79. DMDsecure and Others claim that the Court should:

- annul Article 2(b), Article 4, Article 6(a) and Article 7 of the contested decision;

- order the Commission to pay the costs.

80. Exor claims that the Court should:

- annul Articles 2 and 4, Article 6(a) and Article 7 of the contested decision;

- order the Commission to pay the costs.

81. SIIA, FSFE, Audiobanner.com and ECIS contend that the Court should:

- dismiss the action;

- order Microsoft to pay the costs.

Law

82. It is appropriate to examine, first of all, the pleas relating to the forms of order seeking annulment of the contested decision and, next, those relating to the forms of order seeking annulment or a reduction of the fine.

I - Forms of order seeking annulment of the contested decision

83. The pleas in law which Microsoft puts forward in support of its application for annulment of the contested decision are centred on three issues, namely, first, the refusal to supply and authorise the use of interoperability information; second, the tying of the Windows client PC operating system and Windows Media Player; and, third, the obligation to appoint an independent monitoring trustee responsible for ensuring that Microsoft complies with the contested decision.

A - Preliminary issues

84. In its written pleadings, the Commission raises a number of issues relating to the extent of review by the Community Courts and the admissibility of a number of annexes to the application and the reply.

1. The extent of review by the Community Courts

85. The Commission claims that the contested decision rests on a number of considerations involving complex technical and economic assessments. It submits that, according to the case-law, the Community Courts can carry out only a limited review of such assessments (Case C269/90 Technische Universität München [1991] ECR I5469, paragraph 13; Joined Cases C204/00 P, C205/00 P, C211/00 P, C213/00 P, C217/00 P and C219/00 P Aalborg Portland and Others v Commission [2004] ECR I123, paragraph 279; and Case T28/03 Holcim (Deutschland) v Commission [2005] ECR II1357, paragraphs 95, 97 and 98).

86. Microsoft, citing by way of example Case T62/98 Volkswagen v Commission [2000] ECR II2707, paragraph 43, responds that the Community Courts do not refrain from conducting searching inquiries into the soundness of the Commission's decisions, even in complex cases'.

87. The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the

conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Case T65/96 Kish Glass v Commission [2000] ECR II1885, paragraph 64, upheld on appeal by order of the Court of Justice in Case C241/00 P Kish Glass v Commission [2001] ECR I7759; see also, to that effect, with respect to Article 81 EC, Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62).

88. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's (see, as regards a decision adopted following complex appraisals in the medico-pharmacological sphere, order of the President of the Court of Justice in Case C459/00 P(R) Commission v Trenker [2001] ECR I2823, paragraphs 82 and 83; see also, to that effect, Case C120/97 Upjohn [1999] ECR I223, paragraph 34 and the case-law cited; Case T179/00 A. Menarini v Commission [2002] ECR II2879, paragraphs 44 and 45; and Case T13/99 Pfizer Animal Health v Council [2002] ECR II3305, paragraph 323).

89. However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, concerning merger control, Case C12/03 P Commission v Tetra Laval [2005] ECR I987, paragraph 39).

90. It is in the light of those principles that the Court must examine the various pleas which Microsoft puts forward in support of its application for annulment of the contested decision.

2. Admissibility of the content of certain annexes

91. The Commission, supported on this point by SIIA, claims that in a number of annexes to the application and to the reply Microsoft relies on arguments not found in the actual body of those pleadings. On various occasions, moreover, Microsoft makes a general reference to reports annexed to its pleadings. The Commission further criticises the fact that certain expert opinions produced by Microsoft are based on information to which neither the Commission nor the Court had access, and contends that the Court cannot take account of those arguments, reports or expert opinions.

92. Microsoft asserts that the relevant passages of [the] application' contain the essential matters of fact and of law on which the action is based. According to the case-law, specific points in the text of the application can be supported and completed by references to specific passages in documents attached (order in T56/92 Koelman v Commission [1993] ECR II1267, paragraph 21). Furthermore, the applicant submits that it took a deliberate decision to limit the number of annexes as it did not wish to make the file too bulky, that it is under no obligation to submit every document referred to in the footnotes in its annexes, that the Commission has copies of all the documents lodged during the administrative procedure and that it cannot be disputed that Microsoft is entitled to provide information to its experts.

93. At the informal meeting of 10 March 2006 (see paragraph 70 above), the Judge-Rapporteur drew Microsoft's attention to the fact that in certain annexes to its pleadings it seemed to rely on

arguments not expressly set out in the actual body of those pleadings and questioned Microsoft on that point. As recorded in the minutes of that meeting, Microsoft replied that it was not claiming reliance on arguments ... which would not be expressly referred to in the application or in the reply'.

94. The Court recalls that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law it is necessary, for an action to be admissible, that the basic matters of law and fac t relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (Case C52/90 Commission v Denmark [1992] ECR I2187, paragraph 17; orders in Koelman v Commission , paragraph 92 above, paragraph 21, and Case T154/98 Asia Motor France and Others v Commission [1999] ECR II1703, paragraph 49). Furthermore, it is not for the Court 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 instrumental function (Case T84/96 Cipeke v Commission [1997] ECR II2081, paragraph 34, and Case T231/99 Joynson v Commission [2002] ECR II2085, paragraph 154).

95. That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance also applies to the conditions for admissibility of a reply, which according to Article 47(1) of the Rules of Procedure is intended to supplement the application (see, to that effect, Joined Cases T305/94 to T307/94, T313/94 to T316/94, T318/94, T325/94, T328/94, T329/94 and T335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II931, paragraph 40, not set aside on that point by the Court of Justice, on appeal, in Joined Cases C238/99 P, C244/99 P, C245/99 P, C247/99 P, C250/99 P to C252/99 P and C254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I8375).

96. In the present case, the Court finds that in a number of documents annexed to the application and the reply, Microsoft puts forward legal or economic arguments not limited to supporting or supplementing matters of fact or of law expressly set out in the body of those procedural documents, but which introduce fresh arguments.

97. Furthermore, on a number of occasions Microsoft supplements the text of the application and of the reply on specific points by references to attached documents. However, certain of those references to an attached document are in general terms and therefore do not permit the Court to identify precisely the arguments that might be regarded as supplementing the pleas in law developed in the application or in the reply.

98. The Court notes, however, that while the Commission considers that there is no need to take account of the developments in those various annexes, it none the less comments on those developments in notes annexed to its own pleadings.

99. In accordance with the case-law referred to at paragraphs 94 and 95 above and with Microsoft's statement at the informal meeting of 10 March 2006 (see paragraph 93 above), the annexes referred to at paragraphs 96 to 98 above will be taken into consideration by the Court only in so far as they support or supplement pleas or arguments expressly set out by Microsoft or the Commission in the body of their pleadings and in so far as it is possible for the Court to determine precisely what are the matters they contain that support or supplement those pleas or arguments.

100. As regards the Commission's criticisms of the fact that Microsoft has not provided the information underlying certain expert opinions attached to its pleadings, it is sufficient to state that it is for the Court to appraise, where necessary, whether the assertions in those opinions are without probative value. If, in the absence of access to certain information, the Court should consider that those assertions do not have sufficient probative value, it will not take them into account.

B - The refusal to supply and to authorise the use of interoperability information

101. In this first issue, Microsoft relies on a single plea alleging infringement of Article 82 EC. This plea may be broken down into three parts. In the first part, Microsoft claims that the criteria which permit an undertaking in a dominant position to be compelled to grant a licence, as defined by the Community judicature, are not satisfied in this case. In the second part, Microsoft claims that Sun did not request access to the technology' that the Commission ordered Microsoft to disclose and that the letter of 6 October 1998 cannot in any event be interpreted as containing an actual refusal on its part. Last, in the third part, Microsoft claims that the Commission does not properly take account of the obligations imposed on the Communities by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (Annex 1 C to the Agreement Establishing the World Trade Organisation (WTO)) (the TRIPS Agreement').

1. First part: the criteria on which an undertaking in a dominant position may be compelled to grant a licence, as defined by the Community judicature, are not satisfied in the present case

a) Introduction

102. It may be useful first in this place to give a general outline of the positions taken by the main parties on the issue of the refusal to supply and authorise the use of interoperability information.

103. According to the contested decision, Microsoft abused its dominant position on the client PC operating systems market by refusing, first, to supply Sun and other competitors with the specifications for protocols implemented in Windows work group server operating systems and used by the servers running those systems to deliver file and print services and group and user administration services to Windows work group networks and, second, to allow those various undertakings to use those specifications in order to develop and market work group server operating systems.

104. The Commission contends that the information to which Microsoft refuses access is interoperability information within the meaning of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42). It claims, in particular, that that directive envisages interoperability between two software products as being the ability for them to exchange information and mutually to use that information in order to allow each of those software products to operate in all the ways contemplated (see, in particular, paragraph 256 of the first statement of objections, paragraph 79 of the second statement of objections and paragraph 143 of the third statement of objections). The Commission maintains that the concept of interoperability which Microsoft advocates is inaccurate (recitals 749 to 763 to the contested decision).

105. The Commission finds, on the basis of a series of factual and technical factors, that the proper functioning of a Windows work group network relies on an architecture of client/server and server/server interconnections and interactions, which ensures a transparent access to the core work group server services (for Windows 2000/Windows 2003, this Windows domain architecture can be termed an Active Directory domain architecture)' and that [t]he common ability to be part of that architecture is an element of compatibility between Windows client PCs and Windows work group servers' (recital 182 to the contested decision). The Commission describes that compatibility in terms of interoperability with the Windows domain architecture' (recital 182 to the contested decision) and maintains that such interoperability is necessary for a work group server operating system vendor in order to viably stay on the market' (recital 779 to the contested decision).

106. The Commission further contends that in order that Microsoft's competitors can develop work group server operating systems capable of achieving such a degree of interoperability when the servers on which they are installed are added to a Windows work group, it is essential that they have access to information relating to interoperability with the Windows domain architecture (recitals 183 and 184 to the contested decision). It maintains, in particular, that none of the five methods described by Microsoft of ensuring interoperability between operating systems supplied by different vendors constitutes a sufficient substitute for the disclosure of that information (recitals 666 to 687 to the contested decision).

107. Last, the Commission asserts that, according to the case-law, while undertakings are, as a rule, free to choose their business partners, under certain circumstances a refusal to supply by an undertaking in a dominant position may constitute an abuse of a dominant position within the meaning of Article 82 EC. It maintains that the present case presents a number of exceptional circumstances' which show that Microsoft's refusal to supply was an abuse, even on the strictest hypothesis - and therefore the one most favourable to Microsoft - that the refusal is regarded as a refusal to supply to third parties a licence relating to intellectual property rights (recitals 190 and 546 to 559 to the contested decision). The Commission maintains that it is entitled to take account of exceptional circumstances' other than those identified by the Court of Justice in Joined Cases C241/91 P and C242/91 P RTE and ITP v Commission [1995] ECR I743 (Magill ') and approved by the Court of Justice Case C418/01 IMS Health [2004] ECR I5039, but that in any event those exceptional circumstances are present in this case.

108. Microsoft has argued since the beginning of the administrative procedure that the concept of interoperability employed by the Commission in the present case is not consistent with the concept of full interoperability' envisaged by Directive 91/250 and that it does not correspond to the way in which undertakings organise their computer networks in practice (see, in particular, paragraphs 151 to 157 of the response of 16 November 2001 to the second statement of objections and pages 29 and 30 of the response of 17 October 2003 to the third statement of objections). It claims, in particular, that full interoperability is available to a developer of server operating systems when all the functionality of his program can be accessed from a Windows client operating system' (paragraph 143 of the response of 17 November 2000 to the first statement of objections; see also, to the same effect, pages 29 and 63 of the response of 17 October 2003 to the third statement of objections). Microsoft thus adopts what the Commission describes as a one-way' definition, whereas the Commission relies on a two-way relationship' (recital 758 to the contested decision).

109. In Microsoft's submission, the full interoperability referred to above may be achieved through the disclosure of interface information which it already provides, notably by its MSDN' product or the conferences which it organises for Professional Developers' or through certain other methods available on the market (see, in particular, paragraphs 12, 57 to 63, 73 to 83 and 147 of the response of 17 November 2000 to the first statement of objections; paragraphs 6, 72, 94 to 96, 148 and 149 of the response of 16 November 2001 to the second statement of objections; and page 31 of the response of 17 October 2003 to the third statement of objections).

110. Microsoft claims that the Commission's concept of interoperability means, on the other hand, that its competitors' operating systems must function in every respect as a Windows server operating system. That situation could be achieved only if those competitors were allowed to clone' its products, or some of their features, and if information on the internal mechanisms of its products were communicated to those competitors (see, in particular, paragraphs 7, 20, 27, 144 to 150 and 154 to 169 of the response of 17 November 2000 to the first statement of objections; paragraphs 158 to 161 of the response of 16 November 2001 to the second statement of objections; and pages 10 and 20 of the response of 17 October 2003 to the third statement of objections).

111. Microsoft maintains that a requirement that it disclose such information would amount to an interference with the free exercise of its intellectual property rights and with its incentive to innovate (see, in particular, paragraphs 162, 163 and 176 of the response of 16 November 2001 to the second statement of objections and pages 3, 10 and 11 of the response of 17 October 2003 to the third statement of objections).

112. Last, Microsoft submits that the present case must be appraised in the light of Magill and IMS Health , paragraph 107 above, since the refusal must be analysed as a refusal to grant third parties a licence relating to intellectual property rights and because, accordingly, the contested decision implies compulsory licensing. It maintains, however, that none of the criteria which in its submission were exhaustively accepted by the Court of Justice in those judgments is satisfied in the present case. Microsoft concludes that the refusal at issue cannot be characterised as abusive and that the Commission cannot therefore order it to disclose the interoperability information. In the alternative, Microsoft relies on Case C7/97 Bronner [1998] ECR I7791 and submits that the criteria laid down in that judgment are not satisfied in the present case either.

113. In the second place, it is appropriate to describe the way in which Microsoft structures its argument in the first part of the plea and the way in which the Court will examine that argument.

114. Thus, before developing its actual reasoning (see title (d) of the first part, below), Microsoft puts forward a number of considerations concerning interoperability, which may be summarised as follows. First, it claims that there are five methods of achieving interoperability between Windows client PC and server operating systems and competing server operating systems. Second, it criticises the degree of interoperability required by the Commission in the present case (and claims, in essence, that the Commission's real intention is to allow Microsoft's competitors to clone' its own products or certain of their features) and also the scope of the remedy prescribed in Article 5 of the contested decision.

115. In addition to those various considerations, Microsoft puts forward a series of arguments in order to demonstrate that the communication protocols which it is required to disclose to its competitors pursuant to the contested decision are technologically innovative and that those protocols, or their specifications, are covered by intellectual property rights.

116. Microsoft's actual reasoning in the first part of this plea may be set out as follows:

- the present case must be appraised in the light of the various circumstances recognised by the Court of Justice in Magill , paragraph 107 above, and approved in IMS Health , paragraph 107 above;

- the circumstances in which a refusal by an undertaking in a dominant position to grant third parties a licence covering intellectual property rights may be characterised as abusive are, first, where the product or service concerned is indispensable for carrying on a particular business; second, where the refusal is liable to exclude all competition on a secondary market; third, where the refusal prevents the emergence of a new product for which there is potential consumer demand; and, fourth, where the refusal is not objectively justified;

- none of those four circumstances is present in this case;

- as a subsidiary point, the criteria applicable are those recognised by the Court of Justice in Bronner , paragraph 112 above, which correspond to the first, second and fourth circumstances referred to above and identified in Magill and IMS Health , paragraph 107 above;

- nor, accordingly, is any of the three Bronner criteria, paragraph 112 above, satisfied in the present case.

117. The Court will begin by examining Microsoft's allegations concerning the varying degrees

of interoperability and the scope of the remedy prescribed in Article 5 of the contested decision. The applicant's arguments relating to the existence of five methods of achieving interoperability between its operating systems and its competitors' systems will be analysed when the Court examines what is claimed to be the indispensable nature of the interoperability information. The Court will then deal with Microsoft's arguments concerning the intellectual property rights which in its submission cover its communication protocols or the specifications for those protocols. Finally, the Court will appraise the actual reasoning which Microsoft develops in the first part of the plea and determine, first, the circumstances by reference to which Microsoft's impugned conduct must be analysed and, second, whether those circumstances are present in this case.

b) The varying degrees of interoperability and the scope of the remedy prescribed in Article 5 of the contested decision

Arguments of the parties

118. Microsoft maintains, in essence, that the concept of interoperability on which the Commission bases its conclusion that the refusal to supply interoperability information constitutes an abuse of a dominant position and which serves as the basis for the remedy prescribed in Article 5 of the contested decision is incorrect.

119. Microsoft emphasises that interoperability occurs along a continuum' and that it is not an absolute standard'.

120. While [t]here may well be a minimum level of interoperability that is required for effective competition', that level is not difficult to achieve and there are various ways to achieve interoperability in the sense of having operating systems supplied by different vendors work well together'.

121. Microsoft contends that in the contested decision the Commission adopts a wholly different concept of interoperability from the one set out in Directive 91/250 and used in practice by undertakings when they organise their computer net works. The Commission imagines that it is possible for a server operating system produced by one of Microsoft's competitors to function in all respects' like a Windows server operating system (that is to say, to achieve perfect substitutability' or plug replaceability'). In fact, that level of interoperability could be achieved only if Microsoft's competitors were authorised to clone' its products or certain features of those products. Two server operating systems are able to interoperate in the sense of exchanging information with each other or providing services to each other without necessarily having to be exactly the same'. It is thus important to distinguish the concept of interoperability' from the concepts of cloning' or duplication'.

122. In support of its assertions, Microsoft refers to a report by two computer experts which it had attached to its response of 16 November 2001 to the second statement of objections, in which those experts explain the concepts of tight coupling' and loose coupling' and also explain why efforts to achieve tight coupling' with software products from different designers have failed (annex A.9.2 to the application). Those efforts have failed for both technical and business reasons.

123. Microsoft also states that during the administrative procedure it produced 50 statements from undertakings, both public and private, operating in all industry sectors and from what were then the various Member States. In their statements, those undertakings attest to the high level of interoperability between Windows client and server operating systems and its competitors' server operating systems, due to the use of methods already available on the market. Furthermore, the Mercer reports show that an undertaking's choice of server operating system is not dictated by concerns about interoperability with Windows client and server operating systems.

124. In the reply, when introducing the reasoning designed to show that its communication protocols are protected by intellectual property rights, and also in its answer to one of the written questions

put to it by the Court, Microsoft makes a series of allegations concerning the scope of the remedy prescribed in Article 5 of the contested decision. By those allegations, Microsoft also raises the question of the level of interoperability required by the Commission in the present case.

125. Thus, in the reply, Microsoft claims that there is an inconsistency between the remedy and the standard of interoperability' employed by the Commission in the contested decision for the purpose of assessing the relevance of the alternative means of interoperability'. In its answer to one of the written questions put by the Court, Microsoft asserts that the scope of the disclosure obligation prescribed by Article 5 of the contested decision has been given different interpretations by the Commission.

126. On that last point, Microsoft observes that, at recital 669 to the contested decision, the Commission states that open industry standards fall short of enabling competitors to achieve the same degree of interoperability with the Windows domain architecture as Windows work group server operating systems do'. Microsoft also observes that, at recital 679 to the contested decision, the Commission states that Novell's clientless work group server operating systems cannot use the full capabilities of the Windows client PCs and work group servers in the same way that [Windows] work group server operating systems can'. Microsoft concludes from those statements that the Commission initially envisaged interoperability as being the capability for its competitors to make their products work in exactly the same way as Windows server operating systems. The Commission thus envisages that there be a quasi identity between Windows server operating systems and its competitors' server operating systems.

127. In order for the degree of interoperability thus advocated by the Commission to be achieved (a degree which Microsoft refers to variously as plug replacement', plug-replaceability', drop-in', functional equivalent' and functional clone'), Microsoft would have to disclose much more information than that referred to in Article 5 of the contested decision, notably information on the internal mechanisms of its server operating systems (including algorithms and decision rules').

128. Microsoft submits that the Commission adopted a second approach and advocated a narrow interpretation of Article 5, taking the view that that article required the applicant to license to its competitors only on the wire' communication protocols. In support of that assertion, Microsoft relies on the fact that at the hearing in the interim measures proceedings the parties which had then been granted leave to intervene in support of the form of order sought by the Commission stated that they were not interested in obtaining access to information about the internal mechanisms of the Windows server operating systems. Furthermore, the Commission confirmed in the defence and the rejoinder that it did not propose to allow Microsoft's competitors to clone' the file and print services or group and user administration services delivered by the Windows server operating systems. However, the thousands of pages of specifications which Microsoft communicated to the Commission pursuant to the contested decision will none the less allow its competitors to copy certain features' of its products that it developed through its own research and development efforts. Thus, for example, by having access to the DRS (Directory Replication Service) protocol, third parties would be able to reverse-engineer other parts of the Windows server operating system that use Active Directory.

129. Taking a third approach, in October 2005, and thus several months after the closure of the written procedure in the present case, the Commission again interpreted Article 5 of the contested decision as meaning that the information that Microsoft was to disclose must allow its competitors to create functional equivalents' of the Windows server operating systems or, in other words, systems that were perfectly substitutable' for those systems. Microsoft again asserts that such an interpretation of Article 5 requires that it give access to information on the internal mechanisms of its Windows server operating systems.

130. At the hearing, Microsoft discussed the multimaster replication' mechanism at length and,

in that context, submitted arguments to the same effect as those set out above.

131. Microsoft explained that in the past directory services were executed by a single server which was very large and very expensive. Nowadays those services are generally carried out by a multitude of small, less expensive servers situated in different places and linked in an ensemble which Microsoft illustrated on various slides shown at the hearing by a blue bubble'. Microsoft submitted that the software installed on the servers forming part of that blue bubble' and involved in supplying directory services must share the same internal logic so that the servers are able to work together as though they were a single unit. Each of those servers must, in effect, presume that the others will react in exactly the same way in response to a given request. Furthermore, the communications between servers operating under a given operating system within the blue bubble' are of a very special nature.

132. The multimaster replication mechanism allows any change made to the data contained on a server acting as a domain controller within the blue bubble' (for example, a change in a user's password) to be automatically replicated on all the other servers acting as domain controller and belonging to the same blue bubble'.

133. The first company to succeed in developing such a mechanism was Novell, in 1993. However, the mechanism in its NetWare server operating system allows only a maximum of 150 domain controllers to function in a perfectly synchronised manner within a blue bubble', whereas the mechanism used by Active Directory in the Windows 2000 Server system can deal with several thousand domain controllers simultaneously.

134. With further reference to the multimaster replication mechanism, Microsoft reiterated that the contested decision was designed to allow its competitors to develop server operating systems containing functional equivalents' of its own Windows server operating systems. The decision intended, in particular, that servers implementing directory services on which a non-Microsoft server operating system is installed would be able to replace, within a blue bubble', existing servers on which a Windows server operating system using Active Directory is installed. In order for such a result to be capable of being achieved, however, non-Microsoft server operating systems would have to function in exactly the same way - and therefore share the same internal logic - as Windows server operating systems using Active Directory. That would be possible only if Microsoft's competitors had information relating to the internal mechanisms of its server operating systems, including certain algorithms, namely information going well beyond interoperability information within the meaning of the contested decision.

135. Multimaster replication could not therefore intervene between servers operating under operating systems from different suppliers. For example, a server on which a Sun operating system is installed could not be placed within a blue bubble' containing servers operating under a Novell operating system or using Active Directory. Microsoft explained, however, that since Active Directory relies on standard protocols such as LDAP (Lightweight Directory Access Protocol), it is capable of functioning, within the same computer network, with the directory services provided by its competitors' server operating systems. It makes no difference whether that interoperability operates between two separate servers or between one server and a group of servers within a blue bubble'.

136. The Commission rejects Microsoft's claims.

137. It begins by referring to the definition of interoperability information' and protocols' in Article 1(1) and (2) of the contested decision. According to the decision, Microsoft is required to provide technical documentation, called specifications', which describes those protocols in detail. The specifications show how to format the messages, when to originate them, how to interpreter them, cope with incorrect messages, etc.'. It is essential to distinguish that technical documentation

from the source code of Microsoft's products, and a competitor wishing to write a server operating system which understands' Microsoft's protocols will have to ensure that its product includes source code that implements the protocol specifications. However, two programmers implementing the same protocol specifications will not write the same source code and their programs will perform differently (recitals 24, 25, 698 and 719 to 722 to the contested decision). From that point of view, protocols may be compared with a language whose syntax and vocabulary are the specifications, in so far as the mere fact that two persons learn the syntax and vocabulary of the same language does not guarantee that they will use it in the same way. Furthermore, the fact that two products provide their services through compatible protocols says nothing about how they provide the services'.

138. The Commission asserts that Microsoft advocates a narrow definition of the concept of interoperability, and one that is incompatible with Directive 91/250. It refers to recitals 749 to 763 to the contested decision and observes that Microsoft adduces no new argument by comparison with the assertions already made during the administrative procedure. At the hearing, the Commission stated that it had relied on that directive not only in order to demonstrate the importance of interoperability in the software sector, but also for the purpose of appraising the concept of interoperability.

139. The Commission also recognises that there is a whole range of possible degrees of interoperability between PCs running Windows and work group server operating systems and that some interoperability' with the Windows domain architecture is already possible. It did not fix a priori a given level of interoperability which is indispensable to the maintenance of effective competition on the market but, following its investigation, it established that the degree of interoperability that competitors could achieve using the available methods was too low to enable them to remain viably on the market. The Commission refers to the section of the contested decision in which it shows that interoperability is the key factor driving the uptake of Microsoft's work group server operating systems' (recitals 637 to 665 to the contested decision) and observes that it became apparent that those methods did not permit the level of interoperability required by customers [to be achieved] in an economically viable manner'.

140. In the rejoinder, the Commission contends that, in the contested decision, it does not conclude that it is indispensable that Microsoft's competitors be allowed to reproduce its interoperability solutions'. What matters is that they are able to achieve an equivalent degree of interoperability by their own innovative efforts.

141. Last, the Commission submits that, contrary to Microsoft's contention, the contested decision is not designed to enable non-Microsoft server operating systems to function in all respects like a Windows server operating system and, consequently, to permit its competitors to clone' the features of its products. The contested decision is in fact intended to enable those competitors to develop products which w[ould] function differently [but would be] able to understand the messages conveyed by Microsoft's relevant products'. Furthermore, the interoperability information that Microsoft must disclose to its competitors under the contested decision will not enable them to create exactly the same products as Microsoft's products.

142. On that point, the Commission stated at the hearing that it was necessary to distinguish the concept of functional equivalent' from that of functional clone'. A functional equivalent' is not a system operating identically to the Windows work group server operating system which it replaces but rather a system that can provide the appropriate response to a specific request under the same conditions as that Windows operating system and can make a Windows client PC or server react to its messages in the same way as if they came from that Windows operating system.

143. The Commission submits that tight coupling' and loose coupling' are not clearly-defined technical terms, especially in the field of operating systems software. In any event, it does not agree that the tightly-coupled interface details' referred to in the report in annex A.9.2 are innovative.

144. The Commission has already discussed the customer statements submitted by Microsoft during the administrative procedure, at recitals 357, 358, 440 to 444, 511, 513, 595, 602, 628 and 707 to the contested decision. Those statements, which date back to 2000 and 2001, relate in essence to undertakings which had to a large extent adopted Windows as the standard' for their work group networks. As for the Mercer reports, the Commission submits that it has already stated at recital 645 to the contested decision that the data analysed in those reports suggest precisely the opposite of what Microsoft claims.

145. The Commission proceeds to reject the argument which Microsoft derives from the alleged inconsistency between the remedy prescribed in Article 5 of the contested decision and the standard of interoperability used in the decision to appraise the relevance of the alternative means of interoperability'.

146. The Commission professes to find it difficult to understand the meaning of that argument. In the excerpts from recitals 669 and 679 to the contested decision which Microsoft cites, the Commission does not reject certain alternatives to disclosure of interoperability information on the ground that those alternatives do not permit the cloning' of Microsoft's products, or certain features of those products, but merely notes that those alternatives provide a lesser degree of interoperability with Microsoft's dominant products (a lesser ability to access the features of [those] products) than Microsoft's own offering enjoys'. What is at stake, therefore, is the ability to work with' the Windows environment.

147. It is clear from recitals 568 to 572, 740 and 749 to 763 to the contested decision, moreover, that the decision concerns only disclosure of interface specifications. Microsoft does not substantiate to the requisite legal standard its assertion that, by having access to its communication protocols specifications, third parties would be able to reverse engineer other parts of the Windows server operating system that use Active Directory.

148. At the hearing, the Commission disputed the merits of the assertions which Microsoft made on the basis of the multimaster replication mechanism. It confirmed that the contested decision was intended to ensure, in particular, that servers running a work group server operating system produced by one of Microsoft's competitors would be able to form part of a blue bubble' consisting of servers on which a Windows work group server operating system is installed and that, accordingly, the disclosure obligation prescribed in Article 5 of the contested decision would also cover information on communications between servers within that blue bubble'. However, it rejected Microsoft's assertion that that purpose could be achieved only by providing access to information on the internal mechanisms of its products.

149. SIIA emphasises the crucial role that interoperability plays in the software sector. There is no doubt that consumers place great significance on the fact that computer programs are interoperable with the quasi-monopolistic products represented by Windows client PC operating systems. In normal competitive circumstances, software developers have every incentive to favour interoperability between their products and their competitors' products and to disclose interoperability information. They thus compete on the basis of normal' factors such as price and product security, processing speed or innovative functionality. Microsoft, on the other hand, uses its quasi-monopoly position on certain markets to leverage that position into adjacent markets. More specifically, Microsoft restricts its competitors' capacity to achieve interoperability with its quasi-monopolistic' products by failing to comply with industry standard protocols, by making minor (and unnecessary) additions' to them and by then refusing to disclose information about those extended protocols' to its competitors.

150. SIIA also disputes Microsoft's assertion that the contested decision seeks to allow Microsoft's competitors to develop server operating systems that function in all respects like a Windows server operating system. The purpose of the contested decision is to allow non-Microsoft work group server operating systems to interoperate with Windows client PC and work group server operating systems

in the same way as Windows work group server operating systems do.

Findings of the Court

151. In the various arguments set out at paragraphs 118 to 135 above, Microsoft raises two main issues: first, the degree of interoperability required by the Commission in the present case; and, second, the scope of the remedy prescribed in Article 5 of the contested decision.

152. Those two issues are intrinsically linked, since, as is apparent in particular from recital 998 to the contested decision, the purpose of the remedy is to require Microsoft to disclose what in the Commission's contention it has abusively refused to disclose, and to disclose it both to Sun and to its other competitors. The scope of the remedy must therefore be assessed in the light of the abusive conduct in which Microsoft is found to have engaged, which depends in particular on the degree of interoperability envisaged by the Commission in the contested decision.

153. For the purpose of deciding those issues, the Court will begin by reviewing a series of factual and technical findings made in the contested decision. It was on the basis of its examination of, in particular, the way in which Windows work group networks are organised and the links between the various operating systems within those networks that the Commission evaluated the degree of interoperability required in the present case and thus concluded that access to the interoperability information was indispensable. The Court will also define at the outset the nature of the information at which the contested decision is directed.

- Factual and technical findings

154. At recitals 21 to 59, 67 to 106 and 144 to 184 to the contested decision, the Commission makes a series of factual and technical findings concerning the products and technologies concerned.

155. The Court notes at the outset that Microsoft does not, in effect, dispute those various findings. To a large extent, moreover, they are based on statements made by Microsoft during the administrative procedure (especially in its responses to the three statements of objections) and also on documents and reports published on its Internet site. Furthermore, the technical presentations by the parties' experts at the hearing, including Microsoft's, confirm the substance of those findings.

156. In the first place, the Commission, after observing that the word interoperability' could be used in different contexts by technicians and lent itself to different uses, cites, first of all, the 10 th , 11 th and 12 th recitals in the preamble to Directive 91/250 (recital 32 to the contested decision).

157. Those recitals read as follows:

... the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;

... the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as interfaces;

... this functional interconnection and interaction is generally known as interoperability;... such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.'

158. The Commission then states that Microsoft criticises it for adopting in the present case a concept of interoperability that goes beyond what is contemplated by Directive 91/250. None the less, the Commission and Microsoft are agreed that interoperability is a matter of degree and that various software products in a system interoperate (at least partially) when they are able to exchange

information and mutually to use the information which has been exchanged' (recital 33 to the contested decision).

159. In the second place, the Commission observes that nowadays computers increasingly operate in conjunction with other computers in a network. Depending on the specific tasks that they want to carry out, client PC users use both the computing capability of their own client PC and at the same time the capabilities of the various types of more powerful multi-user' computers, namely servers', which they access indirectly through their client PCs (recital 47 to the contested decision). In order to ensure easy and efficient access to network resources', the applications must be distributed across several computers, each of which hosts different components that interoperate', and the computers linked within the network must be integrated into a consistent distributed computing system' (recital 48 to the contested decision). Last, [s]uch a system would ideally make the complexity of the underlying hardware and software transparent (that is to say, invisible) to the user and distributed applications alike, so that users and applications can easily find their way through this complexity in order to access computing resources' (recital 48 to the contested decision).

160. In the third place, the Commission emphasises that the present case focuses on work group server services', namely the basic infrastructure services used by office workers in their day-to-day work (recital 53 to the contested decision). It identifies, more particularly, the following three types of services: first, the sharing of files stored on servers; second, the sharing of printers; and, third, the administration of groups and users. The third type of services involves in particular ensuring secure access to network resources and the secure use of those resources, notably, first by authenticating users and then by checking that they have the right to perform a particular action (recital 54 to the contested decision).

161. Those different services, moreover, are closely interrelated and may in fact to a large extent be regarded as one and the same... service', but viewed from two different perspectives, namely that of the user (file and print services) and that of the network administrator (group and user administration services) (recitals 56 and 176 to the contested decision). Although Microsoft maintains in its reasoning relating to the elimination of competition that the Commission adopted an artificially narrow' definition of the relevant product market by including only the three types of services referred to above (see paragraphs 443 to 449 below), it does not dispute the existence of such links between those services.

162. In the light of those factors, the Commission defines work group server operating systems' as operating systems designed and marketed to deliver file and print services, and also group and user administration services, collectively to relatively small numbers of client PCs linked together in small to medium-sized networks (recitals 53 and 345 to the contested decision). In order to store and query the group and user administration information effectively, those operating systems generally rely on directory service' technologies (recital 55 to the contested decision).

163. In the fourth place, the Commission examines the way in which interoperability is achieved in Windows work group networks' (recitals 144 to 184 to the contested decision), namely group[s] of Windows Client PCs [on which a Windows client PC operating system is installed] and Windows Work Group Servers [on which a Windows work group server operating system is installed] linked together via a computer network' (Article 1(7) of the contested decision).

164. To that end, the Commission focuses on Microsoft's Windows 2000' generation of operating systems, while observing that the essential characteristics of those systems are similar to those of the next generation of systems (namely the Windows XP Home Edition' and Windows XP Professional' operating systems for client PCs and the Windows 2003 Server' operating system for servers) (footnote 182 to the contested decision).

165. First, the Commission sets out a series of considerations concerning the group and user administration services (recitals 145 to 157 to the contested decision). Within the Windows work group networks, the Windows domains' lie at the core of the provision of those services; the Commission characterises those domains as administrative units' whereby the Windows work group server operating systems administer client PCs and work group servers (recitals 145 and 146 to the contested decision). In particular, each resource' (computer, printer, user, application, etc.) in a Windows domain has one domain account', which defines its identity for the whole domain, and within the same Windows domain there is a single user logon', in the sense that when the user logs on to a domain resource (generally his client PC) he is recognised' by all the other resources in the same domain and does not need to enter his name and password again (recital 146 to the contested decision).

166. The Commission emphasises the importance of the role played within the Windows domains by servers known as domain controllers', in contrast to other servers, which are known as member servers' (recital 147 to the contested decision). Domain controllers are responsible for storing domain accounts and the related information. In other words, they act as switchboard operators' of the Windows domain (recital 147 to the contested decision).

167. The Commission emphasises, more particularly, the key role played by Active Directory and the changes which the introduction of that full-fledged directory service' to the Windows 2000 Server operating system has made to the way in which domain controllers relate to each other in Windows 2000 domains by comparison with the earlier Windows operating systems, namely those of the Windows NT generation (recital 149 to the contested decision).

168. The Windows NT 4.0 operating system had primary domain controllers and backup domain controllers. In that system, changes to domain accounts could be made only by the primary domain controller and were then periodically and automatically propagated to all backup domain controllers. In a Windows 2000 domain, on the other hand, all domain controllers operate as peers', so that it is possible to make changes to domain accounts an any of them, those changes then being automatically propagated to the other domain controllers (recital 150 to the contested decision). Those operations are carried out by means of new synchronisation protocols, which are different from those used by the Windows NT 4.0 operating system.

169. Another new feature of Windows 2000 domains is that they can be organised hierarchically, with trees' of Windows 2000 domains linked to each other by automatic trust relationships, while several trees' can then be linked by trust relationships in a forest' (recital 151 to the contested decision). Windows 2000 domain controllers can be set up as global catalog servers', which means that they store not only information on the resources available on the domains which they control but also a summary' of all the resources available in the forest', namely the Global Catalog'. The data stored in the global catalog are updated by various protocols.

170. The Commission goes on to explain that the move from Windows NT technology to Windows 2000 technology has also entailed changes with respect to the security architecture of Windows work group networks (recitals 152 to 154 to the contested decision). In particular, in the Windows 2000 domain authentication is based on the Kerberos' protocol and no longer on the NTLM (NT LAN Manager) protocol, which provides a series of advantages as regards connection speed, mutual authentication and trust management. The Key Distribution Centre' foreseen by the Kerberos protocol is integrated with other Windows 2000 security services running on the domain controller and uses the domain's Active Directory as its security account database' (recital 153 to the contested decision). However, the Kerberos protocol implemented in the Windows 2000 Professional and Windows 2000 Server operating systems is not the standard version developed by the Massachusetts Institute of Technology (MIT), but a version extended' by Microsoft (recitals 153 and 154 to the contested decision).

171. Last, the changes brought about by the move from Windows NT technology to Windows 2000 technology

and Active Directory include the fact that a number of functions are integrated both in the Windows 2000 Professional operating system and in the Windows 2000 Server operating system, in order to simplify the administration of Windows client PCs in Windows domains (recitals 155 to 157 to the contested decision). Those functions - the Commission cites, more particularly, the Group Policy' and Intellimirror' functions - are significantly enhanced', or even available solely, in a Windows 2000 domain managed from a Windows 2000 domain controller using Active Directory (recital 156 to the contested decision). The Commission notes that, according to Microsoft, [Group Policy was] a feature of Windows 2000... that allow[ed] administrators centrally to manage collections of users, computers, applications and other network resources instead of managing [those] objects on a one-by-one basis'. Groups may be defined locally for a given computer or defined for the whole Windows domain, while Intellimirror, which is available only in a Windows 2000 domain, allows users to have their working environment' (data, software, etc.) available with their personal settings, whether they are connected to the network or not and wherever they are on the network (recital 157 to the contested decision).

172. Second, the Commission sets out a series of considerations concerning file and print services (recitals 158 to 164 to the contested decision).

173. In particular, modern work group server operating systems provide support for distributed file systems' and at the end of the 1990s Microsoft marketed such a system, called Dfs' (Distributed File System), in the form of an add-on that could be installed on client and server PCs running Windows NT 4.0. Windows 2000 is the first generation of Microsoft products to include native support for Dfs both on the client PC and the work group server side (recitals 161 to 163 to the contested decision).

174. Under Windows 2000, Dfs may be installed either in stand-alone' mode or domain-based' mode, but the latter mode, which provides a number of advantages in terms of intelligent' retrieval of the Dfs information from client PCs, is available only in Windows domains and is enhanced by the presence of domain controllers running Active Directory (recital 164 to the contested decision).

175. Third, the Commission explains that Microsoft has developed its own set of distributed object-based system technologies, encompassing COM (Component Object Model) and DCOM (Distributed Component Object Model) technologies (recital 166 to the contested decision). Those two technologies are closely interrelated and COM, which is implemented in both Windows client PC operating systems and Windows work group server operating systems, links those two operating systems into a consistent platform for distributed applications (recital 166 to the contested decision). In its response to the third statement of objections, Microsoft stated that COM [was] fundamental to the architecture of Windows operating systems, with the result that many interfaces in Windows [were] COM-based' (recital 167 to the contested decision). More particularly, many interactions between client PCs and the Active Directory service in Windows work group servers involve COM/DCOM. Furthermore, the DCOM protocol' is involved in client/server communications whereby Windows servers deliver authentication services or file services to Windows client PCs (recital 167 to the contested decision).

176. Fourth, the Commission explains that in many ways Microsoft encourages natural migration' from its Windows NT operating systems to its Windows 2000 operating systems, both by its customers and by software developers (recitals 168 to 175 to the contested decision).

177. Thus, in a Windows domain it is possible to upgrade' computers using previous versions of Windows by having them migrate' to Windows 2000 without using Active Directory. However, customers can take full advantage of the upgrade' only by installing a Windows 2000 domain running Active Directory in native mode', which means that all the domain controllers in the domain concerned migrate' to Windows 2000 and Active Directory. The work group servers of the domain which do not act as domain controllers must also be compatible with Windows 2000 (which assumes, in particular,

that they implement the Kerberos protocol, in the version extended by Microsoft). When a Windows 2000 domain is installed in mixed mode' (when the primary domain controller has migrated' to Windows 2000 but some of the backup domain controllers are still running Windows NT), the user does not benefit from all the advanced features of the Windows 2000 domain. In particular, the user must forego most of the additional flexibility that Active Directory brings to the management of groups of users. Once the user switches his primary controller to native mode he can no longer use as a domain controller a server that is interoperable only with the Windows NT 4.0 generation of Microsoft products (including work group servers running non-Microsoft systems).

178. Software developers are strongly encouraged by Microsoft to use the new features of the Windows operating systems, in particular Active Directory, notably by means of the certification programmes which it has set up (recitals 171 to 175 to the contested decision).

179. Fifth, the Commission draws a series of conclusions (recitals 176 to 184 to the contested decision).

180. It reiterates, first of all, that in Windows technologies file and print services and group and user administration are delivered to users of Windows client PCs as a set of interrelated services'. By way of illustration, the Commission states that, in a Windows 2000 domain, the server message block (SMB) client and server underlying [Dfs], [DCOM], LDAP authentication,... all use [Microsoft] Kerberos automatically for authentication' (recital 176 to the contested decision). Furthermore, besides authentication, the authorisation process depends on the ability to create, modify and interpret Access Control Lists' (ACL), which involves communication with the domain controllers of the domain (recital 176 to the contested decision).

181. Next, the Commission states that, in order to be able to deliver their services transparently' to client PC users, Windows work group servers use specific pieces of software code in the Windows client PC operating system (recital 177 to the contested decision). In that regard, the Commission observes, in particular, that Microsoft stated that Dfs [had] a local component that [would] run even if a Windows 2000 Professional client [PC] [was] operating in standalone mode' and that Windows 2000 Professional contain[ed] a client code that [could] be used to access Active Directory' (recital 177 to the contested decision). Quoting the author of a work entitled Understanding Active Directory Services' published by Microsoft Press, the Commission also states that Active Directory is completely - often invisibly - integrated into the [Windows client PC]' (recital 177 to the contested decision).

182. The Commission emphasises that it is important, however, that the interconnection and interaction involving the Windows 2000 Professional source code should not be viewed solely as being intended to enable a particular Windows work group server to communicate with a particular Windows client PC. It is more accurate to describe that interconnection and that interaction in terms of interoperability within a computer system encompassing several Windows client PCs and several Windows work group servers, all linked together in a network. Interoperability within such a computer system thus has two inseparable components, namely client/server interoperability and server/server interoperability (recital 178 to the contested decision).

183. In many cases, moreover, there is symmetry between server/server and client/server interconnection and interaction' (recital 179 to the contested decision). The Commission mentions, by way of example, the fact that the same application program interface' (API), namely ADSI' (Active Directory Service Interface), is implemented both on Windows 2000 Professional and Windows 2000 Server to handle access to Active Directory domain controllers. A further example given by the Commission is the fact that, in a Windows domain, the Kerberos protocol, as extended by Microsoft, is used for authentication both between a Windows client PC and a Windows work group server and between several Windows work group servers.

184. In certain circumstances, servers will query other servers on behalf of a client PC' (recital 180 to the contested decision). By way of example, the Commission mentions, in particular, Kerberos delegation', a functionality present in the Windows 2000 Server operating system which allows a server to borrow the identity of a client PC and to request a service from another server on behalf of that client PC. Thus servers quite frequently address requests to other servers and therefore act as client PCs (see also footnote 51 to the contested decision).

185. Some client/server communications build on the expectation that certain server/server communications have already taken place. In particular, when a client PC running Windows 2000 Professional queries the domain controller in a Windows 2000 domain, the client PC will expect some preparatory coordination to have taken place between the domain controllers running Windows 2000 Server' (recital 181 to the contested decision). According to the Commission, [that] includes, for example, both the fact that domain controllers will hold a full copy of the Active Directory data, which are kept updated through synchronisation protocols[,] and the fact that Global Catalog servers are able to store information about computers of the forest that are outside their domain, which is possible through various Global Catalog-related products' (recital 181 to the contested decision). In such a situation, the server/server communication is logically linked' to the client/server communication, since it occurs in preparation for the client/server communication.

186. It follows from all of the foregoing matters - which Microsoft does not substantially contest and the correctness of which was largely confirmed by the technical presentations made at the hearing - that, as the Commission correctly observes at recital 182 to the contested decision, Windows work group networks rely on an architecture' of both client/server and server/server interconnections and interactions and that that architecture' - which the Commission characterises as Windows domain architecture' - ensures transparent access' to the main services provided by work group servers.

187. Those various factors also show that, as found at various points in the contested decision (see, in particular, recitals 279 and 689 to the contested decision), those interconnections and interactions are closely interlinked.

188. In other words, the proper functioning of the Windows work group networks relies both on client/server communication protocols - which, by their nature, are implemented both in Windows client PC operating systems and in Windows work group server operating systems - and on server/server communication protocols. As the Commission explained at the hearing, for numerous tasks, server/server communication protocols appear, in fact, as extensions' of the client/server communication protocols. In certain cases, a server acts as a client PC vis-à-vis another server (see paragraph 184 above). Likewise, while it is true that certain communication protocols are implemented only in Windows work group server operating systems, the fact remains that, from a functional point of view, they are linked to the client PCs. The Commission refers on that point, without being contradicted by Microsoft, to the Global Catalog-related protocols and to the synchronisation and replication protocols between domain controllers.

189. The Court therefore finds that the Commission is quite correct to conclude that the common ability to be part of [the Windows domain architecture] is a feature of compatibility between Windows client PCs and Windows work group servers' (recital 182 to the contested decision).

190. Finally, it is necessary to bear in mind the major role played by directory services on the work group server operating systems market. Microsoft itself observes in the reply that on that market the directory service is a key competitive feature responsible in large part for the success of particular products' and emphasises, in particular, that Active Directory is... at the heart of Windows server operating systems', after stating that [f]or both file and print services and user and group administration services, it [is] important to know with precision which user [is] entitled to access which network resources'.

191. Active Directory logs all network object information and allows it to be administered centrally. It fully integrates administration and user authentication and access control functionalities and thus ensures the security of the information. In addition, Active Directory uses the multi-master replication mechanism.

- The nature of the information referred to in the contested decision

192. The first abusive conduct in which Microsoft is found to have engaged is its refusal to supply the interoperability information to its competitors and to allow its use for the purpose of developing and distributing work group server operating system products between October 1998 and the date of the contested decision (Article 2(a) of the contested decision).

193. By way of remedy for that refusal, the Commission ordered Microsoft, inter alia (Article 5(a) of the contested decision), to do the following:

Microsoft ... shall, within 120 days of the date of notification of [the contested decision], make the interoperability information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the interoperability information by such undertakings for the purpose of developing and distributing work group server operating system products[.]'

194. It is appropriate to bear in mind the way in which the Commission defined and assessed the principal concepts of relevance to the present issues.

195. Thus, in Article 1(1) of the contested decision, it defines interoperability information' as the complete and accurate specifications for all the protocols [that are] implemented in Windows work group server operating systems and that are used by Windows work group servers to deliver file and print services and group and user administration services, including the Windows domain controller services, Active Directory services and Group Policy services, to Windows work group networks'.

196. Protocols' are described by the Commission as rules of interconnection and interaction between various pieces of software within a network (recital 49 to the contested decision). More specifically, the protocols at issue in the present case are defined as a set of rules of interconnection and interaction between various instances of Windows work group server operating systems and Windows client PC operating systems running on different computers in a Windows work group network' (Article 1(2) of the contested decision).

197. The Court notes that Microsoft does not contest the Commission's concept of protocols'. On the contrary, in the application Microsoft itself describes protocols as enabling computers connected via a network to exchange information to accomplish predefined tasks'. Indeed, in a report by one of its experts, Mr Madnick, annexed to the applicant's observations on the statements in intervention, the applicant draws a distinction between two categories of communication protocols, depending on whether they are simple' or complex' and mentions the DRS protocol as coming within the second category (annex I.3 (Madnick, Response to Mr Ronald S. Alepin's Annex on Interoperability and the FSFE's Submission')). However, in making that distinction Microsoft does not seek to challenge the correctness of the definition referred to above, but only to establish that complex protocols govern interactions between various similar elements of a network which deliver a joint service in close coordination and that they reveal' much more detailed and more valuable information than simple protocols.

198. Specifications' are not defined in the operative part of the contested decision. However, it is common ground that specifications take the form of detailed technical documentation, which, indeed, reflects the way in which that concept is generally understood in the computer industry.

199. At recital 24 to the contested decision, the Commission states that it is important to distinguish the concept of specifications' from the concept of implementation', in the sense that [a] specification is a description of what the software product must achieve, whereas the implementation relates to the actual code that will run on the computer' (see, to the same effect, recital 570 to the contested decision). In other words, specifications describe the interfaces by means of which a given element of a computer system can use another element of the same system. They describe, in particular, and in a very abstract manner, what functionalities are available and the rules which allow those functionalities to be called up and received.

200. At recital 571 to the contested decision, the Commission states that it is possible to provide interface specifications without disclosing implementation details, and that it is common practice to do so in the computer industry, especially when open interoperability standards are adopted (see also, on that point, recital 34 to the contested decision). In its statement in intervention, SIIA puts forward arguments to the same effect.

201. A number of factors confirm the correctness of those different assertions. First, the practice to which the Commission refers is supported by a set of examples - not disputed by Microsoft - which are mentioned in the contested decision, namely the POSIX 1' specifications (recitals 42 and 88 to the contested decision), the Java' specifications (recital 43 to the contested decision), the specifications of the Kerberos version 5' protocol (recital 153 to the contested decision), the specifications of the NFS' (Network File System) protocol developed by Sun (recital 159 to the contested decision) and the CORBA' specifications drawn up by the Object Management Group (recital 165 to the contested decision). Second, as the Commission states at recital 571 to the contested decision, under the MCPP set up pursuant to the United States settlement, licensees are not granted access to Microsoft's source code, but to specifications of the relevant protocols.

202. Nor does Microsoft call in question, other than quite incidentally, the abovementioned distinction between the concepts of specifications' and implementation', as it merely makes a general reference in footnote 74 to the application to an opinion drawn up by its experts Mr Madnick and Mr Nichols, which was submitted to the Commission during the administrative procedure and is annexed to the application (annex A.12.2 to the application). For the reasons stated at paragraphs 94 and 97 above, the Court considers that it cannot take that opinion into account. Furthermore and in any event, the argument in that opinion is largely based on an incorrect premiss, namely, that the degree of interoperability required by the Commission in the present case means that Microsoft's competitors must be capable of reproducing or cloning' Microsoft's products or certain of their functionalities (see paragraphs 234 to 239 below).

203. The Court notes, moreover, that in the contested decision the Commission expressly states that the abusive refusal to supply imputed to Microsoft concerns only the specifications of certain protocols and not the source code (see, in particular, recitals 568 to 572 to the contested decision).

204. To the same effect, the Commission emphasises on a number of occasions that it is not its intention to order Microsoft to disclose its source code to its competitors. Thus, at recital 999 to the contested decision, it states that the term specifications makes clear that Microsoft should not be required to disclose its own implementation of [those] specifications, that is to say, its own source code'. Likewise, it observes at recital 1004 to the contested decision that the decision does not contemplate compulsory disclosure of Windows source code as [that] is not necessary to achieve the development of interoperable products'. At the same recital, the Commission states that [t]he disclosure order should concern the interface specifications only'.

205. In an opinion entitled Innovation in Communication Protocols that Microsoft is ordered to license to its server operating system competitors', enclosed as annex C.4 to the reply, Mr Lees, one of Microsoft's experts, himself draws a distinction between the protocols used for communications

between servers and... the algorithms/decision rules that operate internally on each server', before observing that it is the protocols that have to be disclosed pursuant to Article 5 of the contested decision. In his opinion, Mr Lees focuses on the DRS protocol, used for the multimaster replication mechanism, and states that it represents one of numerous protocols to which Microsoft grants its competitors access in application of the contested decision.

206. It follows that the information to which the contested decision refers constitutes a detailed technical description of certain rules of interconnection and interaction that can be used within the Windows work group networks to deliver work group services. That description does not extend to the way in which Microsoft implements those rules, namely, in particular, to the internal structure or to the source code of its products.

- The degree of interoperability required by the Commission in the contested decision

207. The Commission adopted a two-stage approach in determining whether the information at issue was indispensable. It first examined the degree of interoperability with the Windows domain architecture that the work group server operating systems supplied by Microsoft's competitors must achieve in order for those competitors to be able to remain viably on the market. It then proceeded to determine whether the interoperability information to which Microsoft refused access was indispensable to the attainment of that degree of interoperability.

208. The Court will examine below the degree of interoperability required by the Commission in the contested decision. At this stage, however, it will not examine the question as to whether the Commission was justified in concluding that Microsoft's competitors could viably remain on the market only if their products were capable of achieving that degree of interoperability. That question, together with the other aspects of the Commission's reasoning as described above, will be appraised when the Court examines what the Commission alleges to be the indispensable nature of the information at issue (see paragraphs 369 to 436 below).

209. It is appropriate, first of all, to summarise briefly the arguments of the main parties.

210. Microsoft shares the Commission's view that interoperability is a matter of degree' (recital 33 to the contested decision).

211. It contends, however, that the degree of interoperability required by the Commission in the present case is inappropriate in that it goes beyond the concept of full interoperability' envisaged by Directive 91/250. That concept - which Microsoft also describes as multivendor interoperability' - requires only that different developers' operating systems are capable of functioning correctly' together.

212. More specifically, Microsoft claims that the Commission's real intention is that competing operating systems for servers should function in every respect as a Windows server operating system. It refers variously to plug replacement', plug-replaceability', drop-in', functional equivalent' and functional clone', and asserts that such a degree of interoperability could be achieved only if it allowed its competitors to clone' or to reproduce' its products (or features of those products) and communicated to those competitors information on the internal workings of its products.

213. Last, Microsoft maintains that multivendor interoperability may be achieved by the methods already available on the market.

214. The Court notes that Microsoft's position as thus described corresponds to the position which it maintained throughout the administrative procedure.

215. Thus, in its response of 17 November 2000 to the first statement of objections, Microsoft states that the degree of interoperability apparently required by the Commission is not consistent with Community law and does not exist on the market. Relying, more particularly, on the 10 th

recital (in the English and French versions) to Directive 91/250, the applicant submits that full interoperability is available to a developer of server operating systems when all of the functionality of his program can be accessed from a Windows client operating system' (paragraph 143 of the response; see also recital 751 to the contested decision). The applicant maintains that the Commission wrongly defines interoperability much more broadly when it considers that, for there to be interoperability between two software products, all the functionalities of both products must function correctly. That, in Microsoft's contention, is tantamount to requiring plug-replaceability' or cloning' (paragraph 144 of the response). Microsoft criticises the fact that the Commission thus subscribes to the position of Sun, according to which it should be possible to replace, within the computer network of an undertaking composed of client PCs running Windows, a server running Windows 2000 by a server with a Solaris operating system, without that entailing a reduction in the functionalities to which users have access (paragraphs 145 and 162 of the response). In order to achieve full interoperability, it is sufficient that Microsoft should disclose the interfaces exposed by the Windows client PC operating systems which developers of competing server operating systems need in order to make the functionalities of those systems available to users of Windows client PCs.

216. Likewise, in its response of 16 November 2001 to the second statement of objections, Microsoft, reiterating, in effect, the same reasoning which it had developed in its response to the first statement of objections, claims that the Commission's criticisms are based on an incorrect definition of interoperability' (paragraphs 149 to 163 of the response). It repeats, in that regard, that Directive 91/250 does not require plug-replaceability' but full interoperability, and that the disclosure of information which it already makes is sufficient to achieve that.

217. In its response of 17 October 2003 to the third statement of objections, Microsoft again adopts the same effective line of reasoning and reiterates that the Commission considers that its competitors must have access to all the information necessary to be able to create copies of the Windows server operating systems' and that it thus treats interoperability in the same way as cloning' (pages 29 to 32 of the response). It contends that interoperability contemplates the availability of sufficient information about the interfaces exposed by Windows client [PC] and server operating systems to enable competitors' products to work with those Windows client [PC] and server operating systems in all the ways [in which] the competitors' products were intended to function' (page 29 of the response). Likewise, Microsoft states that it has agreed with the Commission from the outset that a competition law issue could potentially arise if competitors were unable to develop server operating systems whose functionality is fully accessible from Windows client [PC] operating systems' (page 63 of the response). It claims that the Commission did not, however, establish the existence of such an issue in any of its three statements of objections.

218. The Commission contends that the concept of interoperability employed in the contested decision is consistent with that envisaged by Directive 91/250. In particular, it rejects Microsoft's one-way' interpretation of that concept.

219. The Commission accepts that a certain degree of interoperability with the Windows domain architecture is already possible, but claims that it is clear from its investigation that the degree of interoperability that can be achieved using the available methods is too low to enable Microsoft's competitors to remain viably in the market (footnote 712 to the contested decision).

220. In the Windows work group server networks, client/server and server/server interoperability are closely interlinked and, in order that full interoperability can be achieved between a Windows client PC and a non-Microsoft server operating system, Microsoft must give access both to the client/server communication protocols and to the server/server communication protocols (recitals 177 to 182 and 689 to the contested decision), including those which are pure' server/server protocols, that is to say, protocols which are not implemented on the client PC which are but functionally

related to the client PC' (recitals 277, 567 and 690 to the contested decision).

221. The Commission denies that the contested decision envisages that Microsoft's competitors should develop products functioning in all respects like a Windows server operating system. In fact, the decision is intended to enable competing products [to] be created that w[ould] function differently, whilst being able to understand the messages conveyed by Microsoft's relevant products'. Thus, the interoperability information at issue will be used by Microsoft's competitors not to develop exactly the same products as Microsoft's, but to develop improved products, with added value'.

222. In the first place, the Court finds that it follows from the foregoing considerations that Microsoft and the Commission disagree as to whether the concept of interoperability employed in the contested decision is or is not compatible with that envisaged by Directive 91/250.

223. At recitals 749 to 763 to the contested decision, the Commission sets out in detail the grounds on which it believes that Microsoft's one-way' interpretation of the concept of interoperability is incorrect.

224. The Court notes, first of all, that in its written submissions, Microsoft does not advance any argument capable of casting doubt on the Commission's assessment in that regard. It merely asserts, with reference to certain passages in its responses to the second and third statements of objections, that [t]he contested decision adopts a wholly different notion of interoperability [from] the one set forth in ... Directive [91/250]' (paragraph 95 of the application).

225. Next, the Court finds that the concept of interoperability employed in the contested decision - according to which interoperability between two software products means the capacity for them to exchange information and to use that information mutually in order to allow each of those software products to function in all the ways envisaged - is consistent with that envisaged in Directive 91/250.

226. Thus, as the Commission explains at recitals 752 to 754 and 759 and 760 to the contested decision, the 10 th recital to Directive 91/250 - whether in the English or the French version - does not lend itself to the one-way' interpretation advocated by Microsoft. On the contrary, as the Commission quite correctly emphasises at recital 758 to the contested decision, the 10 th recital to Directive 91/250 clearly shows that, by nature, interoperability implies a two-way' relationship in that it states that the function of a computer program is to communicate and work together with other components of a computer system'. Likewise, the 12 th recital to Directive 91/250 defines interoperability as the ability to exchange information and mutually to use the information which has been exchanged'.

227. In any event, it must be borne in mind that what is at issue in the present case is a decision adopted in application of Article 82 EC, a provision of higher rank than Directive 91/250. The question in the present case is not so much whether the concept of interoperability in the contested decision is consistent with the concept envisaged in that directive as whether the Commission correctly determined the degree of interoperability that should be attainable in the light of the objectives of Article 82 EC.

228. In the second place, the Court observes that the Commission assessed the degree of interoperability by reference to what, in its view, was necessary in order to enable developers of non-Microsoft work group server operating systems to remain viably on the market (see, in particular, footnote 712 and recital 779 to the contested decision).

229. The correctness of that approach is not open to dispute. Article 82 EC deals with the conduct of one or more economic operators involving the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market

by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (Joined Cases C359/96 P and C396/96 P Compagnie maritime belge transports and Others v Commission [2000] ECR I1365, paragraph 34). Furthermore, whilst the finding of a dominant position does not in itself imply any criticism of the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (Case 322/81 Michelin v Commission [1983] ECR 3461, paragraph 57, and Case T228/97 Irish Sugar v Commission [1999] ECR II2969, paragraph 112). Should it be established in the present case that the existing degree of interoperability does not enable developers of non-Microsoft work group server operating systems to remain viably on the market for those operating systems, it follows that the maintenance of effective competition on that market is being hindered.

230. It follows from the contested decision that, by adopting that approach and taking as its basis a factual and technical analysis of the products and technologies concerned and also of the way in which interoperability is achieved in Windows work group networks, the Commission concluded that, in order to be capable of competing viably with Windows work group server operating systems, competing operating systems had to be able to interoperate with Windows domain architecture on an equal footing with Windows work group server operating systems (see to that effect, in particular, recitals 182 and 282 to the contested decision).

231. The interoperability thus required by the Commission has two indissociable components, namely client/server interoperability and server/server interoperability (recitals 177 to 182 and 689 to the contested decision).

232. The Commission also maintains that when a non-Microsoft work group server operating system is installed on a Windows work group server network, it must be capable not only of delivering all its functionalities to Windows client PCs but also of using all the functionalities offered by those client PCs.

233. In the light of those various factors, the Commission maintains, in particular, that a server running a non-Microsoft work group server operating system must be capable of acting as a domain controller, and not merely as a member server, within a Windows domain using Active Directory and, accordingly, be capable of participating in the multimaster replication mechanism with the other domain controllers.

234. The Court finds that, contrary to Microsoft's claim, it cannot be inferred from the degree of interoperability thus required by the Commission that the Commission intends in reality that non-Microsoft server operating systems must function in every respect like a Windows server operating system and, accordingly, that Microsoft's competitors must be in a position to clone' or reproduce' its products or certain features of those products.

235. The assertions thus made by Microsoft are founded on a misreading of the contested decision.

236. The Court observes, in that regard, that, according to recital 1003 to the contested decision, the objective of the decision is to ensure that Microsoft's competitors can develop products that interoperate with the Windows domain architecture natively supported in the dominant Windows client PC operating system and hence viably compete with Microsoft's work group server operating system'.

237. As the Commission explained in greater detail at the hearing, the attainment of that objective assumes that non-Microsoft work group server operating systems are capable of receiving a specific message from a Windows client PC or work group server operating system and giving the required response to that message on the same conditions as a Windows work group server operating system and also of enabling Windows client PC or work group server operating systems to react to that response just as though it came from a Windows work group server operating system.

238. In order for such operations to be practicable, it is not necessary that non-Microsoft work group server operating systems should function internally in exactly the same way as Windows work group server operating systems.

239. Those various considerations are not vitiated by the passages from recitals 669 and 679 to the contested decision cited by Microsoft (see paragraph 126 above). In the first passage, the Commission merely states that the degree of interoperability with the Windows domain architecture that may be achieved by non-Microsoft work group server operating systems using standard protocols is lower than that achieved by Windows work group server operating systems. In the second passage, the Commission states only that non-Microsoft work group server operating systems are capable of using the functionalities of Windows client PC and work group server operating systems only to a lesser degree than Windows work group server operating systems.

240. In the same way Microsoft's assertion that the contested decision intends that its competitors should develop exactly the same products as Windows work group server operating systems must be rejected. As the Court will explain in greater detail at paragraphs 653 to 658 below, in its examination of the circumstance relating to the appearance of a new product, the aim pursued by the Commission is to remove the obstacle for Microsoft's competitors represented by the insufficient degree of interoperability with the Windows domain architecture, in order to enable those competitors to offer work group server operating systems which differ from Microsoft's on important parameters such as, in particular, security, reliability, processing speed or the innovative nature of certain functionalities.

241. The Court also notes that, as Microsoft itself expressly acknowledges in its written submissions (see, for example, paragraphs 14 and 48 of the reply), its competitors will not be in a position to develop products which are clones' or reproductions of Windows work group server operating systems by having access to the interoperability information at which the contested decision is aimed. As stated at paragraphs 192 to 206 above, that information does not relate to Microsoft's source code. In particular, Article 5 of the contested decision does not require Microsoft to disclose implementation details to its competitors.

242. Furthermore, as will also be explained in greater detail at paragraph 658 below, when the Court examines the circumstance relating to the new product, Microsoft's competitors would have no interest in developing exactly the same work group server operating systems as Microsoft's.

243. Nor can the Court accept Microsoft's claim that it follows from the undertakings' statements which it produced during the administrative procedure that there is already a high degree of interoperability between Windows client PC and server operating systems and non-Microsoft server operating systems, owing to the use of methods already available on the market.

244. On that point, it is sufficient to observe that the statements in question have already been fully examined in the contested decision (see, in particular, recitals 357, 358, 440 to 444, 511, 513, 595, 598, 602, 628, 702 and 707 to the contested decision) and that Microsoft puts forward no specific argument capable of establishing that the Commission's assessment of those statements is flawed. In essence, as the Commission states at recital 707 to the contested decision, those statements relate to organisations which had, to a large extent, adopted a Windows solution' for their work group networks.

245. Microsoft's claim that the Mercer reports show that an undertaking's choice of server operating system is not dictated by its interoperability with Windows client PC and server operating systems is incorrect, as will be explained in greater detail at paragraphs 401 to 412 below.

- The scope of Article 5(a) of the contested decision

246. Article 5(a) of the contested decision applies to the complete and accurate specifications of all the protocols implemented in Windows work group server operating systems and used by the servers on which those systems are installed in order to deliver work group services to Windows work group server networks.

247. As established in the technical and factual findings made at paragraphs 154 to 191 above, the proper functioning of the Windows work group networks relies on an architecture' of both client/server and server/server interconnections and interactions.

248. Thus the Commission states, at recital 999 to the contested decision, that the disclosure obligation imposed by the decision includes both direct interconnection and interaction between a Windows work group server and a Windows client PC, as well as interconnection and interaction between a Windows work group server and a Windows client PC that is indirect and passes through another Windows work group server'.

249. The specifications that Microsoft is required to draw up and disclose to its competitors relate to client/server communication protocols, which are implemented both in Windows client PC operating systems and in Windows work group server operating systems, and also to server/server communication protocols.

250. It is clear that the information which Microsoft is required to disclose to its competitors pursuant to Article 5(a) of the contested decision must, in particular, enable computers running non-Microsoft work group server operating systems to assume, within a Windows domain using Active Directory, the role of member server or that of domain controller and, accordingly, to participate in the multimaster replication mechanism. The remedy prescribed by Article 5(a) therefore relates, specifically, to communications between servers within the blue bubble'.

251. The scope of Article 5 of the contested decision, as thus defined, derives from a series of recitals to that decision, notably recitals 194 to 198, 206, 564 and 690 to the contested decision.

252. Thus, at recitals 194 to 198 to the contested decision, the Commission mentions, among other examples of interoperability information that Microsoft refuses to disclose either to Sun or to its competitors, certain information relating to the replication mechanism used by Active Directory.

253. At recital 206 to the contested decision, the Commission expressly rejects Microsoft's assertion in its response of 16 November 2001 to the second statement of objections that the replication and Global Catalog features of Active Directory do not bear on interoperability'. The Commission explains, on that point, that a domain controller in an Active Directory domain (native mode) replicates the data stored in Active Directory with the data stored in the Active Directory of other domain controllers through certain synchronisation protocols.' It also observes that, by means of other protocols whose specifications constitute interoperability information, Global Catalog data are exchanged between domain controllers in the forest'.

254. Likewise, where recital 564 to the contested decision mentions the fact that Microsoft persisted in its refusal' after receiving Sun's complaint and the three statements of objections adopted by the Commission, it refers to recital 194 et seq. to the contested decision.

255. Furthermore, at recital 690 to the contested decision, the Commission explains that the CPLC does not address the broader issue that is at stake in this case', in particular because it does not cover protocols that are pure' server/server protocols but that are functionally related to the client PC, including replication protocols or Global Catalog exchange of data'.

256. In addition, Microsoft interprets Article 5(a) of the contested decision in the same way. Thus, in the application, in order to demonstrate the innovative nature of the communication protocols in respect of which it is required to communicate information to its competitors, it relies specifically

on the multimaster replication mechanism used by Active Directory (see, in particular, the opinion of Mr Campbell-Kelly, Commentary on Innovation in Active Directory', in annex A.20 to the application). Likewise, in the reply, it relies mainly, for that purpose, on the DRS protocol, which is used by Active Directory to achieve, inter alia, replication functions (see, in particular, the opinion of Mr Lees cited at paragraph 205 above). In his opinion, Mr Lees explains that the DRS protocol created by Microsoft incorporates a series of new features, namely it can combine updates from many servers simultaneously; it is integrated with the standard Domain Naming Service (DNS) protocol (for naming) and the Kerberos protocol (for mutual authentication); it transmits information describing the way a particular company has architected its directory service; it [transmits] information about the role that particular servers play in managing the directory service; and it automatically communicates directory updates between servers'. Mr Lees states that the DRS protocol is just one of many communication protocols that Microsoft is required to disclose to its competitors pursuant to the contested decision. He also identifies the following protocols: Microsoft Remote Procedure Call (MSRPC), Network Authentication (Kerberos extensions'), Dfs and File Replication Service (FRS).

257. Last, the scope as thus defined in Article 5 of the contested decision also covers the information to which Sun had requested access in its letter of 15 September 1998. As the Court will explain in greater detail at paragraphs 737 to 749 below, by its request Sun sought, in particular, that its Solaris work group server operating system should be able to act as a fully compatible domain controller in the Windows 2000 work group networks or as a member server (in particular as a file or print server) that was fully compatible with the Windows domain architecture.

258. Furthermore, Microsoft's contention that the scope of the remedy prescribed in Article 5(a) of the contested decision is not consistent with the interoperability standard' used by the Commission in assessing the relevance of the alternative interoperability methods' (see paragraphs 125 to 129 above) must be rejected as unfounded.

259. That contention is based on the misconception that the Commission considers interoperability to be the capability for Microsoft's competitors to make their work group server operating systems work in exactly the same way as Windows operating systems and seeks to enable those competitors to clone' those systems (see paragraphs 234 to 242 above).

260. Contrary to Microsoft's assertion, moreover, the position which the Commission defends in its written submissions concerning the degree of interoperability required in the present case and the scope of the remedy prescribed by Article 5(a) of the contested decision is perfectly consistent with the position which it adopted in the contested decision. Nor is Microsoft entitled to rely on any statements which may have been made by the interveners at the hearing in the interlocutory proceedings as the basis for ascribing a specific interpretation of the contested decision to the Commission. It must be borne in mind that, according to the case-law, the lawfulness of a Community measure must be assessed on the basis of the matters of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 France v Commission [1979] ECR 321, paragraphs 7 and 8, and Joined Cases T177/94 and T377/94 Altmann and Others v Commission [1996] ECR II2041, paragraph 119).

261. Last, the arguments based on the multimaster replication and the blue bubble' which Microsoft put forward at the hearing must also be rejected as unfounded.

262. By those arguments, Microsoft attempts to show that the objective of the contested decision can be achieved in full only if Microsoft discloses to its competitors certain information on the internal mechanism of its server operating systems and, in particular, of the algorithms, that is to say, information going beyond that defined in that decision. Microsoft's essential argument is that, in order for a domain control running under a non-Microsoft work group server operating system to be capable of being placed in a blue bubble' composed of domain controllers using a Windows

work group server operating system employing Active Directory, those different operating systems must share the same internal logic.

263. First, Microsoft fails to demonstrate that, in order to function together within the blue bubble', its work group server operating systems and those of its competitors must necessarily have the same internal logic.

264. Second, the applicant also fails to demonstrate that even if such identity of internal logic were required, this would necessarily mean that Microsoft had to communicate to its competitors information relating to the internal mechanisms of its products and, in particular, to the algorithms. It must be borne in mind, on that point, that in an opinion annexed to the reply, one of Microsoft's experts, commenting on the DRS protocol used for the multimaster replication mechanism, himself draws a distinction between protocols used for communications between servers' and the algorithms/decision rules that operate internally on each server', before stating that it is the protocols that have to be disclosed pursuant to Article 5 of the contested decision (see paragraph 205 above).

265. Third, as regards the Intersite Topology' algorithm which Microsoft mentioned specifically at the hearing, it is quite possible that, as the Commission also submitted at the hearing, competitors need only be in a position to implement an algorithm giving the same result as that algorithm. In other words, Microsoft would not be required to give any information about the implementation of that algorithm in its work group server operating systems, but could merely give a general description of that algorithm, leaving it to its competitors to develop their own implementation of it.

266. The Court thus concludes from the foregoing that there is no inconsistency between the scope of Article 5(a) of the contested decision and the interoperability standard' required by the Commission in that decision.

c) The assertion that Microsoft's communication protocols are protected by intellectual property rights

Arguments of the parties

267. Microsoft first of all puts forward a series of arguments designed to demonstrate that its communication protocols are technologically innovative. Communication protocols are often developed in connection with the performance of specific tasks by server operating systems and are intimately linked with the way in which those tasks are performed. Licensing those communication protocols therefore necessarily means providing competitors with information about the internal features of the server operating systems with which those communication protocols are used. In addition, a large number of engineers and significant financial resources are used in developing and improving communication protocols.

268. Microsoft emphasises, more particularly, the innovative nature of Active Directory, after first observing that directory services constituted an essential aspect of competition on the work group server operating systems market. In that regard, the applicant refers to a note drafted by one of its experts, Mr Campbell Kelly, in which the author describes the innovations which Active Directory presents and, in particular, its method of replicating itself across different server computers in a computing network' (annex A.20 to the application). Microsoft also refers to the opinion of Mr Lees, in annex C.4 to the reply (see paragraphs 205 and 256 above), in which the author describes the innovative aspects of one of the protocols used by Active Directory, namely the DRS protocol, in respect of which Microsoft considers that it is required to provide information to its competitors pursuant to the contested decision. Last, Microsoft refers to annex C.8.1 to the reply, in which one of its engineers, Mr Hirst, describes a series of specifications relating to the multimaster replication mechanism used by Active Directory which Microsoft claims it is required to draw up pursuant to the contested decision.

269. Next, Microsoft puts forward numerous arguments in order to demonstrate that its communication protocols are protected by intellectual property rights.

270. In the first place, it submits that the innovative aspects of those communication protocols are patentable. Microsoft has obtained several patents for those protocols in Europe and the United States and some 20 patent applications are pending there. Furthermore, two opinions (annex A.21 to the application and annex C.6 to the reply) given by Mr Knauer, a lawyer specialising in patent law, support the assertion that Article 5 of the contested decision requires the compulsory grant of patent licences.

271. In the second place, Microsoft contends that the specifications of the server/server communication protocols that it is required to draw up and disclose to its competitors in application of the contested decision are copyright.

272. In the reply, Microsoft examines the question of copyright from two distinct angles. First, it refers to the concepts of forced creation' and forced publication', and claims that if the contested decision had not ordered it to do so, it would not have developed the specifications in question or licensed them to its competitors. Second, relying on Article 4 of Directive 91/250, it raises the question of the adaptation or alteration of copyright works'. The applicant maintains, in particular, that a competitor which uses the specifications to make its server operating system interoperate with the portions of Windows server operating systems that provide work group services will not be creating a distinct work'.

273. In the third place, Microsoft claims that the communication protocols are valuable trade secrets. In particular, it makes its client/server communication protocols available only under licence agreements that impose confidentiality and recognise the applicant's status as owner of the technology. It claims that trade secrets are a form of industrial property and that their protection is a matter for national law. Last, it refutes the Commission's notion that an undertaking suffers less damage when it discloses a business secret than when it is required to allow infringement of its patents or copyright.

274. Microsoft concludes that the requirement that it license the specifications of its communication protocols to its competitors would deprive it of the benefits of its research and development efforts which it devotes to the design and improvement of the communication protocols. It would also reduce the incentive for it and its competitors to invest in communication protocols.

275. The Commission disputes the various arguments set out at paragraphs 267 to 274 above.

276. First of all, it rejects Microsoft's assertion that the communication protocols in question are innovative and its assertion that licensing those protocols entails providing information about the internals' of its work group server operating systems. In particular, the documents prepared by Mr Lees (annex C.4 to the reply) and Mr Hirst (annex C.8.1 to the reply) do not demonstrate that the information in question includes any intrinsically valuable invention'. The Commission refers to two notes drafted by its consultant, OTR (annexes D.2 and D.3 to the rejoinder), which comment on Mr Lees' and Mr Hirst's documents, and explains why the ideas and principles underlying the applicant's communication protocols are not new.

277. Next, the Commission rejects Microsoft's argument that, first, the communication protocols are protected by intellectual property rights and, second, the contested decision involves compulsory licensing.

278. In the first place, the Commission claims that Microsoft does not demonstrate that the alleged innovations presented by the communication protocols in question are covered by a patent. Furthermore, a number of factors demonstrate that Microsoft's refusal was not justified by considerations associated

with patent protection. More particularly, it was only at the end of the administrative procedure, or a few weeks before the adoption of the contested decision, and at the Commission's insistence, that Microsoft identified a patent (patent EP 0669020).

279. In the second place, the Commission rejects Microsoft's assertions concerning copyright. While the specifications at which the contested decision is aimed may, as such, be covered by copyright, it does not follow that the use of the information thus documented' when it is implemented in an operating system constitutes a breach of copyright. The implementation of a specification is not a copy, but results in a clearly distinct work. Furthermore, the question whether the specifications are covered by copyright is by nature purely incidental, since what is central to the present case is the obligation imposed on Microsoft to disclose information and to authorise its use, which necessarily involves the drafting of a document. Last, Microsoft put forward two new arguments relating to copyright in the reply (see paragraph 272 above), which, in the Commission's submission, must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure and are in any event unfounded.

280. In the third place, the Commission acknowledges that the information that Microsoft is required to disclose pursuant to the contested decision has thus far been kept secret from its competitors on the work group server operating systems market. However, it is by no means obvious that Microsoft is correct to equate those trade secrets' with intellectual property rights created by law'. The case-law on compulsory licensing does not as such apply to trade secrets and the protection that such secrets enjoy under national law is normally more limited than that given to copyright or patents. While there may be a presumption of legitimacy of a refusal to license an intellectual property right created by law', the legitimacy under competition law of a refusal to disclose a secret which exists solely as a result of a unilateral business decision depends more on the facts of the case and, in particular, the interests at stake. In the present case, the value of the secret' concerned lies not in the fact that it involves innovation but in the fact that it belongs to a dominant undertaking.

281. SIIA puts forward essentially the same arguments as the Commission does on this point and contends that Microsoft does not demonstrate that the contested decision infringes its intellectual property rights or entails compulsory licensing.

282. FSFE claims that the technology' which Microsoft refuses to disclose to its competitors is neither new nor innovative. Microsoft has a policy of adopting pre-existing protocols and then making minor and pointless changes to them with the aim of preventing interoperability. FSFE refers, in particular, to the following protocols: CIFS/SMB (Common Internet File System/Server Message Block), DCE/RPC (Distributed Computing Environment/Remote Procedure Call), Kerberos 5 and LDAP.

Findings of the Court

283. Although the parties devoted lengthy argument, both in their written pleadings and at the hearing, to the question of the intellectual property rights which cover Microsoft's communication protocols or the specifications of those protocols, the Court considers that there is no need to decide that question in order to resolve the present case.

284. The arguments which Microsoft derives from the alleged intellectual property rights cannot, as such, affect the lawfulness of the contested decision. The Commission did not take a position on the merits of those arguments but adopted the decision on the assumption that Microsoft was able to rely on such rights in the present case. In other words, it proceeded on the premiss that, so far as it relates to the interoperability information, the conduct at issue in the present case might not be a mere refusal to supply a product or a service indispensable to the exercise of a specific activity but a refusal to license intellectual property rights, and thus chose the strictest

legal test and therefore the one most favourable to Microsoft (see paragraphs 312 to 336 below). The Commission did not therefore decide whether or not Microsoft's impugned conduct constituted a refusal to grant a licence or whether or not the remedy prescribed by Article 5 of the contested decision entailed compulsory licensing.

285. Thus, at recital 190 to the contested decision, the Commission states that during the administrative procedure Microsoft relied on the existence of intellectual property rights and the fact that the interoperability information at issue constituted trade secrets. The Commission notes that it is not excluded that Microsoft relied on those rights to prevent Sun from implementing the specifications in question in its own products. It also acknowledges that it is possible that those specifications contain innovations and constitute trade secrets. More generally, the Commission observes that it cannot be excluded that ordering Microsoft to disclose the interoperability information to third parties and to allow them to use it will interfere with the free exercise of its intellectual property rights. It reiterates that last consideration at recital 546 to the contested decision. In footnote 249 to the contested decision, the Commission explains that [i]n any case, since the relevant specifications are not available for scrutiny, it is not possible for the Commission to determine to what extent Microsoft's claims relating to various intellectual property rights are justified'.

286. Furthermore, at recitals 1003 and 1004 to the contested decision, the Commission, in describing the scope of the remedy for Microsoft's refusal, states, first, that the remedy applies only to interface specifications and not to the source code and, second, that the intention is that Microsoft's competitors be authorised to implement the disclosed specifications in their work group server operating systems. Thus, it states, inter alia, that the specifications should also not be reproduced, adapted, arranged or altered, but should be used by third parties to write their own specification-compliant interfaces' (recital 1004 to the contested decision). The Commission concludes that, [i]n any event, to the extent that [the contested decision] might require Microsoft to refrain from fully enforcing any of its intellectual property rights, [that] would be justified by the need to put an end to the abuse' (recital 1004 to the contested decision).

287. In its written pleadings, the Commission puts forward arguments to the same effect. Thus, in the rejoinder, it describes as misleading' Microsoft's assertion in the reply that the [contested decision] requires [it] to grant a licence to whatever [intellectual property rights] may be necessary to implement the specifications in its own products'. The Commission explains, first of all, that the [contested decision] requires Microsoft to grant the right to use the specifications for the purposes of building interoperable products' and that [t]o the extent that [that] may limit Microsoft's ability to fully enforce certain of its [intellectual property rights], [it] will be justified by the need to put the infringement to an end'. The contested decision does not take a position as to whether Microsoft's [intellectual property rights] are affected or not'. The Commission goes on to state that it is not to be inferred, however, that Microsoft's refusal is justified by the exercise of intellectual property rights or that compulsory licensing i s involved in the present case. Nor is there any evidence in the case file or in the application that that is so or, in particular, that competitors need a licence to certain Microsoft [intellectual property rights] in order to achieve interoperability with the Windows domain architecture'.

288. Furthermore, the Commission confirmed, in answer to one of the written questions put by the Court, that the contested decision did not establish that the interoperability information was not covered by a patent or by copyright or, on the contrary, that it was. There was no need to decide that issue since, in any event, the conditions for finding an abuse and for imposing the remedy [prescribed by Article 5 of the contested decision] were satisfied whether or not the information is protected by any patent or copyright'.

289. It follows from the foregoing considerations that the appraisal of the merits of the first

part of the plea must proceed on the presumption that the protocols in question, or the specifications of those protocols, are covered by intellectual property rights or constitute trade secrets and that those secrets must be treated as equivalent to intellectual property rights.

290. The central issue to be resolved in this part of the plea therefore is whether, as the Commission claims and Microsoft denies, the conditions on which an undertaking in a dominant position may be required to grant a licence covering its intellectual property rights are satisfied in the present case.

d) The specific arguments invoked in support of the first part of the plea

(i) The circumstances by reference to which the abusive conduct must be analysed

Arguments of the parties

291. Microsoft, supported by CompTIA and ACT, maintains primarily that the first issue must be assessed in the light of the criteria recognised by the Court of Justice in Magill , paragraph 107 above, and reiterated in IMS Health , paragraph 107 above.

292. In support of that argument, Microsoft reiterates, in the first place, that Article 5 of the contested decision implies the compulsory licensing of its communication protocols, which are technologically innovative and are covered by intellectual property rights.

293. In the second place, Microsoft interprets the Commission's argument as set out at paragraph 302 below as meaning that the Commission considers that it is not required to apply those tests where technological tying' is involved. In Microsoft's submission, that argument finds no support in Case T-83/91 Tetra Pak v Commission [1994] ECR II755, upheld on appeal in Case C333/94 P Tetra Pak v Commission [1996] ECR I5951 (Tetra Pak II '), on which the Commission relies.

294. In the third place, Microsoft rejects the arguments whereby the Commission seeks to show that the circumstances of the present case can be distinguished from the circumstances of IMS Health , paragraph 107 above.

295. First, IMS Health involved strong network effects and it was precisely because of those effects that the 1 860 brick structure created by IMS Health was considered to be an industry standard. Furthermore, in the contested decision the Commission did not rely on the argument that, by refusing to allow compatibility', Microsoft was acting contrary to the public-policy objectives defined in Directive 91/250. In any event, vague public policy considerations cannot provide a ground for ordering an undertaking to grant licences. Last, Microsoft claims that Directive 91/250 does not establish any positive obligation to disclose information.

296. Second, Microsoft rejects the Commission's assertion that Microsoft used its market power on the client PC operating systems market to conquer the work group server operating systems market. Neither the contested decision nor the defence indicates clearly what market power Microsoft is supposed to have used or the way in which that power was exercised.

297. Third, Microsoft contends that the Commission's assertion that Microsoft disrupted previous levels of supply is wrong both in fact and in law and that it fails to take account of the principles laid down in Bronner , paragraph 112 above. The applicant never provided Sun or any other supplier of competing operating systems with a licence on the specifications of its communication protocols. It licensed a network technology to AT & T in 1994 which allowed the development of a product called Advanced Server for UNIX' (AS/U)' and a number of AS/U-based products were created by leading UNIX suppliers, including Sun's PC NetLink'. Although the applicant and AT & T agreed in 2001 not to extend the licensing agreement to include new technology, the AS/U technology' and the products based on it remain available. The fact that the applicant thus licensed a specific technology to AT & T more than 10 years ago cannot mean that it is required to license all

related technologies, including communication protocols, for the indefinite future.

298. Fourth, Microsoft observes that, at recital 577 to the contested decision, the Commission states that Microsoft's refusal to supply Sun is part of a broader conduct of not disclosing interoperability information to work group server operating systems vendors'. It contends that the pattern of conduct thus attributed to it corresponds to [the application] on a non-discriminatory basis [of] a policy that virtually all technology companies adopt to protect the fruits of their research and development efforts' and that such conduct cannot constitute an exceptional circumstance' within the meaning of Magill and IMS Health , paragraph 107 above.

299. In the alternative, Microsoft, supported by CompTIA and ACT, submits that, should the Court find that no intellectual property right is at stake in the present case, the applicable criteria would be those recognised by the Court of Justice in Bronner , paragraph 112 above, which correspond to the first, second and fourth criteria in IMS Health , paragraph 107 above, as set out at paragraph 116 above.

300. Last, Microsoft, CompTIA and ACT claim that none of the four criteria of IMS Health , paragraph 107 above, and, consequently, none of the three criteria of Bronner , paragraph 112 above, is satisfied in this case.

301. The Commission, supported by SIIA and FSFE, contends primarily that, even if the Court should find that the refusal at issue was justified by the exercise of intellectual property rights and that the contested decision entails compulsory licensing, it would not follow that the present problem must automatically be assessed against the criteria established by the IMS Health case-law'.

302. In that connection, the Commission maintains, in the first place, that the exceptional circumstances' rule laid down in the case-law cannot apply as such, and without further qualification' to a refusal to disclose trade secrets that has the effect of technologically tying' a separate product with a dominant product.

303. In the second place, the Commission claims that IMS Health , paragraph 107 above, does not establish an exhaustive list of exceptional circumstances. In that judgment, as in Magill , paragraph 107 above, the Court of Justice defined the conditions on which a decision ordering compulsory licensing could be adopted, in the light of the specific circumstances of those cases. Thus, in IMS Health , paragraph 107 above, the Court of Justice merely established a list of criteria which it was sufficient' to satisfy. In reality, in order to determine whether the conduct of an undertaking in a dominant position which refuses to supply constitutes an abuse, the Commission must examine the entire range of factors surrounding that refusal and in particular the economic and regulatory background to it.

304. In the third place, the Commission lists the factors which distinguish the circumstances of the present case from those of IMS Health , paragraph 107 above, and which permit the conclusion that Microsoft's refusal constitutes an abuse of a dominant position.

305. First, the Commission observes that the contested decision has the particular feature that it deals with a refusal to supply interoperability information in the software industry. The decision aims to permit the development of products that are compatible with Microsoft's products whereas the precedents cited by Microsoft concern situations in which the protected product' was to be incorporated in competitors' products for reasons which went beyond ensuring mere compatibility between two distinct products. Furthermore, those precedents do not concern the specific problems raised in sectors where network effects are pervasive. Unlike the sector concerned in the present case, the economic sectors concerned in those precedents were not sectors where the [legislature] has clearly recognised that compatibility was favourable to society in general'. More particularly, the Commission, referring to recitals 745 to 763 to the contested decision, recalls the importance

which the Community legislature ascribed to interoperability, notably in the context of Directive 91/250, and also the position taken by the legislature, namely that disclosure of information for interoperability purposes is beneficial for society as a whole.

306. Second, the Commission invokes the fact that the present issue involves a supplier in a dominant position which uses its market power on a particular market, in this case the client PC operating systems market, to eliminate competition on a neighbouring market, namely the work group server operating systems market, thereby increasing the barriers to entry in its original market and securing an additional monopoly rent'. That situation reinforces the harm to consumers that results from the restriction of the development of new products.

307. Third, the Commission submits that the present issue concerns a supplier in a dominant position which disrupts previous levels of supply (recitals 578 to 584 to the contested decision). Microsoft's initial policy was to disclose interoperability information, not to retain it, which, among other things, helped Microsoft to introduce its own work group server operating systems on the market and did not discourage it from innovating. However, once its server products' were sufficiently established on the market, Microsoft changed its strategy and chose to foreclose its competitors by refusing to give them access to that information (recitals 587, 588 and 637 et seq. to the contested decision).

308. The Commission maintains that Microsoft cannot deny having disrupted its previous levels of supply. First of all, the agreement between Microsoft and AT & T, which allowed AT & T to develop AS/U, involved the disclosure not only of interoperability information of the type at issue in the contested decision, but also of additional information. Next, the Commission contends that the fact that the AS/U technology is still available is irrelevant. The Commission refers to recitals 580 to 583 to the contested decision and submits that the disclosures made in the context of AS/U' are now outdated, as Microsoft modified the relevant protocols in subsequent versions of Windows. Last, the Commission contends that Microsoft's assertion that the fact that it licensed a specific technology to AT & T more than 10 years ago cannot oblige it to license all related technologies for the indefinite future is irrelevant to the approach taken in the contested decision. The question of the disruption of previous levels of supply is treated in that decision not as an abuse in itself but as one factor relevant to the assessment of Microsoft's refusal to supply (recital 578 et seq. to the contested decision).

309. In the fourth place, the Commission does not claim that the mere fact that a refusal to license an intellectual property right is part of a general pattern of conduct is in itself an exceptional circumstance' sufficient to render that refusal abusive. It merely contends that the fact that Sun is not the only competitor to which Microsoft has refused access to the interoperability information is a circumstance relevant to the assessment of the compatibility of Microsoft's conduct with Article 82 EC.

310. The Commission submits that Microsoft's alternative argument, that the present case must be examined by reference to the criteria established in Bronner , paragraph 112 above, cannot be upheld. Bronner concerned access to an infrastructure that had required significant investment, and if it should be established that the information at issue in the present case is not protected by intellectual property rights, but consists of purely arbitrary combinations of messages, that judgment would surely not be a relevant point of comparison'.

311. In the alternative, the Commission, supported by SIIA and FSFE, claims that, even on the assumption that the lawfulness of the contested decision, in so far as it relates to the first issue, must be assessed against the criteria recognised by the Court of Justice in IMS Health , paragraph 107 above, those criteria are satisfied in the present case.

Findings of the Court

312. It must be borne in mind that Microsoft's argument is that its refusal to supply interoperability information cannot constitute an abuse of a dominant position within the meaning of Article 82 EC because, first, the information is protected by intellectual property rights (or constitutes trade secrets) and, second, the criteria established in the case-law which determine when an undertaking in a dominant position can be required to grant a licence to a third party are not satisfied in this case.

313. It must also be borne in mind that the Commission contends that there is no need to decide whether Microsoft's conduct constitutes a refusal to license intellectual property rights to a third party, or whether trade secrets merit the same degree of protection as intellectual property rights, since the strict criteria against which such a refusal may be found to constitute an abuse of a dominant position within the meaning of Article 82 EC are in any event satisfied in the present case (see paragraphs 284 to 288 above).

314. While Microsoft and the Commission are thus agreed that the refusal at issue may be assessed under Article 82 EC on the assumption that it constitutes a refusal to license intellectual property rights, they disagree as to the criteria established in the case-law that are applicable in such a situation.

315. Thus, Microsoft relies, primarily, on the criteria laid down in Magill and IMS Health , paragraph 107 above, and, in the alternative, on those laid down in Bronner , paragraph 112 above.

316. The Commission, on the other hand, contends that an automatic' application of the criteria laid down in IMS Health , paragraph 107 above, would be problematic' in this case. It maintains that, in order to determine whether such a refusal is abusive, it must take into consideration all the particular circumstances surrounding that refusal, which need not necessarily be the same as those identified in Magill and IMS Health , paragraph 107 above. Thus it explains at recital 558 to the contested decision, that [t]he case-law of the European Courts... suggests that the Commission must analyse the entirety of the circumstances surrounding a specific instance of a refusal to supply and must take its decision [on the basis of] the results of such a comprehensive examination'.

317. At the hearing, the Commission, questioned on this issue by the Court, confirmed that it had considered in the contested decision that Microsoft's conduct presented three characteristics which allowed it to be characterised as abusive. The first consists in the fact that the information which Microsoft refuses to disclose to its competitors relates to interoperability in the software industry, a matter to which the Community legislature attaches particular importance. The second characteristic lies in the fact that Microsoft uses its extraordinary power on the client PC operating systems market to eliminate competition on the adjacent work group server operating systems market. The third characteristic is that the conduct in question involves disruption of previous levels of supply.

318. The Commission contends that in any event the criteria recognised by the Court of Justice in Magill and IMS Health , paragraph 107 above, are also satisfied in this case.

319. In response to those various arguments, the Court observes that, as the Commission rightly states at recital 547 to the contested decision, although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position within the meaning of Article 82 EC unless it is objectively justified.

320. The Court of Justice thus considered that a company in a dominant position on the market

in raw materials which, with the aim of reserving such raw materials for the purpose of manufacturing its own derivatives, refused to supply a customer which was itself a manufacturer of those derivatives, and was therefore likely to eliminate all competition on the part of that customer, abused its dominant position within the meaning of Article 82 EC (Joined Cases 6/73 and 7/73 Commercial Solvents v Commission [1974] ECR 223; see, concerning a refusal to supply a service, Case 311/84 CBEM [1985] ECR 3261).

321. In Case 238/87 Volvo [1988] ECR 6211, the Court of Justice, on a reference for a preliminary ruling under Article 234 EC, was asked whether the refusal by a car manufacturer which was the proprietor of a design right covering car body panels to license third parties to supply products incorporating the protected design must be considered to be an abuse of a dominant position within the meaning of Article 82 EC. In its judgment, the Court of Justice emphasised that the right of a proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without his consent, products incorporating the design constitutes the very subject-matter of his exclusive right. The Court of Justice concluded (paragraph 8) that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position'. The Court of Justice added, however, that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels [might] be prohibited by Article [82 EC] if it involve[d], on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model [were] still in circulation, provided that such conduct [was] liable to affect trade between Member States' (paragraph 9).

322. In Magill , paragraph 107 above, the Court of Justice, on appeal, had also been called upon to adjudicate on the question of the refusal by a dominant undertaking to license a third party to use an intellectual property right. That case concerned a decision in which the Commission had found that three television companies had abused their dominant position on the market represented by their respective weekly programme listings and the market for the television guides in which those listings were published by relying on their copyright in those listings to prevent third parties from publishing complete weekly guides to the programmes broadcast by the various different television channels. The Commission had therefore ordered those television companies to supply their advance weekly programme listings to each other and to supply them to third parties on request and on a non-discriminatory basis and to permit reproduction of those listings by those third parties. The Commission had also stipulated that any royalties requested by the television companies should they choose to grant reproduction licences should be reasonable.

323. In Magill , paragraph 107 above (paragraph 49), the Court of Justice, referring to Volvo , paragraph 321 above, stated that the exclusive right of reproduction form[ed] part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot itself constitute abuse of a dominant position'. Still with reference to Volvo , paragraph 321 above, the Court of Justice explained, however, that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct' (paragraph 50).

324. The Court of Justice considered that the following circumstances were relevant for the purpose of establishing that the conduct of the television companies in question was abusive. In the first place, their refusal concerned a product (the television channels' weekly programme listings) the supply of which was indispensable to the exercise of the activity in question (the publication of a complete weekly television guide) (paragraph 53). In the second place, the refusal prevented

the appearance of a new product, a comprehensive weekly guide to television programmes, which the television companies in question did not offer and for which there was a potential consumer demand, which constituted an abuse under Article 82(b) EC (paragraph 54). In the third place, the refusal was not justified (paragraph 55). Finally, in fourth place, the television companies, by their conduct, had reserved to themselves a secondary market, the market for weekly television guides, by excluding all competition on that market (paragraph 56).

325. In Bronner , paragraph 112 above, the Court of Justice, on a reference for a preliminary ruling under Article 234 EC, had been requested to rule on whether the refusal by a press group holding a very large share of the daily newspaper market in Austria, and operating the only nationwide newspaper home-delivery scheme in Austria, to allow the publisher of a rival newspaper to have access to that scheme for appropriate remuneration, or to allow that publisher to purchase certain complementary services from the group, constituted an abuse of a dominant position contrary to Article 82 EC.

326. In its judgment (paragraph 38), the Court of Justice first of all observed that although in Commercial Solvents v Commission and CBEM , paragraph 320 above, it had held that the refusal by an undertaking holding a dominant position on a given market to supply an undertaking with which it was in competition on a neighbouring market with raw materials and services respectively, which were indispensable to carrying on the rival's business, constituted an abuse, it had done so to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking.

327. Next, the Court of Justice stated (paragraph 39) that at paragraphs 49 and 50 of Magill , paragraph 107 above, it had held that the refusal by the owner of an intellectual property right to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position, but that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve an abuse.

328. Last, the Court recited the exceptional circumstances which it had established in Magill , paragraph 107 above, and stated (paragraph 41):

[E]ven if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for [that] judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article [82 EC] in a situation such as that which forms the subject-matter of the... question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.'

329. In IMS Health , paragraph 107 above, the Court of Justice again ruled on the conditions in which a refusal by an undertaking holding a dominant position to grant to a third party a licence to use a product protected by an intellectual property right might constitute abusive conduct within the meaning of Article 82 EC.

330. The Court of Justice first of all confirmed (paragraph 34), with reference to Volvo , paragraph 321 above, and Magill , paragraph 107 above, that, according to settled case-law, the exclusive right of reproduction formed part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of that position. The Court of Justice also observed (paragraph 35) that it was clear from that case-law that exercise of an exclusive right by the owner might,

in exceptional circumstances, involve abusive conduct. Next, after reciting the exceptional circumstances found to exist in Magill , paragraph 107 above, the Court held (paragraph 38) that it followed from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it was sufficient that three cumulative conditions be satisfied, namely, that that refusal prevents the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market.

331. It follows from the case-law cited above that the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse.

332. It also follows from that case-law that the following circumstances, in particular, must be considered to be exceptional:

- in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;

- in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;

- in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.

333. Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is objectively justified.

334. The Court notes that the circumstance that the refusal prevents the appearance of a new product for which there is potential consumer demand is found only in the case-law on the exercise of an intellectual property right.

335. Finally, it is appropriate to add that, in order that a refusal to give access to a product or service indispensable to the exercise of a particular activity may be considered abusive, it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service. The fact that the indispensable product or service is not marketed separately does not exclude from the outset the possibility of identifying a separate market (see, to that effect, IMS Health , paragraph 107 above, paragraph 43). Thus, the Court of Justice held, at paragraph 44 of IMS Health , paragraph 107 above, that it was sufficient that a potential market or even a hypothetical market could be identified and that such was the case where the products or services were indispensable to the conduct of a particular business activity and where there was an actual demand for them on the part of undertakings which sought to carry on that business. The Court of Justice concluded at the following paragraph of the judgment that it was decisive that two different stages of production were identified and that they were interconnected in that the upstream product was indispensable for supply of the downstream product.

336. In the light of the foregoing factors, the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in Magill and IMS Health , paragraph 107 above, as described at paragraphs 332 and 333 above, are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular

circumstances invoked by the Commission (see paragraph 317 above).

(ii) The indispensable nature of the interoperability information

Arguments of the parties

337. Microsoft maintains that the interoperability information required by the contested decision is not indispensable to the activity of supplier of work group server operating systems. A particular technology cannot be characterised as indispensable if it is economically viable' for the competitors of the undertaking in a dominant position to develop and market their products without having access to that technology.

338. Microsoft contends that the contested decision contains an error of law and an error of fact on that point.

339. It submits, in the first place, that the error of law lies in the fact that the Commission used an inappropriate, extraordinary and absolute standard when examining whether competition could exist'. The applicant refers to recitals 176 to 184 to the contested decision and submits that the Commission considers that non-Microsoft server operating systems must be able to communicate with Windows client PC and server operating systems in exactly the same way that Windows server operating systems do: yet the case-law does not require that such optimal access' to the market be granted.

340. In the reply, Microsoft criticises the fact that the Commission assessed the requisite degree of interoperability by reference to what was necessary to enable its competitors to remain viable on the market. The concept of interoperability used by the Commission at recitals 666 to 687 to the contested decision is unreasonable in that it implies virtual identity' between Windows server operating systems and competing operating systems. Microsoft refers to the passages from recitals 669 and 679 to the contested decision reproduced at paragraph 126 above and submits that, if such a concept had to be accepted, any technology would be indispensable'. Furthermore, the only justification put forward in the contested decision for the assertion that such a level' of interoperability is required if competitors are to remain in viable conditions on the market is that access to the specifications at issue might enable competitors to avoid having users log on twice' (recital 183 to the contested decision). That justification is inadequate, since, first, multiple vendors already provide single sign on' solutions; second, having to log on twice is plainly an alternative solution (even if it is marginally less advantageous); and, third, the remedy prescribed in Article 5 of the contested decision goes far beyond what is necessary to resolve that minor problem.

341. Also in the reply, and after referring to the arguments set out at paragraphs 125 to 128 above and reiterating that the remedy prescribed in Article 5 of the contested decision will not permit its competitors to develop products that are virtually identical' to Windows server operating systems, Microsoft claims that the Commission has failed to show a causal link between the non-availability' of specifications for its communication protocols and the supposed inability of competitors to remain viably on the market.

342. In its observations on the statements in intervention, Microsoft denies that industry and consumers require plug replaceability' and asserts that such a requirement goes far beyond the test of indispensability' laid down by the Court of Justice in Bronner , paragraph 112 above, and IMS Health , paragraph 107 above. In particular, the applicant's competitors do not need Active Directory', since their server operating systems have their own directory services which can provide work group services to Windows client PC and server operating systems.

343. In the second place, Microsoft contends that the contested decision is vitiated by an error of fact in so far as the Commission fails to take account of the fact that several work group server

operating systems are present on the market. Undertakings in Europe continue to maintain different types of computer networks, in that their operating systems are supplied by different distributors.

344. During the administrative procedure, Microsoft submitted reports in which computer scientists describe the ways in which interoperability could be achieved in computing networks'. The responses to the Commission's requests for information confirm that interoperability between different types of operating systems is common in computer networks in Europe. Thus, 47% of companies which responded to those requests for information stated that they used non-Microsoft server operating systems to supply file and print services to Windows client PC operating systems. Similar proof exists in respect of user and group administration services. Microsoft reiterates that the Mercer reports demonstrate that undertakings do not feel that their choice of servers is constrained by interoperability concerns.

345. Microsoft also asserts that interoperability between non-Microsoft server operating systems and Windows client PC and server operating systems can be achieved by five different methods. Each of those methods constitutes an alternative to disclosure of the communication protocols at issue and allows those different operating systems to work well together'. Admittedly, the perfect substitutability' that the Commission considers essential cannot be obtained by those various methods, but they do make it possible to achieve the minimum level of interoperability... required for effective competition'.

346. The five methods to which Microsoft refers are as follows: first, the use of standard protocols such as TCP/IP (Transmission Control Protocol/Internet Protocol) and HTTP (Hyper Text Transfer Protocol); second, the addition of a software code to a Windows client PC or server operating system in order to allow that operating system to communicate with a non-Windows server operating system using communication protocols specific to that non-Microsoft operating system; third, the addition of a software code to a non-Microsoft server operating system in order to allow it to communicate with a Windows client PC or server operating system using communication protocols specific to Windows operating systems; fourth, the use of a server operating system as a bridge' between two different sets of communication protocols; and, fifth, the addition of a block' of software code to all the client PC and server operating systems in a given network to achieve interoperability by means of communications between the different blocks' of software code.

347. Microsoft further submits that the evidence which the Commission assembled during the administrative procedure shows that those methods work in practice for Linux and for the other work group server operating systems. Distributors of Linux products have constantly increased market share on the work group server operating systems market without having access to the specifications of Microsoft's communication protocols. Microsoft refers to sections D and E of a report by Evans, Nichols and Padilla (annex C.11 to the reply) and further submits that Linux products will continue to gain ground on Windows server operating systems. It is generally acknowledged that Linux is a serious competitor to Microsoft and that the 10 largest suppliers of servers costing under USD 25 000 offer work group servers running Linux.

348. CompTIA and ACT put forward arguments which are essentially the same as Microsoft's.

349. CompTIA criticises, in particular, the fact that the Commission considers that non-Windows work group server operating systems must achieve a level of interoperability with the Windows client PC operating systems that is as good as that achieved by Microsoft itself'.

350. ACT refers to Microsoft's arguments on this point in its written pleadings and submits that there are several methods of ensuring sufficient interoperability between the operating systems of different suppliers. It also has concerns that the Commission's interpretation of the indispensability criterion will have negative effects on innovation.

351. The Commission claims that Microsoft's disclosure of the interoperability information is indispensable if its competitors are to continue to compete on the work group server operating systems market.

352. It contends, in the first place, that Microsoft's allegation of an error of law rests on a misrepresentation of the Commission's position and on confusion between different questions analysed in the contested decision. The indispensability criterion entails an examination of the degree of interoperability necessary to remain as a viable competitor on the market and of whether the withheld information is the only economically viable source for achieving that degree of interoperability.

353. The Commission emphasises that the information that Microsoft refuses to disclose is functionally related to the client PC' and explains that the indispensability of that information derives from the importance for work group server operating systems of interoperability with client PCs (recitals 383 to 386 to the contested decision) and from Microsoft's quasi-monopoly on the client PC operating systems market.

354. The Commission analysed the indispensability criterion, as defined in the case-law, at recitals 666 to 686 to the contested decision and examined whether there were alternative solutions to disclosure of the relevant information that would enable undertakings to compete viably with Microsoft on the work group server operating systems market.

355. The Commission observes that in Microsoft's view the mere existence of inefficient interoperability solutions that allow competitors to achieve only de minimis market penetration shows that the indispensability criterion is not satisfied. Such an argument cannot be accepted, as that criterion must be assessed against the aim of preserving an effective competitive structure that benefits consumers. The question is whether the information that Microsoft refuses to disclose is indispensable to any competitor seeking to carry on business on the relevant market as a viable competitive constraint and not as a de minimis player who has effectively left the market for a niche position'.

356. In the rejoinder, the Commission makes clear that its position is that a dominant undertaking is not entitled to compromise effective competition on a secondary market by abusively refusing to allow its competitors access to an input' necessary for their viability. If there is no alternative to the input to which access is refused that could allow competitors to exercise effective competitive pressure on the dominant undertaking on the secondary market, it is then clear that the input is indispensable to the maintenance of effective competition.

357. Also in the rejoinder, the Commission reiterates that there is a whole range of possible degrees of interoperability between Windows PCs and work group server operating systems. The Commission did not fix a priori a given level of interoperability that is indispensable for the maintenance of effective competition on the market, but based its findings on the manifestly unsatisfactory nature of the alternative methods which Microsoft's competitors had already used and which did not permit the level of interoperability required by customers in an economically viable manner'. The Commission again denies having taken into account a degree of interoperability achieving the virtual identity' to which the applicant refers, and submits that what is indispensable is not that Microsoft's competitors be allowed to reproduce the interoperability solutions implemented by Microsoft but that they be able to achieve an equivalent degree of interoperability by their own innovative efforts'. Last, the Commission observes that at recitals 590 to 692 to the contested decision it examines the severe consequences' which the limited degree of interoperability with Windows client PC operating systems has for competitors and customers. In particular, Microsoft's conduct has the effect of progressively ousting all its competitors from the work group server operating systems market, even though some of them originally had a significant commercial or technical advantage over Microsoft on that market (recitals 587 and 668 to the contested decision).

358. In the second place, the Commission rejects the allegations of an error of fact.

359. First, it is not demonstrated that the solutions proposed by the computer scientists in the reports produced by Microsoft during the administrative procedure are commercially viable alternatives to disclosure of interoperability information.

360. Second, the argument which Microsoft derives from the responses to the Commission's requests for information is not relevant in so far as it means that interoperability with smaller players is enough, or that some interoperability already exists'. In reality, Microsoft overlooks the fact that its competitors entered the work group server operating systems market before Microsoft began to distribute products of that type. The fact that the information at issue is indispensable if Microsoft's competitors are to be able to continue to represent a competitive constraint for Microsoft's products means that those competitors will be gradually eliminated from the market. That fact that their elimination is not yet complete does not show that the indispensability criterion is not fulfilled, since the essential thing is whether the information is indispensable in order to remain as a viable competitor on the market.

361. Third, by its reference to the five alternative methods of achieving interoperability between the operating systems supplied by different distributors Microsoft does not contest the findings made on that point in the contested decision but merely asserts that those methods are feasible' and that they allow its own products and its competitors' products to work well together'.

362. The Commission recalls that it has already examined those methods in the contested decision and, in particular, the question whether reverse engineering might constitute an alternative to disclosure of the interoperability information (recitals 683 to 687 to the contested decision), and it demonstrated that they do not constitute viable substitutes' to disclosure of the interoperability information at issue.

363. Fourth, the Commission rejects Microsoft's allegation that the analysis in the contested decision is contradicted by the entry and alleged growth of Linux on the work group server operating systems market.

364. First of all, the figures for Linux [do] not represent the penetration of the market by a single operator but rather the best efforts of a number of competing vendors who build upon Linux (Red Hat, Novell/SuSE, IBM, Sun, etc.)'. The respective market shares of those competing distributors are therefore miniscule'.

365. The Commission proceeds to criticise the findings in section D of the Evans, Nichols and Padilla report in annex C.11 to the reply; it asserts that:

- as stated, in particular, at recitals 487 to 490 to the contested decision, the data from International Data Corporation (IDC) used by those experts in drafting that report are approximate and are therefore not on their own appropriate for assessing market development;

- that applies a fortiori as regards quite marginal annual changes relative to the overall size of the market';

- there is no proof that Linux's market share of 6.75% of units sold, which Microsoft calculates using an extrapolation factor concerning all servers, applies to the work group server operating systems market;

- the two examples of responses to the 2003 market enquiry to which the experts refer in order to demonstrate that it is possible to use, in relation to Linux, interoperability solutions based on reverse engineering are not representative in that the entities concerned are two of only three entities, out of a total of more than 100 which participated in that market enquiry, that made a non-insignificant use of Linux/Samba';

- the experts provide no information on how the four other methods which Microsoft claims can ensure interoperability between operating systems supplied by different distributors could have allowed the alleged expansion of Linux on the market during the period covered by the abuse consisting in the refusal to supply.

366. Likewise, the Commission criticises the findings in section E of that report. It claims that:

- it has already rejected, at recitals 605 to 610 to the contested decision, the arguments which Microsoft bases on IDC's projections and the results of the third Mercer survey;

- IDC tends to overestimate its projections of Linux's market share of the networking' and file/print' subcategories;

- the migration from the Windows NT operating systems to the Linux operating system mentioned in the Meryll Lynch report of 8 March 2004 (annex 7 to annex C.11 to the reply) is likely to be a one-off phenomenon, as Windows NT is an outdated product that is no longer supported by Microsoft';

- the Yankee Group report of 25 May 2004 (annex 9 to annex C.11 to the reply) relates to server operating systems in general and not to work group server operating systems, and is therefore largely irrelevant in the present case;

- the Forrester Research report of 27 May 2004 (annex 10 to annex C.11 to the reply) is not primarily concerned with work group server operating systems and contains findings which contradict Microsoft's argument, notably the finding that 92% of those questioned will use Active Directory in 2006.

367. SIIA submits essentially the same arguments as the Commission. It maintains that it is essential for competition on the merits in the software industry that work group server operating systems suppliers are able to achieve interoperability with Microsoft's quasi-monopolistic products on a level playing field'. In order to be able to compete effectively on the market, those suppliers must have access to the interoperability information at issue.

368. SFE rejects the argument which Microsoft bases on the five alternative methods of ensuring interoperability. It claims that, [t]echnically, all these ways describe realistic scenarios', but that they have a fundamental omission: [a]uthentication'. Microsoft has tightly coupled' its Windows client PC operating systems with its own [a]uthentication servers', so that it is simply impossible to separate the authentication task from the other tasks carried out by Windows work group servers.

Findings of the Court

369. As already pointed out at paragraph 207 above, the Commission adopted a two-stage approach in determining whether the information at issue was indispensable, in that, first of all, it considered what degree of interoperability with the Windows domain architecture non-Microsoft work group server operating systems must achieve in order for its competitors to be able to remain viably on the market and, second, it appraised whether the interoperability that Microsoft refused to disclose was indispensable to the attainment of that degree of interoperability.

370. Microsoft claims that that reasoning is incorrect in law and in fact.

- The alleged error of law

371. Microsoft's arguments concerning the Commission's supposed error of law relate to the first stage of its reasoning.

372. Microsoft takes issue first of all with the degree of interoperability required by the Commission in the present case: it contends, in substance, that the Commission's position effectively requires that its competitors' work group server operating systems be able to communicate with Windows client PC and server operating systems in exactly the same way as Windows server operating systems do.

The applicant reiterates that that degree of interoperability implies virtual identity between its systems and its competitors' systems.

373. Those assertions must be rejected.

374. The Court has already defined, at paragraphs 207 to 245 above, the degree of interoperability which the Commission required in the contested decision. The Court observed, in particular, that the Commission had concluded that, in order to be able to compete viably with Windows work group server operating systems, competitors' operating systems must be able to interoperate with the Windows domain architecture on an equal footing with those Windows systems (see paragraph 230 above). The Court has held that interoperability, as thus envisaged by the Commission, had two indissociable components, client/server interoperability and server/server interoperability and that it implied in particular that a server running a non-Microsoft work group server operating system could act as domain controller within a Windows domain using Active Directory and, consequently, would be able to participate in the multimaster replication mechanism with the other domain controllers (see paragraphs 231 and 233 above).

375. The Court has also already found that, contrary to Microsoft's contention, by requiring such a degree of interoperability the Commission did not intend that non-Microsoft work group server operating systems should function in every respect as a Windows work group server operating system and, accordingly, that the applicant's competitors could develop work group server operating systems that were identical, or even virtually identical', to the applicant's (see paragraphs 234 to 242 above).

376. Next, Microsoft criticises the fact that the Commission appraised the requisite degree of interoperability according to what in its view was necessary to allow designers of non-Microsoft work group server operating systems to remain viably on the market.

377. It is sufficient to observe, in that regard, that the Court has already confirmed, at paragraph 229 above, the correctness of the approach thus adopted by the Commission.

378. Finally, Microsoft claims that it is not necessary for its competitors' work group server operating systems to attain the degree of interoperability required by the Commission in order for them to be able to remain viably on the market.

379. It must be emphasised that the Commission's analysis of that question in the contested decision is based on complex economic assessments and that, accordingly, it is subject to only limited review by the Court (see paragraph 87 above).

380. It follows from the considerations set out below that Microsoft has not demonstrated that the Commission's analysis is manifestly incorrect.

381. In that regard, it must be observed, in the first place, that Microsoft has not established that the Commission's finding that interoperability with the client PC operating system is of significant competitive importance in the market for work group server operating systems' (recital 586 to the contested decision) is manifestly incorrect.

382. On the contrary, a number of factors confirm the correctness of that finding.

383. Thus, as may be seen from the technical explanations of the relevant products at recitals 21 to 59 to the contested decision and also from the explanations given by the parties' experts at the hearing, it is necessary to bear in mind that, by nature, computer programs do not function in isolation, but are designed to communicate and function with other computer programs and hardware, especially in network environments (see also, at paragraph 157 above, the 10 th recital in the preamble to Directive 91/250).

384. Furthermore, within the computer networks installed in organisations, the need to be able to function together is particularly pressing in the case of client PC operating systems and work group server operating systems. As the Commission emphasises at recital 383 to the contested decision, and as the Court has already observed at paragraph 161 above, file and print services and group and user administration services are intimately connected to the use of client PCs and are provided to users of client PCs as a set of interconnected tasks. As the parties' expert witnesses explained at the hearing, in computer networks the relationship between work group servers and client PCs is stimulated' or provoked' by actions or requests originated by client PC users, such as, in particular, the entry of a name and password, the creation of a file or a request to print a document. The Commission was likewise correct to find, at recital 532 to the contested decision, that [c]lient PCs and work group servers represent nodes in a computer network and are therefore physically linked with each other'. Last, it must be borne in mind that one of the essential functions of work group server operating systems is specifically the administration of client PCs.

385. Furthermore, as stated at recitals 383 to 386 to the contested decision, certain results of the Mercer surveys confirm the importance of the interoperability of work group server operating systems with client PC operating systems. Apart from the results of the second and third Mercer surveys, which are more specifically concerned with Windows client PCs and which will be examined at paragraphs 401 to 412 below, the first Mercer survey shows that the ease with which a product can be integrated in an existing or planned future computer environment is one of the main factors which IT executives take into account when deciding what products to purchase. It follows from a comparison of certain results of that survey with certain results of the third Mercer survey, moreover, that the importance of interoperability with client PC operating systems is more clear-cut for work group server operating systems than for other types of server products (recital 386 to the contested decision).

386. In the second place, the Court considers that the interoperability of work group server operating systems with client PC operating systems is even more important in the case of Windows client PC operating systems.

387. Microsoft's dominant position on the client PC operating systems market exhibits, as the Commission states at recitals 429 and 472 to the contested decision, extraordinary features', since, notably, its market shares on that market are more than 90% (recitals 430 to 435 to the contested decision) and since Windows represents the quasi-standard' for those operating systems.

388. As the Windows operating system is thus present on virtually all client PCs installed within organisations, non-Windows work group server operating systems cannot continue to be marketed if they are incapable of achieving a high degree of interoperability with Windows.

389. In the third place, the Court observes that, according to the contested decision, it is important that non-Windows work group server operating systems can interoperate not only with Windows client PC operating systems but also, more generally, with the Windows domain architecture.

390. More specifically, the Commission considers that, in order to be able to be viably marketed, non-Windows work group server operating systems must be capable of participating in the Windows domain architecture - which consists of an architecture' of both client/server and server/server interconnections and interactions, closely interlinked (see paragraphs 179 to 189 above) - on an equal footing with Windows work group server operating systems. That means, in particular, that a server running a non-Microsoft work group server operating system is able to act as domain controller within a Windows domain using Active Directory and, consequently, is capable of participating in the multimaster replication mechanism with the other domain controllers.

391. The Court therefore finds that Microsoft has not established that that assessment is manifestly

incorrect.

392. In that regard, the Court finds first, that, in light of the very narrow technological and privileged links that Microsoft has established between its Windows client PC and work group server operating systems, and of the fact that Windows is present on virtually all client PCs installed within organisations, the Commission was correct to find, at recital 697 to the contested decision, that Microsoft was able to impose the Windows domain architecture as the de facto standard for work group computing' (see, to the same effect, recital 779 to the contested decision, where the Commission states, inter alia, that the quasi-monopoly that Microsoft has held on the client PC operating systems market for many years enables it to determine to a large extent and independently of its competitors the set of coherent communications rules that will govern the de facto standard for interoperability in work group networks').

393. Second, as the Commission states at recital 637 to the contested decision, various sources of evidence, such as Microsoft's own marketing documents, reports by industry analysts, evidence obtained during the 2003 market enquiry and the Mercer surveys, show that interoperability with the Windows environment is a factor that plays a key role in the uptake of Windows work group server operating systems.

394. Thus, at recitals 638 to 641 to the contested decision, the Commission describes various facts which demonstrate that, for marketing purposes, Microsoft systematically uses interoperability with the Windows environment as a key marketing argument for its work group server operating systems. Those facts are not disputed by Microsoft.

395. Likewise, at recitals 642 to 646 to the contested decision, the Commission refers to certain results of the 2003 market enquiry in order to demonstrate that interoperability with the Windows environment plays a key role in the decisions taken by the organisations questioned on the purchase of work group server operating systems.

396. In the application, Microsoft merely asserts that organisations do not choose server operating systems for reasons linked with their interoperability with Windows operating systems and makes a global reference to certain documents annexed to the application (annex A.12.1 to the application (Matthews, The Commission's Case on Microsoft's Interoperability: An Examination of the Survey Evidence'), and annex A.22 to the application (Evans, Nichols and Padilla, The Commission Has Failed to Address Major Flaws in the Design, Conduct, and Analyses of Its Article 11 Inquiries')). For the reasons set out at paragraphs 94 to 99 above, the Court cannot take those annexes into account.

397. In any event, the Court finds that the abovementioned results of the 2003 market enquiry confirm the correctness of the Commission's case.

398. Thus, during that enquiry, the Commission requested the entities questioned to indicate whether they had already implemented (or decided to implement) Active Directory in the majority of the Windows domains in their computer network (question 15). It also requested the entities who answered that question in the affirmative, that is to say, 61 entities out of 102, to indicate from a list of factors those which had been important in their decision to implement Active Directory (question 16). Of those 61 entities, 52 (approximately 85.2%) mentioned as being such a factor the fact that Active Directory offers a better integration with Windows workstations - including applications running on the client PC or integrated into the client PC (e.g. Outlook, Office) than competing directory services' or the fact that Active Directory is required by applications used in [their] organisation' (question 16). On the other hand, only 17 entities (approximately 27.9%) mentioned one of the following factors as having been important in their decision to implement Active Directory: Active Directory offers a better integration with Web services than competing directory services';

Active Directory is a more mature product than competing directory services'; and Active Directory offers a better compliance and quality of implementation of directory standards than competing directory services'.

399. Likewise, the entities taking part in the 2003 market enquiry were also asked whether they relied primarily on Windows servers to provide file and print services (question 13). If so, they were to state whether certain interoperability factors set out in that question had been important in their decision to make use of such servers. Of the 77 entities who answered that question, 58 (approximately 75.3%) mentioned at least one of the factors in question.

400. In footnote 101 to the application and also in footnote 68 to the reply, Microsoft suggests, while merely making a general reference to the arguments in certain annexes (annex A.22 to the application and section A of annex C.13 to the reply (Evans, Nichols and Padilla, Response to the Commission's Annex B.6 Regarding Its Article 11 Inquiries')), that a number of the questions put by the Commission in connection with the 2003 market enquiry were flawed' or biased'. The Court considers that that argument cannot be accepted. Apart from the fact that such a global reference to annexes cannot be accepted, for the reasons stated at paragraphs 94 to 99 above, the Court finds that Microsoft's argument is intrinsically contradictory in that, in the parts of its pleadings to which the footnotes concerned relate, the applicant specifically relies, in support of its own case, on certain results of the 2003 market enquiry.

401. Contrary to Microsoft's contention, moreover, the results of the second and third Mercer surveys lead to the same conclusions as the 2003 market enquiry as regards the importance for consumers of interoperability with Windows operating systems.

402. Thus, in its second survey, Mercer, citing the same interoperability-related factors as those set out in question 13 of the 2003 market enquiry (see paragraph 399 above), asked a number of IT executives whose organisations mainly used Windows operating systems to supply file and print services to indicate whether one or more of those factors had played a key role in the decision to adopt those operating systems, giving those factors a mark on a scale of 1 (low importance) to 5 (high importance). Of the 134 IT executives concerned, 99 (or approximately 73.9%) stated that at least one of those factors had played such a role. Furthermore, it is significant that 91 IT executives (or approximately 67.9%) awarded a mark of 4 out of 5 to at least one of those factors.

403. In the same survey, the IT executives questioned had also been invited to evaluate the role played by 21 different factors in their purchasing decisions concerning operating systems for the execution of file and print services, giving those factors a mark on a scale of 0 (no importance) to 5 (high importance). The factor interoperability with (Windows) work stations' received an average mark of 3.78 and was placed in fourth position, behind the factors reliability/availability' (average mark 4.01), available functions and availability of help (internal or external' (average mark 3.93) and security' (average mark 3.80).

404. The results of the second Mercer survey also show that when the IT executives concerned were asked to evaluate the role played by 18 factors in their decisions concerning the acquisition of directory services, they gave the factor interoperability with (Windows) work stations' an average mark of 3.94 (first position).

405. In the third Mercer survey, the IT executives were asked to evaluate the role played by 13 different factors in their decisions concerning the acquisition of work group server operating systems by giving those factors a mark on a scale from 0 (no importance) to 5 (high importance). In response to that request, the factor interoperability with Windows work stations' received an average mark of 4.25. While it is true that that factor was only placed in second position, between reliability/availability of the server operating system' (average mark 4.47) and integrated security in the server operating

system' (average mark 4.04), the fact remains that the results which it obtained show that to a very large extent the decisions of purchasers of work group server operating systems are dictated by considerations to do with interoperability with Windows client PCs.

406. It is true that in the third Mercer survey the IT executives were also invited to evaluate the relative importance of each of the 13 factors referred to in the preceding paragraph and that, on that basis, the gap between reliability/availability of the server operating system' (in first place, with 34%) and interoperability with Windows work stations' (in second place, with 9%) is much wider. However, those results must be qualified, because, as the Commission explains at recitals 643 and 659 to the contested decision, interoperability is a factor which influences other factors that purchasers take into consideration when choosing a work group server operating system. Thus, purchasers may believe that a non-Microsoft work group server operating system has disadvantages in relation to security or processing speed, whereas, in reality, those disadvantages are attributable to a lack of interoperability with Windows operating systems (see the two examples given by the Commission in footnote 786 to the contested decision). Those purchasers thus have a tendency to underestimate the importance of interoperability with Windows.

407. The results of the third Mercer survey are also important in so far as they show that Microsoft's manifest and increasing lead over its competitors on the work group server operating systems market (see the examination of the circumstance relating to the elimination of competition at paragraphs 479 to 620 below) is to be explained not so much by the merits of its products as by its interoperability advantage.

408. Furthermore, the IT executives concerned were requested not only to evaluate the relative importance of 13 different factors in their decisions concerning the acquisition of work group server operating systems (see paragraph 406 above), but also to evaluate, for each of those factors, the respective performances of Linux, NetWare, UNIX and Windows operating systems.

409. In fact, for reliability/availability of the server operating system', which had been considered the most important factor (with 34%) by the IT executives questioned, Windows obtained the lowest average mark (3.63). UNIX systems came first by a significant margin (average mark 4.55), followed by Linux (average mark 4.10) and NetWare (average mark 4.01).

410. Likewise, Windows obtained the lowest average mark for its performance for integrated security in the server operating system' (average mark 3.14), far behind UNIX (average mark 4.09), NetWare (average mark 3.82) and Linux (average mark 3.73), although that factor plays a very important role in the organisations' decisions concerning the acquisition of work group server operating systems (see paragraph 405 above). Those results are all the more revealing since, as stated at paragraph 406 above, purchasers have a tendency to believe that problems are security-related when, in reality, they are the consequence of a lack of interoperability with Windows systems.

411. On the other hand, it is striking to note that, as regards performances relating to interoperability with Windows work stations', Windows was awarded the highest average mark (average mark 4.87) of all the average marks given to the different server operating systems concerned for each of the 13 factors used by Mercer. It is in relation to that factor, moreover, that the gap between Microsoft and its competitors' operating systems is widest, since NetWare obtained an average mark of 3.78, Linux an average mark of 3.43 and UNIX an average mark of 3.29.

412. On the same subject, the Court notes that, as the Commission quite correctly states at recital 662 to the contested decision, if the average marks given to Linux, NetWare, UNIX and Windows for each of the 13 factors concerned with the percentage of relative influence' attributed to those factors are weighted, and if the weighted marks are added up, it is UNIX that gets the highest result, followed, first, by Windows and then, with close results that are not significantly lower

than Windows' results, by Linux and NetWare.

413. Third, the Court observes that, at recital 183 to the contested decision, the Commission asserts that [w]hen a [non-Windows] work group server is added to a Windows work group network, the degree of interoperability with the Windows domain architecture that such a work group server is able to achieve will have an impact on the efficiency with which that work group server delivers its services to the users of the network'.

414. The Court considers that the correctness of this assertion is confirmed by the contested decision in a number of respects. The decision refers to a series of problems which Microsoft's competitors' work group server operating systems encounter because they cannot interoperate with the Windows domain architecture to the same degree as can Windows work group server operating systems.

415. A first example given by the Commission is the fact that, if a work group server does not interoperate sufficiently with the security architecture' of the Windows work group network, the user might be required to log on twice if he wishes to have access to both Windows-based resources' and resources offered by... work group servers [using competing operating systems]' (recital 183 to the contested decision). In its pleadings, Microsoft does not deny that that problem exists, but merely attempts to minimise it (see paragraph 340 above). Indeed, the Court takes note of the fact that at the hearing, one of Microsoft's expert witnesses himself underlined the risks that multiple user names and passwords created for network security and the disadvantages, in terms of efficiency and productivity, due to the fact that users had to enter several user names and passwords.

416. Another example is set out at recital 196 to the contested decision, where the Commission reproduces a statement made by Microsoft in its response of 16 November 2001 to the second statement of objections, namely that more policy-based [user group] management is possible if a Windows 2000 Professional client is attached to a Windows 2000 server running Active Directory than if it is running in standalone mode or is part of a non-Windows 2000 domain or realm'.

417. At recital 240 to the contested decision, the Commission states that, more than a year after the launch of Windows 2000, Microsoft had still not fully disclosed the updated CIFS/SMB specification to its competitors. In footnote 319, the Commission correctly states that even if Microsoft had disclosed the updated specification, that would not have been sufficient to ensure proper administration of the file service'.

418. It is also appropriate to cite the factors which the Commission quite correctly identifies concerning the ADSI interface developed by Microsoft to enable software writers to access the LDAP protocol which supports Active Directory (recitals 243 to 250 to the contested decision). In particular, the Court notes the limitations of the ADSI provider' developed by Novell (recital 250 to the contested decision).

419. At recitals 251 to 266 to the contested decision, the Commission explains that Microsoft introduced a proprietary' extension to the Kerberos standard protocol and that the work group server operating systems which run the unextended' version of that security protocol encounter authorisation problems when they work in a Windows environment (see also footnote 786 to the contested decision). It should be borne in mind that the Kerberos protocol, as modified by Microsoft, offers advantages as regards, in particular, faster connection and efficiency (see recital 152 to the contested decision and paragraph 170 above).

420. At recitals 283 to 287 to the contested decision, the Commission correctly explains that the directory synchronisation tools' to which Microsoft refers allow the directory services in its competitors' systems to achieve only limited synchronisation with Active Directory. It emphasises, in particular, that those tools only synchronise a limited part of the information contained in a directory' and that they do not suppress the need to manage the users, permissions, group memberships

and security policies separately for the Windows work group servers and the non-Microsoft work group servers' (recital 285 to the contested decision).

421. It follows from all of the foregoing considerations that Microsoft has not established that the Commission made a manifest error when it considered that non-Microsoft work group server operating systems must be capable of interoperating with the Windows domain architecture on an equal footing with Windows work group server operating systems if they were to be marketed viably on the market.

422. The Court also concludes from those considerations that the absence of such interoperability with the Windows domain architecture has the effect of reinforcing Microsoft's competitive position on the work group server operating systems market, particularly because it induces consumers to use its work group server operating system in preference to its competitors', although its competitors' operating systems offer features to which consumers attach great importance.

- The alleged error of fact

423. The arguments which Microsoft derives from the Commission's alleged error of fact are of two types.

424. In the first place, Microsoft claims that the Commission's case is contradicted, first, by the fact that several work group server operating systems are present on the market and by the heterogeneous nature of computer networks within undertakings in Europe and, second, by the fact that, even though they do not have access to the interoperability information at issue, distributors of Linux products have recently entered the market and have consistently gained market share.

425. The Court considers that the first of those arguments is not sufficient to call in question the validity of the Commission's argument.

426. First of all, contrary to Microsoft's contention, interoperability considerations play a key role in decisions concerning the acquisition of work group server operating systems (see paragraphs 381 to 412 above).

427. Also, the third Mercer survey shows that interoperability with Windows work posts' is the factor in respect of which the gap between Microsoft's work group server operating system and its competitors' systems is the widest (see paragraph 411 above).

428. Next, as will be explained in greater detail at paragraphs 569 to 582 below, Microsoft's competitors, with the exception of distributors of Linux products, had been present on the work group server operating systems market for several years before Microsoft began to develop and market such systems. While it is true that on the date of adoption of the contested decision those competitors were still present on the market, the fact remains that their market share fell significantly as Microsoft's share increased rapidly, notwithstanding the fact that some of them, particularly Novell, had a considerable technological advantage over Microsoft. The fact that competition is eliminated gradually and not immediately does not contradict the Commission's argument that the information at issue is indispensable.

429. In fact, as the Commission stated in answer to one of the written questions put by the Court, the fact that Microsoft's competitors were able to continue to sell work group server operating systems during the years immediately preceding the adoption of the contested decision is explained in part by the fact that at that time there was still, within organisations, a not insignificant basis of client PCs using a Windows operating system belonging to a range of products predating the Windows 2000 range (see recitals 441 to 444 to the contested decision). For example, the table at recital 446 to the contested decision shows that in 2001 the Windows 98, Windows Millennium Edition (Windows Me) and Windows NT client PC operating systems were still being licensed in significant numbers. It is precisely with the Windows 2000 operating systems that interoperability

problems arose in a particularly acute manner for Microsoft's competitors (see paragraphs 571 to 573 below). At the same time, there was also a non-negligible installed base of work group servers using Windows NT operating systems, which caused fewer interoperability problems than the systems which succeeded them. It must be borne in mind, in that regard, that organisations modify their work group server networks only once in a period of several years, and do so only incrementally (see recital 590 to the contested decision).

430. The second argument referred to at paragraph 424 above, based on the entry and growth of Linux products on the work group server operating systems market, must also be rejected.

431. First of all, as the Commission explains at recitals 487 and 488 to the contested decision, and as the Court will explain at paragraphs 502 and 553 below, the IDC data on which Microsoft relies to describe the evolution of the position of Linux products on the market present certain flaws. Those data come from a database which IDC established by identifying eight main categories of tasks (or workloads') carried out within organisations and distinguishing a number of sub-categories' within those main categories. The two tasks most closely related to the work group tasks referred to by the contested decision, namely file and print sharing and user and user group administration, are those known, respectively, as file/print sharing' and networking' (recital 486 to the contested decision). However, the tasks within those two sub-categories are not a perfect match for the services which constitute the work group server operating systems market. What is more, a number of those tasks can be performed with a much lower level of interoperability between client PCs and servers than the work group tasks identified by the Commission and are therefore more likely than the latter tasks to be carried out by non-Microsoft operating systems.

432. Next, account must be taken of the fact that the growth of Linux products on the work group server operating systems market was only modest during the years immediately preceding the adoption of the contested decision. When those Linux products were used in conjunction with Samba software (developed with the use of reverse engineering) they could attain a certain degree of interoperability with Windows operating systems. However, that degree of interoperability was significantly reduced following the launch of the Windows 2000 generation. Thus, in October 2003 - that is to say, several months after Microsoft had already begun to market the Windows 2003 server operating system, which had succeeded the Windows 2000 server system - the degree of interoperability that Linux products had managed to achieve enabled them to act only as member servers within a domain using Active Directory (see recitals 296 and 297 to the contested decision).

433. Finally, as will be explained in greater detail at paragraphs 595 to 605 below, the projected growth of Linux products on the work group server operating systems market is lower than Microsoft claims and will come about to the detriment not of Microsoft's systems but, in particular, of Novell's systems and the systems of distributors of UNIX products.

434. In the second place, Microsoft claims that the Commission failed to take account of the fact that several methods other than the disclosure of the information at issue ensure sufficient interoperability between different suppliers' operating systems.

435. On that point, it is sufficient to observe that Microsoft itself has recognised, both in its written pleadings and in answer to a question put to it at the hearing, that none of its recommended methods or solutions made it possible to achieve the high degree of interoperability which the Commission correctly required in the present case.

436. It follows from all of the foregoing considerations that Microsoft has not demonstrated that the circumstance that the interoperability information was indispensable was not present in this case.

(iii) Elimination of competition

Arguments of the parties

437. Microsoft submits that the refusal at issue is not such as to exclude all competition on a secondary market, namely, in this case, the work group server operating systems market.

438. In support of that assertion, Microsoft claims, in the first place, that the Commission applied a test that was wrong in law.

439. Microsoft observes that, at recital 589 to the contested decision, the Commission refers to a mere risk' of elimination of competition on the market. In cases dealing with compulsory licensing of intellectual property rights, on the other hand, the Court has always ascertained whether the refusal in question was likely to eliminate all competition' and required, in that regard, something close to certainty'. The Commission therefore ought to have applied a stricter test, namely the test of a high probability' of eliminating effective competition. Contrary to the Commission's contention, the words risk', possibility' and likelihood' do not mean the same thing.

440. Microsoft further submits that the reference in the contested decision to Commercial Solvents v Commission and CBEM , paragraph 320 above, is irrelevant. Those cases did not involve a refusal to license intellectual property rights. In each of those cases, moreover, the prospect of eliminating competition was immediate and real, as there were no alternative sources of supply.

441. In the second place, Microsoft claims that the Commission's argument that competition on the server operating systems market could be eliminated owing to its refusal to disclose its communication protocols to its competitors is contradicted by market conditions. The applicant reiterates, first, that it is commonplace for undertakings in Europe to have heterogeneous computer environments composed of Windows client PC and server operating systems and non-Microsoft server operating systems and, second, that the Mercer reports show that enterprise customers base their decisions relating to the purchase of operating systems on a range of criteria such as reliability, scalability and applications compatibility and do not consider the criterion of interoperability with Windows client PC operating systems to be a determinative criterion.

442. Microsoft also observes that, six years after the alleged refusal to supply, there were still numerous competitors on the work group server operating systems market, including IBM, Novell, Red Hat and Sun, and a number of suppliers of Linux products. The applicant reiterates that Linux is a recent entrant to the market and has grown rapidly and that it is an incontrovertible fact that Linux products, either on their own or together with Samba products or with Novell's Nterprise server software, compete directly with Windows server operating systems in performing a wide range of tasks, including the provision of work group services to Windows client PC operating systems. Furthermore, IDC, which describes itself as the premier global market intelligence and advisory group in the information technology and telecommunications industries, estimated that there was no risk of competition being eliminated. IDC's projections indicate that over the period 2003 to 2008 Microsoft's share of the market for work group server operating systems used on servers costing under USD 25 000 will remain virtually stable, whereas Linux's share will double.

443. In the third place, Microsoft criticises the Commission's artificially narrow' definition of the second product market.

444. Microsoft contends that [c]ompetition with Windows server operating systems is even more vigorous' if the definition also covers tasks other than the provision of file and print services and user and group administration services that Windows server operating systems can perform.

445. Microsoft observes that the Commission does not deny that the basic version of its Windows Server 2003 operating system enables a wide range of tasks to be performed, many of which are outside the second product market as defined in the contested decision. According to the Commission's approach,

the same Windows server operating system is inside the relevant market when it provides file and print services to Windows client PC operating systems and is outside the market when it provides proxy services or firewall services to those same operating systems.

446. Microsoft maintains that the Commission is not entitled to rely on the fact that its Windows Server 2003 operating system is marketed in different versions at different prices to support its assertion that the basic version of that system is in a different market from the other versions of the same system. The more expensive' versions of that system provide the same work group services as the basic version.

447. In the reply, Microsoft expands somewhat on its complaint relating to the incorrect definition of the second product market. It states, first of all, that on the market for server operating systems in general it has a market share of around 30%. Next, it asserts that [n]o one in the industry uses the term work group server in the way the Commission has used it to define [that product market]' and that when industry observers' occasionally do refer to work group servers' they generally include servers that perform a wide range of tasks, including Web, database and application serving'. Last, it claims that none of the major server vendors on the market sells work group servers that are limited to performing the tasks identified by the Commission.

448. Microsoft also rejects the explanations which the Commission sets out in the defence to justify its definition of the market. First of all, Microsoft states that [v]endors do not charge different people different prices for the same server operating system edition depending on how they will use it'. Next, it denies that the server operating systems considered by the Commission to be work group server operating systems' are optimised' to provide work group services: the IDC data on which the Commission relied when calculating market share show that, with the sole exception of Novell's NetWare, [those] operating systems spend far more time devoted to non-work group tasks than to work group [tasks]'. Last, the applicant asserts that [t]he cost of modification in many cases would be zero [and] in the other cases ... would be negligible'.

449. Furthermore, Microsoft refers generally to two reports by Evans, Nichols and Padilla, in annex A.23 to the application and annex C.12 to the reply.

450. In the fourth place, Microsoft, in the reply, criticises the methodology used by the Commission to calculate the market share of operators on the second product market, which consists in taking into account only the time which server operating systems spend in performing work group tasks and only sales of server operating systems costing under USD 25 000. That leads to the absurd consequence that a copy of an operating system is counted as [being] both inside and outside the market, depending on the tasks it is performing at any given time' and provides no relevant information about dominance'.

451. CompTIA claims, first of all, that the Commission applied the wrong legal standard when ascertaining whether Microsoft's refusal involved a mere risk of elimination of all effective competition' when it ought to have examined whether that refusal gave rise to the likelihood that all competition would be eliminated from the secondary market. Next, CompTIA asserts that the evidence in the file does not demonstrate that that refusal was likely to have such a consequence. It emphasises, in particular, the growing success' of Linux.

452. ACT emphasises the very close link between the indispensability criterion and the elimination of competition' criterion. It claims, in particular, that the contested decision is contradictory in so far as, on the one hand, it recognises that up to 40% of the work group server operating systems market is held by competitors who are able to provide substitute products without having had access to the interoperability information and, on the other, it states that competition on that market is impossible without such access because the information is indispensable.

453. ACT also disputes the Commission's argument that there is no need to take into account competition

by de minimis players. It also criticises the fact that the Commission relies on a mere risk' of elimination of competition, and emphasises that Linux's position on the market continues to grow.

454. The Commission asserts that the applicant's refusal creates a risk that all effective competition on the secondary market for work group server operating systems will be eliminated.

455. In the first place, the evidence analysed at recitals 585 to 692 to the contested decision clearly shows that there is a high likelihood' that that risk will be realised in the near future'. The Commission refers to recital 700 to the contested decision and submits that if Microsoft's conduct remains unfettered, there is a serious risk that its competitors' products will be confined to a niche' existence or will not be profitable at all.

456. The Commission contends that the Commercial Solvents v Commission and CBEM cases, paragraph 320 above, provide valuable guidance for the purpose of assessing Microsoft's conduct in the light of Article 82 EC, even though those cases did not involve a refusal to license intellectual property rights. In that context, the expressions risk', possibility' and likelihood' used by the Court of Justice in its case-law on abusive refusals to supply have the same meaning.

457. The Commission submits that most of Microsoft's arguments are based on the incorrect premiss that the Commission must establish that competition has already been eliminated or, at least, that its elimination is imminent. The Commission demonstrated in the contested decision that the degree of interoperability that can be achieved on the basis of Microsoft's disclosures is insufficient to enable competitors to stay viably on the market' (footnote 712 to the contested decision). Microsoft has not adduced evidence that that conclusion is vitiated by a manifest error of assessment.

458. In the second place, the Commission deals with the arguments which Microsoft bases on the facts observed on the market.

459. It states, first of all, that the risk of elimination of all competition was already present in 1998, as it is present today': the only difference is that now [that] elimination of competition is more imminent than it was in 1998'.

460. Next, the Commission disputes the conclusions that Microsoft draws from the Mercer reports. In the Commission's view these reports demonstrate that customers choose Windows as a work group server operating system because of Microsoft's unfair interoperability advantage', in spite of the fact that Windows is lagging behind' other products on a number of features that customers consider important.

461. The argument which Microsoft bases on the growth of Linux products is refuted as wholly unsupported; the Commission refers to recitals 506 and 632 to the contested decision, in which it is clearly shown that the past growth of Linux has been de minimis '. The last two Mercer surveys demonstrate that Linux has only a very low market share, in the order of 5%, on the work group server operating systems market.

462. The Commission contends that the IDC projections are exaggerated and based on imperfect data (see paragraphs 365 and 366 above). In reality, the IDC data suggest that Microsoft rapidly acquired a dominant position on the relevant market, that it is continuing to increase its market share and that it is facing an increasingly fragmented fringe of niche players.

463. In the third place, the Commission rejects Microsoft's criticism of its definition of the second product market.

464. In reaching that definition, the Commission first of all identified a list of core work group services, which closely correspond to a specific customer need'. Those core services are the key services that customers take into account when purchasing a work group server operating system. The Commission based its analysis on a variety of evidence, including the information gathered

in the 2003 market enquiry (recitals 349 to 352 to the contested decision), statistical correlation' between the use of a given operating system for one of the core work group services and its use for the other core services (recital 353 to the contested decision) and Microsoft's description and pricing of its products (recitals 359 to 382 to the contested decision).

465. The Commission contends that work group server operating systems are optimised' to provide work group services and that the way in which they provide those services plays a decisive role in the decision to purchase such systems. The fact that work group servers are sometimes used to run an application does not have the effect of temporarily' excluding them from the market or of temporarily' including in the market enterprise servers which are optimised' to run enterprise applications.

466. In response to Microsoft's argument that its Windows work group server operating systems may be used to provide proxy services or firewall services, the Commission refers to recital 58 to the contested decision and states that those tasks are implemented by specialised edge servers'. Those servers cannot therefore exercise a competitive constraint on Microsoft on the work group server operating systems market.

467. In the rejoinder, the Commission claims, first of all, that the terminology which it uses to designate the product market is irrelevant to whether it correctly defined that market. Furthermore, the expression work group server operating system' is indeed used in the industry to designate the type of products at stake in the [contested] decision'.

468. Next, the Commission rejects Microsoft's criticisms of the explanations set out in the defence (see paragraph 448 above).

469. First, contrary to Microsoft's contention, both it and its competitors do... charge customers different prices for the same server operating system depending on how they will use it'. Prices vary according to the number of client PCs which have access to the server concerned. Furthermore, server operating systems vendors offer a number of different editions - at different prices - of systems forming part of the same family'. More generally, the Commission observes that Windows server operating systems are licensed by Microsoft to customers and [that] there is in principle no reason why Microsoft should not be able to discriminate depending on use'.

470. Second, the Commission submits that Microsoft's assertion that work group server operating systems spend far more time devoted to non-work group tasks than to work group [tasks]' is based on IDC data processed according to an inappropriate method.

471. Third, in response to Microsoft's assertion that the cost of modification in many cases would be zero', the Commission refers to recitals 334 to 341 and 388 to 400 to the contested decision, which show that there is no supply side substitutability for either client PC operating systems or work group server operating systems.

472. Still in the rejoinder, moreover, the Commission emphasises that Microsoft does not deny that interoperability with client PCs - and, more especially, with Windows client PCs - is particularly important for the performance of work group tasks by a server operating system. Microsoft's refusal to disclose interoperability information significantly harms its competitors' capacity to meet consumer expectations concerning the performance of those tasks and thus alters the conditions of competition for servers sold for those tasks by comparison with those sold for different tasks. In the Commission's submission, [that] remains true even assuming... that, for each of both Microsoft and its rivals, the various editions of its server operating systems currently on the market are all equally suited ... for the performance of both work group server tasks and certain other low-end tasks (non-mission critical applications such as e-mail, etc.)'.

473. The Commission further submits that, [a]s for the supply side, it is obvious that, if one

accepts for present purposes (i) the demand-side requirements of customers as regards work group services (undisputed by Microsoft) and (ii) Microsoft's own hypothesis that the various editions of each vendor's respective server operating systems have identical capacities as regards work group tasks, then the very same distorted market forces which force the exit of Microsoft's competitors from the sale of server operating systems for work group tasks will prevent supply-side substitution through (re)entry on the basis of the high-end editions of the same operating system families'.

474. Last, the Commission refers to annex B.11 to the defence and annex D.12 to the rejoinder, in which it comments on the observations set out in annex A.23 to the application and annex C.12 to the reply.

475. In the fourth place, the Commission rejects Microsoft's criticisms of the method which it used to calculate market share. First of all, for the purpose of its assessment, there is no need for Microsoft to have already acquired a dominant position on the relevant secondary market by means of its abusive conduct: what matters is that there is a risk of elimination of competition on that market. Next, the Commission's method gives a sufficiently reliable picture of the imbalance of forces on the market for work group server operating systems'. The Commission did not consider only the time allocated to different tasks by a given server, but examined, in respect of the undertakings which participated in the 2003 market enquiry and responded to the second and third Mercer surveys, what proportion of the work group tasks was performed by servers from different suppliers. Neither that market enquiry nor those surveys indicate that Microsoft held a market share of less than 60% for any one of those work group tasks.

476. The Commission further contends that applying the filters identified by Microsoft makes it possible to use [the IDC] data as a rough proxy for the sale of the editions of various vendors identified as being work group server operating systems'. It maintains that, to the extent that Microsoft's own exclusionary behaviour has the effect of partitioning sales of server operating systems purchased primarily for work group tasks from those primarily purchased for other tasks, a workload filter permits one to form an impression of Microsoft's relative strength in sales primarily for the former tasks'. In any event, even if only the [USD] 25 000 filter' were applied, without any distinction based on workload, Windows' share would be 65% by volume and 61% by relevant turnover (recital 491 of the contested decision).

477. SIIA claims that, owing to the indispensability of the interoperability information, the refusal at issue is by nature such as to eliminate competition on the work group server operating systems market. In particular, Microsoft's market share on that market rose significantly and rapidly at the time when it placed its Windows 2000 Server operating system on the market. SIIA also contends that the arguments which Microsoft bases on the alleged growth in Linux products on the market are unfounded.

478. FSFE asserts that Linux products do not exert a competitive threat on the work group server operating systems market.

Findings of the Court

479. The Court will examine in the following order the four categories of arguments which Microsoft puts forward in support of its contention that the circumstance relating to the elimination of competition is not present in this case: first, the definition of the relevant product market; second, the method used to calculate market shares; third, the applicable criterion; and, fourth, the assessment of the market data and the competitive situation.

- The definition of the relevant product market

480. Microsoft's arguments in respect of the definition of the relevant product market concern

the second of the three markets identified by the Commission in the contested decision (see paragraphs 23 and 25 to 27 above), namely, the work group server operating systems market. The Commission describes those systems as being designed and marketed to deliver collectively file and print sharing services and group and user services to a relatively small number of client PCs linked together in a small or medium-sized network (recitals 53 and 345 to the contested decision).

481. Microsoft contends, in effect, that the Commission defined that second market too restrictively by including only server operating systems used to supply the services mentioned in the preceding paragraph, namely what are known as work group' services. Microsoft's objective in challenging the Commission's definition of the market is essentially to establish that the evolution of the market is different from that described at recitals 590 to 636 to the contested decision and does not represent the elimination of all competition.

482. The Court notes at the outset that in so far as the definition of the product market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Community judicature (see, to that effect, Case T342/99 Airtours v Commission [2002] ECR II2585, paragraph 26). However, this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, Commission v Tetra Laval , paragraph 89 above, paragraph 39).

483. The Court notes, moreover, that Microsoft on the one hand repeats arguments which it already submitted during the administrative procedure and which the Commission expressly rejected in the contested decision, but fails to indicate in what way the Commission's findings are incorrect, and, on the other, makes a general reference to two reports in annex A.23 to the application and annex C.12 to the reply. For the reasons set out at paragraphs 94 to 99 above, those reports will be taken into account by the Court only to the extent to which they support or complement pleas or arguments expressly set out by Microsoft in the body of its pleadings.

484. In arriving at the contested definition of the product market, the Commission took into account the demand-side substitutability and the supply-side substitutability of the products. It must be borne in mind that, as stated in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), point 7, [a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. As indicated at point 20 of that notice, moreover, supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. That means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

485. The Court would point out straight away that the definition of the second market is not based on the idea that there is a separate category of server operating systems exclusively implementing file and print services and user and group administration services. Quite to the contrary, at a number of points in the contested decision the Commission expressly acknowledges that work group server operating systems may also be used to carry out other tasks, and, in particular, may run non-mission critical' applications (see, in particular, recitals 59, 355, 356 and 379 to the contested decision). At recital 59 to the contested decision, the Commission states that non-mission critical' applications are those whose failure would impact the activity of some users [but] would not impact the overall activity of the organisation'. In that regard, the Commission refers, more specifically,

to the running of internal email services. As will be explained in greater detail below, the Commission's definition is based in fact on the finding that the capacity of work group server operating systems to supply collectively file and print services and also user and group administration services constitutes, without prejudice to the other tasks which they are capable of performing, an essential feature of those systems, and that those systems are primarily designed, marketed, purchased and used to provide those services.

486. As regards, in the first place, demand-side substitutability, the Commission concludes at recital 387 to the contested decision that there are no products that... exercise sufficient competitive pressure on work group server operating systems such that they should be included in the same relevant product market'.

487. In arriving at that conclusion, the Commission established, first, that it followed from the information gathered in the 2003 market enquiry that work group servers performed a distinct set of linked tasks which were demanded by consumers (recitals 348 to 358 to the contested decision).

488. The Court considers that that finding is confirmed by the evidence in the file and that Microsoft has raised no argument which disp roves it.

489. In its request for information of 4 June 2003, the Commission asked the organisations concerned whether within those organisations a particular type of server was used to supply file and print services and group and user administrative services (first part of question 1). Of the 85 organisations which answered that question, 70 (approximately 82.3%) said that that was so.

490. The Commission also asked the organisations whether they considered that those services constituted a set of server tasks that go together' (second part of question 1). Of the 83 organisations which answered that question, 51 (61.4%) endorsed that proposition.

491. Those results are explained, in particular, by the fact that those services constitute the basic services which client PC users use in their daily activities. Entity I 06, for example, explains its positive answer to both parts of question 1 by describing servers that supply work group services as infrastructure servers' and those services as standard desktop services'. It states that [e]ach user shall be identified/authenticated; he/she will create/modify files, print them, exchange/share them'. Likewise, other organisations refer to the servers as being infrastructure server providers' (see response of entities I 13 and I 30).

492. It is also significant that, as the Commission observes at recital 352 to the contested decision, several organisations explained their positive response to both parts of question 1 by the need to have a single sign-on identification' for users accessing the resources of the network or a single point of administration of the network (see, inter alia, the responses of entities I 30, I 46-16, I 46-37 and Inditex). Other organisations mention cost considerations, stating, in particular, that the use of the same operating system to supply work group services allows a reduction in administration costs (see, inter alia, the responses of entity I 49-19 and Inditex).

493. It is true that in the description of work group tasks' in its request for information of 4 June 2003 the Commission also included support for internal email and collaboration services and other non-mission critical applications' and that a number of the organisations questioned approved the inclusion of those services in that description. It is also true that, in answer to question 2 in the same request for information, 62 organisations out of 85 (approximately 72.9%) stated that they appreciated the flexibility offered by a work group server operating system which, in addition to file and print services and user and group administration services, was able to supply non-mission critical' services.

494. However, it cannot be inferred from those findings alone that the Commission defined the second

product market too narrowly.

495. First, those findings must be qualified. Thus, in their response to question 1 of the request for information of 4 June 2003, a number of the organisations questioned stated that in their operations internal email or collaboration services were performed on specialist servers and they distinguished those services from the other work group services mentioned by the Commission (see, in particular, the responses of entities I 091, I 11, I 22, I 37, I 53, I 46-13, I 4615, I 59 and I 72, and also those of Danish Crown, Spardat and Stork Food & Dairy Systems). For example, while entity I 37 considered that the work group tasks defined by the Commission constituted a set of linked server tasks, it stated that file/print [services] [went] together', whereas internal email [services] [belonged to] a different set of servers'. Likewise, entity I 4615 stated that it had a server that provided file and print services and workstation management only'.

496. Second, as the Commission observes at recitals 353 and 354 to the contested decision, and as it reiterates in its answer to one of the written questions put by the Court, the 2003 market enquiry also shows that when organisations use a given operating system to supply file or print services, they generally use the same operating system to supply user and group administration services. The Court notes that Microsoft does not dispute the findings in footnotes 436 and 438 to the contested decision relating to the correlation coefficients' calculated by the Commission on the basis of the responses to question 5 of its request for information of 16 April 2003. The Commission explains in those footnotes that the correlation coefficient' between the workload share of a NetWare system (or a Windows system) for one of the work group services (namely file sharing, printing and user and group administration) and the workload share of the same system for another of the same services is particularly high. On the other hand, the correlation coefficient' is much lower between the workload share of a NetWare system (or a Windows system) for one of the work group services and the workload share of the same system for a different type of service, in particular internal email services or other applications which are non-mission critical'. The Commission adds that the same conclusions may be deduced from results of the second and third Mercer surveys. In other words, it is apparent from that evidence, which Microsoft does not dispute, that it is much more usual to combine, on the same server, the work group services identified by the Commission than one of those services and a service of another type.

497. Consequently, while it is true that users attach a certain importance to the possibility of using work group server operating systems to perform certain non-mission critical' tasks in addition to work group services, that does not at all affect the conclusion that there is a separate demand for server operating systems that supply work group services. Since it is settled that it is the three categories of services thus considered that determine the choice of demand, it is immaterial that the server operating systems belonging to the relevant market are capable of performing certain additional tasks.

498. Furthermore, as indicated at recitals 357, 358 and 628 to the contested decision, the customer statements produced by Microsoft during the administrative procedure confirm the correctness of the Commission's analysis.

499. Those statements show that while, admittedly, as Microsoft emphasises at a number of points in its pleadings, organisations often have heterogeneous' computer networks (that is to say, networks in which server and client PC operating systems from different suppliers are used), they nevertheless use different types of servers to perform different types of tasks. More particularly, it is clear from those statements that work group services as defined by the Commission are generally supplied by other types of servers than those performing mission critical' services. Thus, it appears from those organisations' descriptions of their computer environment that work group services are normally supplied by entry-level servers running a Windows or NetWare system, while mission critical' applications

run on more expensive and larger UNIX servers or on mainframes.

500. For example, a large chemical and pharmaceutical group states that the business-critical' applications which it uses to pay its staff salaries and for internal banking transactions run on mainframes, while other business-critical' applications used, inter alia, for the administrative and technical management of certain of its divisions are supplied by UNIX servers. On the other hand, within that group non-business-critical' tasks, in particular file and print services and user and group administration services, are performed by separate servers which mainly run Windows operating systems. Likewise, a large airline explains that the applications which it uses especially for flight planning and reservation services are supplied by UNIX servers, whereas non-mission critical' applications are supplied by Windows servers. A further relevant example is provided by a banking group, which states that it uses UNIX servers for essential financial applications, Solaris servers for other financial applications and applications which it develops in-house, and Windows NT servers to support infrastructure functionality such as domain services (especially login and permissioning) and file and print services'.

501. The Court notes that, as indicated particularly at recitals 58 and 346 to the contested decision, low-end servers are not all used to supply work group services. Some of those servers are installed at the edge' of networks and are intended to perform specialist tasks, such as Web serving, Web caching and firewall tasks.

502. Last, Microsoft's argument to the effect that the IDC data show that, with the single exception of Novell's NetWare system, the operating systems which the Commission describes as work group server operating systems' spend much less time performing work group tasks than performing other tasks cannot be upheld. That argument is based on IDC data which establish that only 24% of sales of servers, across all price ranges, running a Windows operating system correspond to file', print' and network administration' tasks (see footnote 93 to the reply). However, as may be seen from recitals 487 and 488 to the contested decision, and as the Court will explain in greater detail at paragraph 553 below, the method which IDC uses to calculate market shares has a number of flaws. In any event, even if the tasks mentioned above were to be considered to correspond to the work group services referred to in the contested decision, the percentage calculated on the basis of IDC's data would represent only Microsoft's share of sales of server operating systems, in all versions, which relate to the work group server operating systems market. Contrary to Microsoft's assertion, the percentage in question is not limited to work group server operating systems.

503. Second, the Commission found, relying in particular on Microsoft's own description of its products, that the server operating systems were optimised' for the tasks which they were to perform (recitals 359 to 368 to the contested decision).

504. The Court considers that the evidence in the file confirms the correctness of that finding.

505. Thus, information published by Microsoft on its Internet site shows that the server operating systems in the Windows 2000 range are marketed in three different versions, namely, Windows 2000 Server, Windows 2000 Advanced Server and Windows 2000 Datacenter Server, and that each of those versions is intended to meet a specific task-based user demand.

506. Microsoft describes Windows 2000 Server as the entry-level' version of its Windows 2000 server operating systems and as the right solution for work group file, print and communication servers' (recital 361 to the contested decision). Windows 2000 Server scales from 1 to 4 processors and up to 4 gigabytes' (recital 364 to the contested decision).

507. Windows 2000 Advanced Server is presented by Microsoft as the right operating system for essential business and e-commerce applications that handle heavier workloads and high-priority processes' (recital 362 to the contested decision). Windows Advanced Server not only contains all the functionalities

offered by Windows 2000 Server but also offers additional scalability and reliability features, such as clustering, designed to keep... business-critical applications up and running in the most demanding scenarios' (recital 362 to the contested decision). Microsoft also states that Windows 2000 Advanced Server scales from 1 to 8 processors and up to 64 gigabytes' (recital 364 to the contested decision).

508. Last, Microsoft presents Windows 2000 Datacenter Server as offering maximum reliability and availability' and as constituting the right operating system for running mission-critical databases [and] enterprise resource planning software' (recital 363 to the contested decision). Windows 2000 Datacenter Server is designed for enterprises that need very reliable high-end drivers and software' and scales from 1 to 32 processors and up to 64 gigabytes' (recitals 363 and 364 to the contested decision).

509. Microsoft gives a similar presentation of the different versions of the range of server operating systems that replaced the Windows 2000 range, namely Windows Server 2003 Standard Edition, Windows Server 2003 Enterprise Edition, Windows Server 2003 Datacenter Edition and Windows Server 2003 Web Edition.

510. Thus, it describes Windows Server 2003 Standard Edition as the ideal multipurpose network operating system for the everyday needs of organisations of all sizes, but especially small businesses and work groups' and as permitting intelligent file and printer sharing, secure Internet connectivity, centralised desktop policy management and Web solutions that connect employees, partners, and customers' (recital 365 to the contested decision).

511. Windows Server 2003 Enterprise Edition, according to Microsoft's description, offers, in addition to the functionalities present in Windows Server 2003 Standard Edition, reliability features needed for business-critical applications' (recital 366 to the contested decision).

512. Windows Server 2003 Datacenter Edition, according to Microsoft, is built for mission critical applications that demand the highest levels of scalability, availability, and reliability' (recital 366 to the contested decision).

513. Last, Windows Server 2003 Web Edition is described by Microsoft as being designed for building and hosting Web applications, pages, and services' and as being designed specifically for dedicated Web serving needs' (recital 367 to the contested decision). Microsoft emphasises that that system can be used solely to deploy Web pages, Web sites, Web applications, and Web services' (recital 367 to the contested decision).

514. That publicity material shows that Microsoft itself presents the different versions of its server operating systems as being designed to meet distinct task-based user demands. It is also apparent from that publicity material that the different versions are not designed to run on the same hardware.

515. The Court also notes that the products of other operating system suppliers are also optimised' for work group services. That is so particularly for the products of Red Hat, whose Red Hat Enterprise Linux ES' and Red Hat Enterprise Linux AS' operating systems are clearly designed to meet distinct user demands. Thus, as the Commission states at footnote 463 to the contested decision, on Red Hat's website its Red Hat Enterprise Linux ES' system is described as being ideally suited for network, file, print, mail, Web, and custom or packaged business applications'. On the other hand, its Red Hat Enterprise Linux AS' system is presented as being targeted at high-end and mission-critical systems' and as the ultimate solution for large departmental and datacenter servers'. That is consistent with the finding that operating systems running on high-end servers are designed to perform mission critical' tasks and must therefore be more reliable and have more functionalities than work group server operating systems (recitals 57 and 346 to the contested decision).

516. Third, the Commission relied on Microsoft's pricing strategy' and, in particular, on the fact that it charged different prices for different versions of its server operating systems (recitals 369 to 382 to the contested decision).

517. First of all, it is clear from the information set out at recitals 370 to 373 to the contested decision, and not disputed by Microsoft, that there are significant price differentials between the different versions of its server operating systems, both in the Windows 2000 Server range and in the Windows 2003 Server range.

518. Thus, based on 25 Client Access Licences' (CALs'), the selling price of Windows 2000 Advanced Server is 2.22 times the price of Windows 2000 Server, while Windows 2000 Datacenter Server costs 5.55 times the price of Windows 2000 Server (based on 25 CALs).

519. Likewise, based on 25 CALs, the selling price of Windows Server 2003 Enterprise Edition is 2.22 times the price of Windows Server 2003 Standard Edition. The selling price of Windows Server 2003 Datacenter Edition is 5.55 times the price of Windows Server 2003 Standard Edition (based on 25 CALs). Windows Server 2003 Web Edition, which can be used only to perform certain specific tasks (see paragraph 513 above), is sold at a much lower price than Windows Server 2003 Standard Edition.

520. Next, contrary to what Microsoft appears to suggest (see paragraph 446 above), the Commission does not infer from the sole fact that Microsoft charges different prices for the different versions of its server operating systems that those versions belong to separate product markets. From the aspect of demand-side substitutability, the Commission takes into account not only those price differentials but also, and primarily, the fact that each of the different versions is designed to meet a specific user demand.

521. Nor is Microsoft entitled to rely on the fact that the more expensive' versions of its Windows Server 2003 range, namely Windows Server 2003 Enterprise Edition and Windows Server 2003 Datacenter Edition, allow the same work group tasks to be performed as Windows Server 2003 Standard Edition. Even though that may be true, the fact remains that the first two systems are intended to meet demands which are different from the third system and that it is unlikely that a user interested only in work group services will purchase a much more costly system than Windows Server 2003 Standard Edition for that purpose.

522. As the Commission correctly observes at recital 376 to the contested decision, Microsoft itself shares that opinion when, in its own marketing material, it states, with reference to the systems in the Windows 2000 Server range:

[T]he three offerings in the family - Windows 2000 Server, [Windows 2000] Advanced Server, and [Windows 2000] Datacenter Server - allow you to tailor your investment to provide the level of system availability that's appropriate for your various business operations, without overbuying for operations that don't require maximum uptime.'

523. In the same context, Microsoft cannot rely on the fact that the Windows Server 2003 Standard Edition operating system also allows tasks other than work group tasks to be performed. That argument ignores the fact that Microsoft charges different prices for that operating system depending on whether it is intended to be used to supply work group services or other types of services. As explained at recitals 84 and 380 to the contested decision, the prices charged by Microsoft for the Windows Server 2003 Standard Edition operating system include a fee for each server on which it is installed and a fee (CAL) for each client PC to which that server supplies work group services. By contrast, the user does not need to purchase a CAL if he wishes to use that operating system to perform unauthenticated' tasks, such as firewall, proxy or cache serving. Those findings show, moreover, that Microsoft's assertion that [v]endors do not charge different people different prices

for the same server operating system edition dep ending on how they will use it' is incorrect.

524. Fourth, and last, the Commission observed that server operating systems other than work group server operating systems did not need to interoperate as fully with the client PCs in an organisation as work group server operating systems (recitals 384 and 383 to 386 to the contested decision).

525. In that regard, it is sufficient to point out that it has already been found at paragraph 385 above that the Commission was correct to make such an appraisal. In any event, its appraisal is not disputed by Microsoft.

526. It follows from the foregoing considerations that Microsoft has not established that the Commission's finding that there are no products that, from the demand-side perspective, exercise sufficient competitive pressure on work group server operating systems to justify their inclusion in the same relevant product market (recital 387 to the contested decision) was manifestly incorrect.

527. In the second place, the question of supply-side substitutability is analysed by the Commission at recitals 388 to 400 to the contested decision.

528. The Commission considers that other operating system vendors, including in particular vendors of server operating systems, would not be able to switch their production and distribution assets to work group server operating systems without incurring significant additional costs and risks and within a time framework sufficiently short so as to consider that supply-side considerations are relevant in this case' (recital 399 to the contested decision). More specifically, the Commission rejects the argument developed by Microsoft in its response of 16 November 2001 to the second statement of objections, that there is a virtually instantaneous supply-side substitution', in that it is sufficient to disable' the more complex functionalities' in higher-end server operating systems in order to obtain a product comparable to a work group server operating system.

529. It is clear to the Court that, in the body of its pleadings, Microsoft puts forward no specific argument capable of calling in question the analysis carried out by the Commission in the recitals to the contested decision referred to above. In the reply, it merely makes the general assertion that [t]he cost of modification in many cases would be zero' and in the other cases... would be negligible', without even indicating whether it thereby intends to contest the Commission's finding that there was no supply-side substitutability.

530. In those circumstances, the Court finds that Microsoft has not established that the Commission manifestly erred when it concluded that there was no supply-side substitutability in this case.

531. The Court concludes from the foregoing that the Commission was correct to define the second product market as the work group server operating systems market.

532. That conclusion is not called in question by Microsoft's assertion that [n]o one in the industry uses the term work group server in the way the Commission has used it to define [the relevant product market]'. First, as the Commission quite correctly states, the terminology which it uses to designate the market makes no difference whatsoever to whether it defined the market correctly. Second, Microsoft's assertion in any event has no basis in fact, since the file shows that the expressions work group server' and work group server operating system' are used in the industry to designate the type of products covered by the contested decision. Thus, in its complaint of 10 December 1998, Sun expressly states that the complaint relates to Microsoft's conduct in the work group server operating systems sector'. Likewise, it must be borne in mind that in its marketing material Microsoft itself presents its Windows 2000 Server as the right solution for work group file, print and communication servers' (see paragraph 506 above).

- The method used in calculating market shares

533. Microsoft takes issue with the Commission for having used an inappropriate method to calculate

the market shares of the various operators on the second product market. It maintains, in particular, that that method provides no relevant information about dominance'.

534. The Court finds that, for the reasons given below, Microsoft has not demonstrated that the method used by the Commission is vitiated by any manifest error of assessment.

535. At recitals 473 to 490 to the contested decision, the Commission explains its method in detail.

536. The Commission states, first of all, that it uses two categories of proxies' to assess the position of the various operators on the market, namely, first, estimates of new sales by IDC based on price-band proxies and workload shares for various tasks and, second, estimates of market shares based on the results of the 2003 market enquiry and the second and third Mercer surveys (recital 473 to the contested decision).

537. It must be pointed out at the outset that the statement in the preceding paragraph shows that Microsoft's assertion that the Commission, when calculating market shares, took into account only the time spent by the server operating systems in performing work group tasks and sales of server operating systems costing under USD 25 000 is clearly incorrect. Microsoft fails to mention that the Commission also took into consideration data from sources other than IDC. As will be shown at paragraph 556 below, the market shares established on the basis of the latter data correspond globally to those determined on the basis of the IDC data.

538. Next, the Commission states that market shares must be estimated on the number of units of the product shipped and the turnover generated by sales of software and hardware together (recitals 474 to 477 to the contested decision).

539. Last, the Commission contends that the IDC data must be adjusted by means of two filters' (recitals 478 to 489 to the contested decision). First, it takes account only of servers costing less than USD 25 000 (or EUR 25 000, since, as stated in footnote 6 to the contested decision, at the material time EUR 1 corresponded roughly to USD 1). Second, it took into consideration only certain of the categories of tasks defined by IDC.

540. Microsoft's complaint is directed against the use of those two filters.

541. As regards the first filter, in the body of the reply Microsoft merely contests, quite generally, its relevance. In annex C.12 to the reply, it expands somewhat on its argument, first, by claiming that the 2003 market enquiry - some of the results of which were used by the Commission to justify the application of that filter - concerns the behaviour of a particular group of customers' and, second, by criticising the fact that the Commission takes account of the selling price of servers and not the selling price of operating systems. On that last point, the applicant submits that the same work group server operating system can run on servers of very different prices, and in particular on servers costing more than USD 25 000.

542. Those arguments cannot be accepted.

543. First of all, the entities questioned by the Commission in connection with the 2003 market enquiry do not represent a particular group of customers'. As stated at recital 8 to the contested decision, those entities are companies selected at random by the Commission, established in different Member States, of different sizes and from different activity sectors.

544. Next, as the Commission stated in answer to one of the written questions put by the Court, the price limit of USD 25 000 (or EUR 25 000) applies to the total cost of the system (that is to say, hardware and software)'. The Court finds that the Commission was correct to take account of the selling price of hardware and software to evaluate the market shares of the operators on the work group server operating systems market. As stated at recitals 69 and 474 to the contested decision, some vendors (including Sun and most UNIX vendors) develop and sell server operating

systems bundled with the hardware. The Court takes account, moreover, of the fact that during the administrative procedure Microsoft itself recommended the approach thus adopted by the Commission (see recital 476 to the contested decision).

545. Last, the Court finds that the Commission was quite correct to apply a maximum price of USD 25 000 (or EUR 25 000), which corresponds to the maximum selling price of servers in the first of the three categories of servers according to which IDC divides the market for the purposes of its analyses (recital 480 to the contested decision). In effect, the results of the 2003 market enquiry show that work group server operating systems generally run on relatively cheap servers, unlike mission critical' applications, which are run on high-level servers.

546. Thus, in connection with that enquiry, the Commission asked the organisations concerned to state what price they were prepared to pay for a work group server (question 3 of the request for information of 4 June 2003). Of the 85 organisations which answered that question, 83 (approximately 97.6%) stated that they would not pay more than EUR 25 000.

547. Likewise, in its request for information of 16 April 2003, the Commission asked the organisations a number of questions concerning their past and planned purchases of servers intended to supply file and print services (questions 8 and 9). It appears from the answers to those questions that, of the 8 236 servers purchased for that purpose by those organisations, 8 001 (approximately 97.1%) cost less than EUR 25 000 and that, of the 2 695 planned purchases of such servers, 2 683 (approximately 99.6%) cost less than EUR 25 000 (recital 479 to the contested decision).

548. As regards the second filter, Microsoft merely observes in the body of its reply that the application of that filter leads to the absurd consequence that a copy of an operating system is counted as [being] both inside and outside the market, depending on the tasks it is performing at any given time'. In annex C.12 to the reply the applicant adds that a large part of the (artificially) excluded sales almost certainly represent sales of [server operating systems] editions that are within the Commission's candidate market [namely, the work group server operating systems market]'.

549. Those arguments cannot be upheld either.

550. The Court finds not only that the Commission was quite correct to use that second filter, but also that Microsoft greatly exaggerates the consequences of its being used.

551. It is important to bear in mind why the Commission considered it necessary to use that filter. As stated at recital 482 to the contested decision, the Commission's reason for doing so was that not all the operating systems running on servers costing under USD 25 000 (or EUR 25 000) supply work group services. In particular, some of those systems are devoted exclusively to specific tasks outside, or at the edge of, work group networks, such as Web services or firewall services. That is the case, for example, of Windows Server 2003 Web Edition, which according to its licence conditions cannot be used to supply work group services and which normally runs on servers costing below USD 25 000 (or EUR 25 000).

552. The Commission therefore correctly concluded that it was necessary to qualify the IDC data on sales of computers costing below USD 25 000 (or EUR 25 000) by also taking into account the various types of tasks performed by those servers (recital 483 to the contested decision). To that end, the Commission used the IDC data in a database called IDC Server Workloads 2003 Model'. Those data were obtained from consumers whom IDC requested to specify the tasks (or workloads') carried out by the servers which they used in their organisation. As already stated at paragraph 431 above, IDC identified eight main categories of tasks and distinguished a number of sub-categories within those categories. The Commission used the sub-categories file/print sharing' and networking', which were the ones that most closely corresponded to the file and print' and group and user administration' services referred to in the contested decision (recital 486 to the contested decision).

553. Admittedly, the tasks in those two sub-categories do not correspond exactly with the services constituting the work group server operating systems market. The Commission was however fully aware of that as may be seen from the examples which it gives at recitals 487 and 488 to the contested decision and which show, in particular, that certain tasks performed on high-end servers may be placed in one or other of those sub-categories although they clearly do not represent work group tasks.

554. However, it was precisely the combination of the two filters of which Microsoft complains that allowed that problem of consistency between the tasks defined by IDC and those identified by the Commission to be reduced.

555. In any event, it is clear that the market shares obtained if only the first filter is applied are not significantly different from those obtained when both filters are used together. Thus, Microsoft's market share for 2002, when calculated on the basis of all servers sold for below USD 25 000, is 64.9% by units shipped and 61% by turnover (recital 491 to the contested decision). When, for the same servers, only the sub-categories file/print sharing' and networking' are taken into consideration, Microsoft's market shares are as follows: 66.4% by units shipped (65.7% by turnover) for the first sub-category and 66.7% by units shipped (65.2% by turnover) for the second (recital 493 to the contested decision).

556. More generally, as noted at recital 473 to the contested decision, the percentages obtained using the IDC data, when both filters are applied together, correspond globally with those obtained on the basis of the 2003 market enquiry and the second and third Mercer surveys (see, for example, recitals 495, 497 and 498 to the contested decision). It must be emphasised in that context that each time the Commission erred on the side of caution. Thus, in Microsoft's case, it took the lowest market share, at least 60%' (recital 499 to the contested decision).

557. The Court concludes that Microsoft has not demonstrated that the method which the Commission used when calculating market shares is vitiated by a manifest error of assessment or, consequently, that the estimates of market shares given at recitals 491 to 513 to the contested decision must be considered manifestly incorrect.

558. Nor did the Commission base its finding that Microsoft held a dominant position on the work group server operating systems market solely on its market shares on that market. It also took into account the fact that there were barriers to entry to that market (recitals 515 to 525 to the contested decision), owing in particular to the presence of network effects and obstacles to interoperability, and also the close commercial and technological links between that market and the client PC operating systems market (recitals 526 to 540 to the contested decision).

559. Last, as regards the abusive refusal to supply, it must be borne in mind that in the contested decision the Commission takes issue with Microsoft for having used, by leveraging, its quasi-monopoly on the client PC operating systems market to influence the work group server operating systems market (recitals 533, 538, 539, 764 to 778, 1063, 1065 and 1069). In other words, Microsoft's abusive conduct has its origin in its dominant position on the first product market (recitals 567 and 787 to the contested decision). Even if the Commission were wrongly to have considered that Microsoft was in a dominant position on the second market (see, in particular, recitals 491 to 541, 781 and 788 to the contested decision) that could not therefore of itself suffice to support a finding that the Commission was wrong to conclude that there had been an abuse of a dominant position by Microsoft.

- The applicable criterion

560. In the contested decision, the Commission considered whether the refusal at issue gave rise to a risk' of the elimination of competition on the work group server operating systems market (recitals 585, 589, 610, 622, 626, 631, 636, 653, 691, 692, 712, 725, 781, 992 and 1070 to the contested decision).

Microsoft contends that that criterion is not sufficiently strict, since according to the case-law on the exercise of an intellectual property right the Commission must demonstrate that the refusal to license an intellectual property right to a third party is likely to eliminate all competition', or, in other words, that there is a high probability' that the conduct in question will have such a result.

561. The Court finds that Microsoft's complaint is purely one of terminology and is wholly irrelevant. The expressions risk of elimination of competition' and likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.

562. In this case, the Commission had all the more reason to apply Article 82 EC before the elimination of competition on the work group server operating systems market had become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse (see recitals 515 to 522 and 533 to the contested decision).

563. Nor is it necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.

564. Last, it must be borne in mind that it is for the Commission to establish that the refusal to supply gives rise to a risk of the elimination of all effective competition. As already stated at paragraph 482 above, the Commission must base its assessment on accurate, reliable and coherent evidence which comprises all the relevant data that must be taken into consideration in order to assess a complex situation and which are capable of substantiating the conclusions drawn from them.

- The assessment of the market data and the competitive situation

565. In the contested decision, the Commission analyses together the circumstance that interoperability is indispensable and the fact that the refusal is likely to eliminate competition (recitals 585 to 692 to the contested decision). Its analysis has four parts. In the first place, the Commission examines the evolution of the work group server operating systems market (recitals 590 to 636 to the contested decision). In the second place, it establishes that interoperability is a factor which plays a determining role in the use of Windows work group server operating systems (recitals 637 to 665 to the contested decision). In the third place, it states that there are no substitutes for disclosure by Microsoft of the interoperability information (recitals 666 to 687 to the contested decision). In the fourth place, it makes a number of observations about the CPLC (recitals 688 to 691 to the contested decision).

566. The arguments which Microsoft puts forward in support of the present complaint relate essentially to the first part of the Commission's analysis. Microsoft claims, in effect, that the market data contradict the Commission's argument that competition on the work group server operating systems market is at risk of being eliminated as a consequence of the refusal at issue.

567. In the first part of its analysis, the Commission began by examining the evolution of the market shares of Microsoft and its competitors on the second product market. It established, essentially, that Microsoft's market share had experienced rapid and significant growth and that it continued

to increase to the detriment of Novell in particular. The Commission then noted that the market share of UNIX vendors was weak. Last, it considered that Linux products had only a very small presence on the market, that they had made no headway on the market during the years immediately preceding the adoption of the contested decision and that certain forecasts concerning their future growth were not capable of calling in question its finding that effective competition would be eliminated on the market.

568. The Court considers that those different findings are confirmed by the evidence in the file and that they are not called in question by Microsoft's arguments.

569. First, the file shows that initially Microsoft supplied only client PC operating systems and that it was a relatively late entrant to the server operating systems market (see, in particular, paragraph 47 of the response of 17 November 2000 to the first statement of objections). It was only in the early 1990s that Microsoft began to develop a server operating system - it marketed its first system, Windows NT 3.5 Server', in July 1992 - and it was only with Windows NT 4.0', released in July 1996, that it first encountered real commercial success (see, in particular, paragraph 50 of the response of 17 November 2000 to the first statement of objections and paragraphs 50 and 56 of the application).

570. It is apparent from the IDC data, as reproduced at recital 591 to the contested decision, that Microsoft's market share, by units shipped, on the market for operating systems for servers costing under USD 25 000 grew from 25.4% (24.5% by turnover) in 1996 to 64.9% (61% by turnover) in 2002, a leap of almost 40% in just six years.

571. It also follows from the IDC data mentioned at recital 592 to the contested decision that Microsoft's market share increased continuously following the launch of the Windows 2000 generation of operating systems. As the Commission rightly observes at a number of places in the contested decision (see, for example, recitals 578 to 584, 588 and 613 to the contested decision), it was specifically with the Windows 2000 range of operating systems that the problems of interoperability arose in a particularly acute fashion for Microsoft's competitors.

572. Thus, for example, the NDS for NT' software, which had been developed by Novell by reverse engineering, made interoperability possible between Microsoft's competitors' work group server operating systems and the Windows domain architecture (in this instance Windows NT). NDS for NT could be installed on a Windows NT domain controller and enabled clients to use Novell's NDS (Novell Directory Service) (later called eDirectory) to administer the different aspects of Windows NT domains. Because Microsoft failed to communicate certain information to Novell, however, NDS for NT does not work with the Windows 2000 Server operating system (see recital 301 to the contested decision).

573. Another example is AS/U, which AT & T had been able to develop in the 1990s by using certain Windows source code which Microsoft had agreed to disclose to it under a licence. AS/U enabled a server running UNIX to work as main domain controller in a Windows NT domain (see recital 211 to the contested decision). Likewise, Sun, on the basis of the AS/U source code licensed to it by AT & T, had developed a product comparable to AS/U, PC NetLink', which, when installed on a Solaris server, enabled that server to provide transparent Windows NT file, print, directory, and security services to Windows 3.X/95/98/NT clients' (and to do so natively', that is to say, without users having to install additional software on their client PCs) and to act as a primary domain controller (or backup domain controller) in a Windows NT domain (see recital 213 to the contested decision). In 2001 Microsoft and AT & T decided not to extend their licence agreement to certain new server operating system technologies. Thus, Microsoft did not supply AT & T with the source code relating to the systems which replaced Windows NT 4.0. Consequently, PC NetLink was no longer capable of working except with Windows NT client PCs - in particular,

it did not work with Windows 2000 - and gradually lost its attraction.

574. In the same context, it is appropriate to mention the various changes which followed the migration from Windows NT technology to Windows 2000 technology and Active Directory (see paragraphs 167 to 171 above).

575. Second, it is apparent from the file that, alongside the evolution of Microsoft's position as described above, Novell experienced a continuous decline on the work group server operating systems market and in just a few years became a secondary player. At the time when Microsoft entered the server operating systems market, the leading product for the supply of work group services was Novell's NetWare (see paragraph 56 of the application), which had been present on that market since the mid-1980s.

576. Thus, the IDC data mentioned at recital 593 to the contested decision show that, when the file/print sharing' sub-category and servers costing under USD 25 000 are taken into account, NetWare's market share fell from 33.3% in 2000 to 23.6% in 2002 by units shipped and from 31.5% in 2000 to 22.4% in 2002 by turnover.

577. Novell's decline is confirmed both by the statements of market analysts and by Microsoft itself (see recital 596 to the contested decision).

578. Similarly, in the report containing the analysis of the results of its third survey, Mercer expressly states that numerous organisations have reduced their use of NetWare. Mercer observes, in particular, that when asked about their usage of each of the server operating systems for work group server functions over the last five years, organisations that have reduced their usage of NetWare outnumber those that have increased their usage of NetWare by a nearly 7:1 ratio' (page 25 and table 16 of the report).

579. Furthermore, as the Commission correctly observes at recitals 594 and 595 to the contested decision, certain results of the 2003 market enquiry and certain customer statements produced by Microsoft during the administrative procedure clearly show a tendency within organisations to replace NetWare by Windows 2000 Server. On the other hand, there are only very few examples of migration' from Windows to NetWare (see recitals 594 and 632 to the contested decision).

580. Third, the evidence in the file shows that Microsoft's other competitors were able to maintain only a very marginal position on the work group server operating systems market.

581. Thus, first of all, the IDC data mentioned at recital 508 to the contested decision show that the market share of UNIX vendors (including Sun) represented, when the file/print sharing' subcategory and servers costing under USD 25 000 were taken into account, only 4.6% by units shipped and 7.4% by turnover. For the network administration' sub-category, the corresponding figures were 6.4% by units sold and 10.8% by turnover.

582. The results of the 2003 market enquiry and the customer statements produced by Microsoft show that UNIX systems are effectively used not to perform work group tasks but to run mission-critical' Web supply and firewall applications and also, to a lesser extent, to run internal email services (see recitals 509 to 511 to the contested decision).

583. Next, the IDC data, the results of the 2003 market enquiry and Microsoft's customer statements show that, contrary to Microsoft's assertions, Linux products also had only a marginal presence on the work group server operating systems market at the time of adoption of the contested decision.

584. Thus, the IDC data reproduced at recital 599 to the contested decision show that the combined market share of vendors of Linux products, by units shipped, fell, for the file/print sharing' subcategory and servers costing under USD 25 000, from 5.1% in 2000 to 4.8% in 2002. When measured by turnover, that combined market share remained at 3.9% over that period.

585. Admittedly, for the network administration' sub-category and servers costing under USD 25 000, the combined share of vendors of Linux products, by units shipped, rose, according to the IDC data mentioned in footnote 728 to the contested decision (see also recital 505 to the contested decision), from 10.1% in 2000 to 13.4% in 2002 (and from 8% to 10.8% over the same period, by turnover). However, that increase has to be qualified in light of the fact that, as the Commission observes at recital 488 to the contested decision and in the above footnote to the contested decision, that sub-category includes services which are not work group services within the meaning of the contested decision. IDC describes that sub-category as includ[ing] the following networking applications: directory, security/authentication, network data/file transfer, communication, and system data/file transfer' (recital 488 to the contested decision). Such a description is likely to lead the users questioned by IDC to include in that sub-category certain tasks which do not belong there (and do not belong in the relevant product market) and which are generally performed by Linux or UNIX systems. For example, that description might be interpreted as covering network edge tasks', such as firewall (which might be considered to relate to security') and routing (which might be considered to relate to system data/file transfer'). As stated, in particular, at recitals 58, 346, 482, 600 and 601 to the contested decision, however, tasks of that type are generally performed by Linux on high-end servers. Accordingly, the IDC data relating to the network administration' sub-category overestimate Linux sales on the work group server operating systems market.

586. It is true that, at recital 487 to the contested decision, the Commission observes that the IDC data on the file/print sharing' sub-category are also less than perfect, notably in that, because high-end servers which perform mission critical' applications may be used to print certain documents (for example invoices), the users questioned may form the view that those servers perform tasks belonging to that sub-category when it is clear that they are not work group servers. However, the application of the EUR 25 000 (or USD 25 000) filter allows such inaccuracy to be reduced (see recital 489 to the contested decision, where the Commission observes that mainframes that print invoices will generally cost more than that amount). The IDC data are therefore more flawed with respect to the network administration' sub-category than with respect to the file/print sharing' sub-category.

587. The results of the 2003 market enquiry contain no flaws of the type referred to in the preceding paragraph. Those results confirm that Linux had only a marginal presence on the work group server operating systems market. Thus, in its request for information of 16 April 2003, the Commission requested the organisations concerned whether they used Linux servers in conjunction with Samba software to perform work group tasks (question 25). Of the 102 organisations which participated in that enquiry, only 19 used Linux servers for work group tasks, and in most cases did so to a very limited extent (recital 506 to the contested decision). Thus, out of a total of more than 1 200 000 client PCs covered by the 2003 market enquiry, fewer than 70 000 (less than 5.8%) were served by Linux/Samba servers for file and print tasks (recitals 506 and 599 to the contested decision).

588. Likewise, as the Commission submits in the defence (paragraph 140), the second Mercer survey reveals, for Linux products, a combined market share of 4.8% for file and print tasks and 5.2% for group and user administration tasks (the third Mercer survey reveals, for the same products, a market share of 5.4% for file and print services and 4.5% for group and user administration tasks).

589. In reality, the results of the 2003 market enquiry show that, like UNIX, Linux products are generally used to perform tasks other than work group tasks, namely, to provide Web and firewall services and to run mission-critical' applications (see recitals 600 and 601 to the contested decision, where the Commission comments on the responses to questions 5 and 6 of the request for information of 16 April 2003).

590. That finding is confirmed, moreover, by the customer statements submitted by Microsoft during

the administrative procedure, as the Commission correctly observes at recital 602 to the contested decision.

591. Furthermore, the presence of vendors of Linux products on the work group operating systems market, apart from the fact it is by no means comparable to the market presence which Microsoft managed to acquire in just a few years, was achieved not at Microsoft's expense but at the expense of Novell and UNIX vendors. As the Commission stated in the rejoinder (paragraph 104), among the entities questioned by Mercer whose use of Linux for work group server tasks had increased over the previous five years, 67% had decreased their use of NetWare or UNIX, while only 14% had decreased their use of Windows. As the Commission correctly states at recital 632 to the contested decision, moreover, the 2003 market enquiry revealed only two instances of migration from Windows to Linux for work group server tasks.

592. Microsoft's assertions to the contrary in annex C.11 to the reply are scarcely credible, having regard particularly to the consistent increase in its market share on the relevant product market throughout the period covered by the abusive refusal in question.

593. The above factors confirm that Microsoft's refusal has the consequence that its competitors' products are confined to marginal positions or even made unprofitable. The fact that there may be marginal competition between operators on the market cannot therefore invalidate the Commission's argument that all effective competition was at risk of being eliminated on that market.

594. In light of the factors referred to at paragraphs 583 to 593 above, the Court considers that the Commission was correct to find, at recital 603 to the contested decision, that Linux vendors did not represent a significant threat to Microsoft on the work group server operating systems market.

595. Microsoft also claims that the presence of Linux products on the work group server operating systems market will continue to increase in the future. It expands on that argument in annex A.19 to the application and in annex C.11 to the reply. The Commission provides a detailed response to that argument in annex B.10 to the defence and in annex D.11 to the rejoinder.

596. In support of that argument, Microsoft refers, first of all, to certain results of the third Mercer survey.

597. In that survey, Mercer asked the IT executives whose organisations already used Linux operating systems for work group tasks whether they planned to increase that use within the next five years. Table 19 in the Mercer report, in which the results of that survey are analysed, shows that of the 70 IT executives concerned by that question, 53 responded in the affirmative.

598. The Court finds that the Commission was correct to conclude, at recital 605 to the contested decision, that that factor was not conclusive. On the one hand, those 53 IT executives represented only approximately 17.9% of the 296 IT executives who participated in the third Mercer survey (226 of those executives stated that their organisation did not use Linux systems to supply work group services). On the other hand, the 53 I T executives in question did not quantify their intended increase in use of Linux systems to perform work group tasks, nor did they specify whether that increase would be at the expense of Windows.

599. Furthermore, table 18 in the same Mercer report shows that 58 IT executives considered that Linux would not even become viable' for the performance of work group tasks within the next five years.

600. It is true that the same table shows that 60% of the IT executives questioned stated that their organisation planned to adopt Linux systems within the next five years to supply work group services. However, as the Commission correctly observes at recital 606 to the contested decision,

those executives were not invited to quantify their takeup of Linux nor to say whether it would be at the expense of Windows.

601. Next, Microsoft relies on certain projections by IDC which establish that Linux's market share will double between 2003 and 2008.

602. The Court observes that the IDC data contain a number of flaws, as its sub-categories include tasks which do not belong to the work group server operating systems market covered by the contested decision. IDC's growth projections must therefore be qualified.

603. Furthermore, as the Commission correctly observes at recital 609 to the contested decision, the limited growth that Linux is forecast to achieve on the market, according to those projections, would be at the expense, not of Windows, but of competing systems and, more particularly, of NetWare. The Court observes, in that context, that in April 2003 Novell announced that from 2005 its NetWare 7.0 operating system would be sold in two different versions, one based on the traditional NetWare platform and the other on the Linux operating system (see recital 95 to the contested decision).

604. Last, in annex A.19 to the application and annex C.11 to the reply, Microsoft refers to the opinion expressed by certain industry observers'. It refers, more expressly, to certain passages in a report of 8 March 2004 by Merrill Lynch (annex 7 to annex C.11 to the reply) which contains the results of a survey carried out by Merril Lynch among 50 IT executives. The applicant observes that half of those executives proposed to increase their use of Linux systems in their organisation and that, of that half, 34% envisaged doing so in order to replace Windows NT for file and print tasks.

605. That argument is not convincing. All that it means is that 17% of the IT executives questioned intended to replace Windows NT by Linux systems for the tasks referred to in the preceding paragraph, whereas it says nothing about the extent to which Windows would be thus replaced. In reality, in light of the fact that at the time of the Merril Lynch survey Windows NT technology was already outdated' (see recital 583 to the contested decision), it is highly probable that the installed base of Windows NT servers was relatively small and, accordingly, that the migration' referred to above would be on only a small scale. It should also be borne in mind that non-Microsoft server operating systems could achieve a higher degree of interoperability with the Windows NT generation of systems than with subsequent generations of Windows produced by Microsoft. As the Commission emphasises in its assessment of the circumstance relating to the indispensability of the information at issue (see paragraph 366 above), the migration' referred to in the Merril Lynch report is likely to be a one-off phenomenon and cannot therefore affect the Commission's findings in respect of the risk of the elimination of competition.

606. Continuing with the first part of its analysis (the part relating to the evolution of the work group server operating systems market), the Commission then established that Windows 2000, and in particular Active Directory, were quickly gaining traction in the market' (recitals 613 to 618 and 781 to the contested decision). The Commission further observed that, [owing] to Microsoft's disruption of interoperability-related disclosures, interoperability with... Windows 2000 features is significantly more difficult for non-Microsoft work group servers than used to be the case with the analogous technologies in Windows NT', before concluding that the uptake [of the new features of the Windows domain specific to Windows 2000] contributes to the lock-in of the customers that embrace them in a homogeneous Windows solution for work group networks' (recital 613 to the contested decision).

607. The Court finds that a number of documents in the file substantiate the correctness of those findings.

608. Thus, in a bulletin published in November 2001, IDC stated that [f]or the vast majority

of users, the question is not if, but when, they will implement directory services to support Windows 2000 Server and future Windows server operating systems' and that for Windows 2000 users, the directory of choice is overwhelmingly going to be Active Directory' (recital 614 to the contested decision).

609. Likewise, as the Commission notes at recital 616 to the contested decision, an Evans Data Corporation survey conducted in 2002 shows that, when asked about the directory services for which their applications were designed, 50.3% of the in-house developers concerned mentioned Active Directory.

610. Certain results of the 2003 market enquiry also confirm the impressive interest caused by Active Directory. Thus, in its request for information of 16 April 2003, the Commission asked the entities concerned whether they had already implemented (or decided to implement) Active Directory in the majority of the Windows domains in their computer network (question 15). Of the 102 entities covered by the survey, 61 answered that question in the affirmative.

611. The interest in Active Directory is also apparent from certain results of the second Mercer survey, as the Commission notes at recital 618 to the contested decision.

612. It was stated at paragraphs 571 to 574 above, moreover, that the interoperability that work group server operating systems can achieve with products of the Windows 2000 generation is much lower than they were able to achieve with systems of the previous generation.

613. Last, the Commission concluded the first part of its analysis by rejecting three categories of arguments that Microsoft had put forward during the administrative procedure to dispute the risk of elimination of competition identified by the Commission. Microsoft had referred to certain statements made by its competitors, relied on the fact that the computer networks within undertakings were heterogeneous and claimed that replacement solutions for Windows existed.

614. In its pleadings, Microsoft referred to the customer statements which it had produced during the administrative procedure and reiterated its argument that networks within undertakings are heterogeneous.

615. On that point, it is sufficient to observe that it has already been found at paragraphs 498 to 500 above that those statements confirmed that, so far as work group servers were concerned, those customers' computer networks consisted primarily of Windows systems.

616. In its pleadings, Microsoft also relies on the fact that professional customers adopt their purchasing decisions in respect of server operating systems according to a set of criteria and that the question of interoperability with Windows client PC operating systems is not a determining factor in that regard. As already demonstrated at paragraph 426 above, that assertion is incorrect.

617. Furthermore, Microsoft's argument that, six years after the alleged refusal to supply, there were still numerous competitors on the work group server operating systems market (see paragraph 442 above) must be rejected for the reasons set out at paragraph 429 above.

618. It follows from all of the foregoing that the Commission did not make a manifest error of assessment when it concluded that the evolution of the market revealed a risk that competition would be eliminated on the work group server operating systems market.

619. The Commission had even more reason to conclude that there was a risk that competition would be eliminated on that market because the market has certain features which are likely to discourage organisations which have already taken up Windows for their work group servers from migrating to competing operating systems in the future. Thus, as the Commission correctly states at recital 523 to the contested decision, it follows from certain results of the third Mercer survey that the fact of having an established record as proven technology' is seen as a significant factor by the large majority of IT executives questioned. At the time of the adoption of the contested decision, Microsoft, at a conservative estimate, held a market share of at least 60% on the work group server

operating systems market (recital 499 to the contested decision). Likewise, certain results of that survey also establish that the factor available skill-sets and cost/availability of support (in-house or external)' is important for the majority of the IT executives questioned. As the Commission quite correctly states at recital 520 to the contested decision, [that] means that the easier it is to find technicians skilled in using a given work group server operating system, the more customers are inclined to purchase that work group server operating system' and, [i]n turn, however, the more popular a work group server operating system is among customers, the easier it is for technicians (and the more willing are technicians) to acquire skills related to that product'. Microsoft's very high market share on the work group server operating system market has the consequence that a very large number of technicians possess skills which are specific to Windows operating systems.

620. The Court therefore concludes that the circumstance that the refusal at issue entailed the risk of elimination of competition is present in this case.

(iv) The new product

Arguments of the parties

621. Microsoft cites paragraphs 48 and 49 of IMS Health , paragraph 107 above, and maintains that it has not been established that its refusal prevented the appearance of a new product for which there is unsatisfied consumer demand.

622. The applicant already markets server operating systems which implement the communication protocols in question and its competitors market their own server operating systems, which use communication protocols which they have selected to provide work group services.

623. Microsoft refers to recital 669 to the contested decision and claims that the contested decision seeks to allow its competitors to make their products behave in exactly the same way as Windows server operating systems and that it is the Commission's intention that the applicant's communication protocols should be used by its competitors to create server operating systems that compete directly with the applicant's products by mimicking their functionality.

624. Microsoft also claims that the contested decision fails to identify any new product that its competitors would develop using the applicant's communication protocols and to demonstrate that there is any demand for such a product. The Commission merely claims that Microsoft's competitors could use the disclosures to [develop] the advanced features of their own products' (recital 695 to the contested decision).

625. Microsoft observes that neither the letter of 15 September 1998 nor Sun's complaint of 10 December 1998 gives the slightest indication that Sun intended to use Microsoft's technology' to create anything other than a work group server operating system.

626. Microsoft disputes the Commission's assertion that in order to be described as new, it is sufficient for a product to contain substantial elements contributed by the licensee's own efforts. It maintains that the [a]ddition of a feature taken from a competitor's products can hardly be viewed as the creation of a new product'.

627. Microsoft also challenges the Commission's claim that the applicant's refusal is a refusal to allow follow-on innovation' (see paragraph 632 below). It disputes the accuracy of the statements set out at recital 696 to the contested decision and submits that Novell never used AS/U and that sales of work group server operating systems supplied by Sun and several other vendors' who had been licensed to use AS/U were always modest. In reality, the compulsory licensing ordered in the contested decision is likely to reduce innovation, because the applicant will have less incentive to develop a specific technology if it is required to make that technology available to its competitors.

628. Last, Microsoft denies that the refusal at issue harms consumers. The Mercer report on which

the Commission relies (see paragraph 635 below) relates to products currently on the market and is therefore irrelevant to the question whether the refusal to supply prevented the emergence of new products for which there is unmet consumer demand. Much more significantly, none of the Mercer reports shows that Microsoft lags behind' its competitors. More specifically, the Commission fails to mention that Windows server operating systems scored higher than NetWare and Linux systems in 10 out of 13 categories and higher than UNIX systems in 9 out of 13 categories; and throughout the administrative procedure no customer claimed that it had been forced to use Windows server operating systems as a result of the applicant's alleged refusal to disclose interoperability information to its competitors.

629. CompTIA submits that the Commission has not shown in the contested decision that Microsoft's refusal had prevented the appearance of a new product.

630. The Commission rejects Microsoft's assertion that its refusal did not prevent the appearance of a new product for which there is unmet consumer demand.

631. The Commission submits that, in the first place, it follows from paragraph 49 of IMS Health , paragraph 107 above, that a new product' is a product which does not limit itself essentially to duplicating the products already offered on the market by the owner of the copyright. It is sufficient, therefore, that the product concerned contains substantial elements that result from the licensee's own efforts. As Microsoft is required to disclose only the specifications and not the implementation of its interfaces, its competitors will not limit themselves to duplicating its products and, indeed, will not be able to do so. Competitors will use the interoperability information to constantly market improved products and offer... added value over their own and Microsoft's previous offerings', instead of being eliminated from the market as a consequence of Microsoft's refusal to disclose that information (recital 695 to the contested decision). Nor will any feature of Microsoft's products, and in particular any portion of its software code, be integrated in other work group server operating systems.

632. In the second place, the Commission did not confine itself in the contested decision to a mere analysis of the new product' criterion as defined in IMS Health , paragraph 107 above. It examined that criterion by reference to the prohibition laid down in Article 82(b) EC of abuses of a dominant position that limit technical development to the prejudice of consumers. The Commission thus took particular care to ascertain that Microsoft's refusal was a refusal to allow follow-on innovation', that is to say, the development of new products, and not a mere refusal to allow copying.

633. In support of those assertions, the Commission claims, first, that it examined the conduct which Microsoft's competitors had adopted in the past when Microsoft supplied interoperability information to them or inadvertently allowed them to employ workarounds' (recital 696 to the contested decision). In response to Microsoft's criticisms of that point, the Commission explains that, as Novell was not a UNIX vendor', it was not interested in UNIX-based implementations' such as AS/U. However, Sun and other UNIX vendors offered innovative products which could have met demand from those consumers if Microsoft had not refused to supply interoperability information.

634. Second, the Commission observes that, at recital 698 to the contested decision, it noted that numerous different implementations of the same specification were possible.

635. Third, the Commission cites recital 699 to the contested decision and asserts that it follows from the results of the third Mercer survey that, in spite of the fact that Microsoft lags behind its competitors' on several features considered important by server operating systems consumers, those consumers content themselves with Microsoft's products because of the interoperability barrier to adopting alternatives'. Microsoft scores higher than its competitors only because interoperability with Windows is a factor taken into account and because less important factors are given the same

weight as important factors. In response to Microsoft's argument that no customer has complained about having to adopt a Windows operating system because of its refusal to supply, the Commission refers to recitals 702 to 708 to the contested decision.

636. Fourth, the Commission observes that Microsoft's competitors undertake research and development, but that they need access to Microsoft's protocols to enable organisations using Windows work group servers and PCs to take advantage of their innovation without being penalised by the lack of interoperability. It states that [a]s such, the refusal does not directly impair competitors' ability to innovate, but rather the consumer's ability to benefit from such innovation, as well as the competitors' ability to earn a return on their innovation - and hence in the long er term their incentives to innovate'.

637. Last, the Commission asserts that Microsoft's arguments concerning its own incentives to innovate are not relevant to the assessment of the consequences which the abusive practice has for its competitors' incentives to innovate.

638. In the third place, the Commission claims that Microsoft's argument that the new product' criterion is not satisfied in this case is based on a misinterpretation of the case-law.

639. First, that criterion does not require a concrete demonstration that the licensee's product will attract customers who do not buy the products offered by the existing dominant supplier. In IMS Health , paragraph 107 above, the Court of Justice focused on product differentiation which could affect consumer choices or, in other words, whether there was potential demand' for the new product. The new product' criterion emphatically does not apply solely to restrictions on production. In the rejoinder, the Commission asserts that the proposed new products will clearly respond to potential demand and that they will build upon operating systems currently marketed by Microsoft's competitors, which have features that consumers value, often more highly than the corresponding features of Microsoft's work group server operating systems.

640. Second, Microsoft cannot rely on the fact that the contested decision focuses on its competitors' ability to adapt their own existing products'. The relevant question is whether those competitors will essentially confine themselves to reproducing the existing products developed by the holder of the intellectual property right. Microsoft's competitors' products will implement the same set of protocols as Windows work group server operating systems do but will differ widely in terms of performance, security and functionality.

641. Third, the Commission asserts that the case-law does not preclude the possibility that the licensee's future products will compete with the products of the owner of the intellectual property right, as may be seen from the facts of Magill and IMS Health , paragraph 107 above.

642. SIIA claims that the refusal at issue prevents the emergence of new and innovative non-Microsoft work group server operating systems meeting the interoperability needs of customers'. If they have the interoperability information, Microsoft's competitors will be able to offer not only enhanced functional capabilities' but also, and most importantly, interoperable products. SIIA also observes that there would be no competitive advantage for Microsoft's competitors in merely duplicating Microsoft's products' and that, moreover, they would be unable to do so if they had access to the information covered by the contested decision.

Findings of the Court

643. It must be emphasised that the fact that the applicant's conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in limiting production, markets or technical developments to the... prejudice of consumers'.

644. Thus, at paragraph 54 of Magill , paragraph 107 above, the Court of Justice held that the

refusal by the broadcasting companies concerned had to be characterised as abusive within the meaning of that provision because it prevented the appearance of a new product which the broadcasting companies did not offer and for which there was a potential consumer demand.

645. It is apparent from the decision at issue in that case that the Commission had, more specifically, considered that by their refusal, the broadcasting companies limited production or markets to the prejudice of consumers (see the first paragraph of recital 23 to Commission Decision 89/205/EEC of 21 December 1988 relating to a proceedings under Article [82 EC] (IV/31.851, Magill TV Guide/ITP, BBC and RTE) (OJ 1989 L 78, p. 43). The Commission had found that that refusal prevented publishers from producing and publishing a weekly television guide for consumers in Ireland and Northern Ireland, a type of guide not then available on that geographic market. Although each of the broadcasting companies concerned published a weekly television guide, each guide was devoted to that particular broadcaster's own programmes. In finding an abuse of a dominant position by those broadcasting companies, the Commission had emphasised the harm which the absence of a general weekly television guide on the market in Ireland and in Northern Ireland caused to consumers, who, if they wished to know what programmes were being offered in the coming week, had no alternative to buying the weekly guides of each channel and themselves extracting the relevant information in order to make comparisons.

646. In IMS Health , paragraph 107 above, the Court of Justice, when assessing the circumstance relating to the appearance of a new product, also placed that circumstance in the context of the damage to the interests of consumers. Thus, at paragraph 48 of that judgment, the Court emphasised, with reference to the Opinion of Advocate General Tizzano in that case ([2004] ECR I5042), that that circumstance related to the consideration that, in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market, to the detriment of consumers.

647. The circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health , paragraph 107 above, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

648. It was on that last hypothesis that the Commission based its finding in the contested decision. Thus, the Commission considered that Microsoft's refusal to supply the relevant information limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC (recitals 693 to 701 and 782 to the contested decision) and it rejected Microsoft's assertion that it had not been demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).

649. The Court finds that the Commission's findings at the recitals referred to in the preceding paragraph are not manifestly incorrect.

650. Thus, in the first place, the Commission was correct to observe, at recital 694 to the contested decision, that [owing] to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems'.

651. It must be borne in mind that it has already been stated at paragraphs 371 to 422 above that Microsoft's refusal prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers' purchasing decisions in respect of work group server operating

systems were channelled towards Microsoft's products. The Court has also already observed, at paragraphs 606 to 611 above, that it was apparent from a number of documents in the file that the technologies of the Windows 2000 range, in particular Active Directory, were increasingly being taken up by organisations. As interoperability problems arise more acutely with work group server operating systems in that range of products than with those of the preceding generation (see paragraphs 571 to 574 above and recitals 578 to 584, 588 and 613 to the contested decision), the increasing uptake of those systems merely reinforces the lock-in' effect referred to in the preceding paragraph.

652. The limitation thus placed on consumer choice is all the more damaging to consumers because, as already observed at paragraphs 407 to 412 above, they consider that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features to which they attach great importance, such as reliability/availability of the... system' and security included with the server operating system'.

653. In the second place, the Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers (see, to that effect, recital 694 to the contested decision). That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed (recital 699 to the contested decision).

654. The Commission's finding that [i]f Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture' (recital 695 to the contested decision) is corroborated by the conduct which those competitors had adopted in the past, when they had access to certain information concerning Microsoft's products. The two examples which the Commission gives at recital 696 to the contested decision, PC NetLink' and NDS for NT', speak volumes in that regard. PC NetLink is software developed by Sun on the basis of AS/U, which had been developed by AT & T using source code which Microsoft had licensed to it in the 1990s (recitals 211 to 213 to the contested decision). A document submitted by Microsoft during the administrative procedure shows that the innovative features and added value that PC NetLink brought to Windows work group networks was used as a selling point for that product (footnote 840 to the contested decision). Likewise, in its marketing material, Novell highlighted the new features which NDS for NT - software which it had developed using reverse engineering - brought to the Windows domain architecture (in this instance Windows NT) (footnote 841 to the contested decision).

655. The Commission was careful to emphasise, in that context, that there was ample scope for differentiation and innovation beyond the design of interface specifications' (recital 698 to the contested decision). In other words, the same specification can be implemented in numerous different and innovative ways by software designers.

656. Thus, the contested decision rests on the concept that, once the obstacle represented for Microsoft's competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important (see, to that effect, recital 699 to the contested decision).

657. It must be borne in mind, in that regard, that Microsoft's competitors would not be able to clone or reproduce its products solely by having access to the interoperability information covered

by the contested decision. Apart from the fact that Microsoft itself acknowledges in its pleadings that the remedy prescribed by Article 5 of the contested decision would not allow such a result to be achieved (see paragraph 241 above), it is appropriate to repeat that the information at issue does not extend to implementation details or to other features of Microsoft's source code (see paragraphs 194 to 206 above). The Court also notes that the protocols whose specifications Microsoft is required to disclose in application of the contested decision represent only a minimum part of the entire set of protocols implemented in Windows work group server operating systems.

658. Nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. Once they are able to use the information communicated to them to develop systems that are sufficiently interoperable with the Windows domain architecture, they will have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft's products with respect to certain parameters and certain features. It must be borne in mind that, as the Commission explains at recitals 719 to 721 to the contested decision, the implementation of specifications is a difficult task which requires significant investment in money and time.

659. Last, Microsoft's argument that it will have less incentive to develop a given technology if it is required to make that technology available to its competitors (see paragraph 627 above) is of no relevance to the examination of the circumstance relating to the new product, where the issue to be decided is the impact of the refusal to supply on the incentive for Microsoft's competitors to innovate and not on Microsoft's incentives to innovate. That is an issue which will be decided when the Court examines the circumstance relating to the absence of objective justification.

660. In the third place, the Commission is also correct to reject as unfounded Microsoft's assertion during the administrative procedure that it was not demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).

661. First of all, as has already been observed at paragraphs 407 to 412 above, the results of the third Mercer survey show that, contrary to Microsoft's contention, consumers consider non-Microsoft work group server operating systems to be better than Windows work group server operating systems on a number of features to which they attach great importance.

662. Next, Microsoft cannot rely on the fact that consumers never claimed at any time during the administrative procedure that they had been forced to adopt a Windows work group server operating system as a consequence of its refusal to disclose interoperability information to its competitors. In that connection, it is sufficient to point out that Microsoft does not dispute the Commission's findings at recitals 705 and 706 to the contested decision. Thus, at recital 705 to the contested decision, the Commission observes that it is developers of complementary software required to interoperate with Microsoft's systems who depend on the interface information' and that [c]ustomers will not always exactly know what is disclosed by Microsoft to other work group operating system vendors and what is not'. At recital 706 to the contested decision, the Commission states [w]hen confronted with a choice between putting up with interoperability problems that render their business processes cumbersome, inefficient and costly, and embracing a homogeneous Windows solution for their work group network, customers will tend to opt for the latter proposition' and that [o]nce they have standardised on Windows, they are unlikely to report interoperability problems between their client PCs and the work group servers'.

663. Furthermore, Microsoft's own statements concerning the disclosures made under the United States settlement show that those disclosures had the consequence of offering greater choice to consumers (see recital 703 to the contested decision).

664. Last, it must be borne in mind that it is settled case-law that Article 82 EC covers not

only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure (Case 85/76 HoffmannLa Roche v Commission [1979] ECR 461, paragraph 125, and Irish Sugar v Commission , paragraph 229 above, paragraph 232). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.

665. The Court concludes from all of the foregoing considerations that the Commission's finding to the effect that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article 82(b) EC is not manifestly incorrect. The Court therefore finds that the circumstance relating to the appearance of a new product is present in this case.

(v) The absence of objective justification

Arguments of the parties

666. In the first place, Microsoft claims that the refusal to supply the information was objectively justified by the intellectual property rights which it holds over the technology' concerned. It has made significant investment in designing its communication protocols and the commercial success which its products have achieved represents the just reward. It is generally accepted, moreover, that an undertaking's refusal to communicate a specific technology to its competitors may be justified by the fact that it does not wish them to use that technology to compete with it.

667. In the reply, Microsoft relies on the fact that the technology which it is required to disclose to its competitors is secret, that it is of great value for licensees and that it contains significant innovation.

668. In its answer to one of the written questions put by the Court, the applicant adds that it had an objective justification for not licensing the technology given the prejudice to incentives to innovate that would have resulted if Sun (or others) had used that technology to build a functional equivalent that would compete against Microsoft's products on the same market'.

669. In the second place, Microsoft claims that the Commission rejected its arguments on the basis of a new test, which is legally defective and marks a radical departure from the tests defined in the case-law. At recital 783 to the contested decision, the Commission considered that a refusal to communicate information protected by intellectual property rights constituted an infringement of Article 82 EC if, all things considered, the positive impact on the level of innovation in the whole industry outweighed the negative impact of the dominant undertaking's incentives to innovate.

670. Microsoft contends that the application of such a balancing test' will have the consequence that dominant undertakings will have less incentive to invest in research and development, because they will have to share the fruits o f their efforts with their competitors. Intellectual property rights give the holder an incentive to continue to innovate and they also encourage competing undertakings to undertake their own innovative activities in order to avoid being left behind'. Nor does the Commission make any attempt to quantify' the negative impact that the compulsory licensing required by the contested decision will have on the applicant's competitors, who will wait to see what technology they can obtain under a licence rather than take the trouble to create their own technology.

671. Microsoft also criticises the vagueness and the unforeseeable consequences of that test; it observes, in particular, that the Commission provides no guidance which would enable undertakings in a dominant position to assess whether preserving [their] incentives to innovate can justify a decision to retain [their] intellectual property for [their] own use'. More generally, the contested decision gives no indication of the way in which that test was applied in the present case or of how it should be applied in the future.

672. In the third place, Microsoft disputes the relevance of the Commission's references to the

United States settlement and the settlement with Sun (see paragraph 687 below).

673. Under the United States settlement, the applicant is required to license communication protocols implemented in Windows client PC operating systems for the sole purpose of being implemented in server software. Under the contested decision, on the other hand, it is required to license its server/server' communication protocols so that they can be implemented in directly competing server operating systems. The applicant's obligations under the United States settlement are limited to a five-year period, moreover, and an undertaking has a greater incentive to continue to develop technology when, after a fixed period, it will again have exclusive use of the improvements to that technology.

674. The settlement with Sun provides for a reciprocal commitment to share technology and intellectual property rights on negotiated terms, for a period of six years only. Under the contested decision, on the other hand, the applicant cannot choose its licensees and will be granted no licence in return; royalties and other licensing terms will be subjected to regulation by the Commission; and the applicant's licensing obligations extend indefinitely into the future'.

675. CompTIA emphasises, first of all, the importance of innovation for competition in the IT and communications industry and the need to have a robust system of [intellectual property rights] protection'. It submits, in particular, that those intellectual property rights encourage companies to improve existing products and to bring new products to the market.

676. Next, CompTIA, with reference to recital 783 to the contested decision, claims that the Commission applied a new balancing test in this case and submits that that test is inconsistent with the case-law.

677. The Commission, in the first place, asserts that it properly took into consideration the justification put forward by Microsoft.

678. First of all, Microsoft acknowledged in the application that it had relied on a single justification, namely the fact that it held intellectual property rights in the technology' concerned. Such justification cannot be accepted, particularly since in Magill , paragraph 107 above, where there was no doubt whatsoever that the effect of the contested decision for the companies concerned was the compulsory licensing of copyright, the Court of Justice held that the refusal was not objectively justified. The Commission is supported on that point by SIIA.

679. Next, the Commission explains that it took Microsoft's argument to mean that the facts of the case, and in particular the likely impact [which] an order to supply [would have] on [its] incentives to innovate', were so exceptional that the Commission could not apply the existing precedents.

680. It was for Microsoft to prove that its abusive conduct was objectively justified. More particularly, the applicant was at the very least required to show that the obligation imposed on it to disclose the interoperability information would have a negative impact on its incentives to innovate and also that there was a risk that that negative impact would outweigh the set of factors identified by the Commission which would otherwise make the behaviour abusive'. However, the only arguments which Microsoft put forward were purely theoretical and wholly unsubstantiated.

681. The Commission also contends that Microsoft cannot justify its refusal by the fact that the technology concerned is secret and valuable and that it contains significant innovations. Furthermore, that justification was not presented in the application.

682. In the second place, the Commission denies having applied a new evaluation test in this case.

683. First, the Commission rejects Microsoft's assertion that an undertaking is justified in refusing to supply a given technology to its competitors where it wishes to prevent them from using that technology to compete with it. That argument might be interpreted as meaning that even if the first

three criteria established by the Court of Justice in Magill and IMS Health , paragraph 107 above, are satisfied, a refusal to license is lawful if competitors intend to use the licence to compete with the dominant undertaking. That argument is manifestly incorrect. Again, that assertion might be interpreted as meaning that the principles laid down in Magill , paragraph 107 above, do not apply where the intellectual property right concerned covers technology. Apart from the fact that Microsoft fails to explain what it means by technology' in this context, it would be extremely difficult to draw a distinction between technological' intellectual property rights and non-technological' intellectual property rights. Nor is it certain that the interoperability information at issue constitutes such technology, in particular if it represents what is a purely arbitrary convention without any innovative character.

684. Second, the Commission disputes Microsoft's assertion that because of the contested decision its competitors will no longer have any incentive to create their own technology. Microsoft fails to address the finding at recital 697 to the contested decision that, in view of Microsoft's quasi-monopoly on the client PC operating systems market, its competitors are not in a position to develop viable alternatives to its communication protocols.

685. Third, the Commission observes that Microsoft merely refers to its incentives to innovate in protocol design and ignores other aspects of its products. The Commission refers to recital 724 to the contested decision and submits that such an approach is incorrect.

686. Fourth, the Commission contends that Microsoft glosses over the fact that the information at issue is information necessary for interoperability within the meaning of Directive 91/250. It is clear from Article 6 of that directive that the Community legislature considers that the disclosure of interoperability information is beneficial for innovation.

687. In the third place, the Commission refers to certain statements made by Microsoft during the administrative procedure and after the adoption of the contested decision. Thus, at the administrative hearing, Microsoft stated, in response to a question from the Commission's services, that it had not noticed that the United States settlement had had any negative impact on its incentives to innovate. Likewise, at a joint press conference with Sun following the settlement concluded with that undertaking, Microsoft stated that both companies would continue to compete and innovate and that the impact of the settlement [would] not be less innovation, but more innovation'. The Commission contends that the argument which Microsoft bases on the fact that the United States settlement provides for reciprocal commitments is irrelevant and notes that when Sun concluded that settlement it already had a policy of disclosing the relevant protocols to the entire industry.

Findings of the Court

688. The Court notes, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

689. In the present case, as the Commission found at recital 709 to the contested decision and as Microsoft expressly confirmed in the application, Microsoft relied as justification for its conduct solely on the fact that the technology concerned was covered by intellectual property rights. It made clear that if it were required to grant third parties access to that technology, that would... eliminate future incentives to invest in the creation of more intellectual property' (recital 709 to the contested decision). In the reply, the applicant also relied on that fact that the technology

was secret and valuable and that it contained important innovations.

690. The Court considers that, even on the assumption that it is correct, the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights cannot constitute objective justification within the meaning of Magill and IMS Health , paragraph 107 above. Microsoft's argument is inconsistent with the raison d'être of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply. In other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC even though in Magill and IMS Health , paragraph 107 above, the Court of Justice specifically stated the contrary.

691. It must be borne in mind that, as stated at paragraphs 321, 323, 327 and 330 above, the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case-law that such a refusal can be characterised as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market. It must be borne in mind that it has been established above that such exceptional circumstances were present in this case.

692. The argument which Microsoft puts forward in the reply, namely that the technology concerned is secret and of great value to the licensees and contains important innovations, cannot succeed either.

693. First, the fact that the technology concerned is secret is the consequence of a unilateral business decision on Microsoft's part. Furthermore, Microsoft cannot rely on the argument that the interoperability information is secret as a ground for not being required to disclose it unless the exceptional circumstances identified by the Court of Justice in Magill and IMS Health , paragraph 107 above, are present, and at the same time justify its refusal by what it alleges to be the secret nature of the information. Last, there is no reason why secret technology should enjoy a higher level of protection than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent-application procedure.

694. Second, from the moment at which it is established that - as in this case - the interoperability information is indispensable, that information is necessarily of great value to the competitors who wish to have access to it.

695. Third, it is inherent in the fact that the undertaking concerned holds an intellectual property right that the subject-matter of that right is innovative or original. There can be no patent without an invention and no copyright without an original work.

696. The Court further observes that in the contested decision the Commission did not simply reject Microsoft's assertion that the fact that the technology concerned was covered by intellectual property rights justified its refusal to disclose the relevant information. The Commission also examined the applicant's argument that if it were required to give third parties access to that technology there would be a negative impact on its incentives to innovate (recitals 709 and 712 to the contested decision).

697. The Court finds that, as the Commission correctly submits, Microsoft, which bore the initial burden of proof (see paragraph 688 above), did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate.

698. Microsoft merely put forward vague, general and theoretical arguments on that point. Thus, as the Commission observes at recital 709 to the contested decision, in its response of 17 October 2003 to the third statement of objections Microsoft merely stated that [d]isclosure would... eliminate future incentives to invest in the creation of more intellectual property', without specifying the technologies or products to which it thus referred.

699. In certain passages in the response referred to in the preceding paragraph, Microsoft envisages a negative impact on its incentives to innovate by reference to its operating systems in general, namely both those for client PCs and those for servers.

700. In that regard, it is sufficient to note that, at recitals 713 to 729 to the contested decision, the Commission quite correctly refuted Microsoft's arguments relating to the fear that its products would be cloned. It must be borne in mind, in particular, that the remedy prescribed in Article 5 of the contested decision does not, and is not designed to, allows Microsoft's competitors to copy its products (see paragraphs 198 to 206, 240 to 242 and 656 to 658 above).

701. It follows that it has not been demonstrated that the disclosure of the information to which that remedy relates will significantly reduce - still less eliminate - Microsoft's incentives to innovate.

702. In that context, the Court observes that, as the Commission correctly finds at recitals 730 to 734 to the contested decision, it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market. Such disclosure allows the operators concerned to make their own products more attractive and therefore more valuable. In fact, none of the parties has claimed in the present case that such disclosure had had any negative impact on those operators' incentives to innovate.

703. The Court further considers that if the disclosures made under the United States settlement and the MCPP as regards server-to-client protocols had no negative impact on Microsoft's incentives to innovate (recital 728 to the contested decision), there is no obvious reason to believe that the consequences should be any different in the case of disclosure relating to server/server protocols.

704. Last, the Court finds that Microsoft's assertion that in the contested decision the Commission applied a new evaluation test when rejecting the objective justification which Microsoft had submitted is based on a misreading of that decision.

705. That assertion is based on a single sentence in recital 783 to the contested decision, which is in a part of that decision containing the findings of the Commission's analysis, at recitals 560 to 778, of the refusal at issue.

706. That sentence reads as follows:

[A] detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft)'.

707. However, that sentence must be read in conjunction with the one coming immediately afterwards in the same recital, which states that ... the need to protect Microsoft's incentives to innovate

cannot constitute an objective justification that would offset the exceptional circumstances identified'.

708. It must also be compared with recital 712 to the contested decision, where the Commission sets out the following considerations:

It has been established above... that Microsoft's refusal to supply [creates a risk of elimination of] competition in the relevant market for work group server operating systems, that this is due to the fact that the refused input is indispensable to carry on business in that market and that Microsoft's refusal has a negative impact on technical development to the prejudice of consumers. In view of these exceptional circumstances, Microsoft's refusal cannot be objectively justified merely by the fact that it constitutes a refusal to license intellectual property. It is therefore necessary to assess whether Microsoft's arguments regar ding its incentives to innovate outweigh these exceptional circumstances.'

709. In other words, in accordance with the principles laid down in the case-law (see paragraphs 331 to 333 above), the Commission, after establishing that the exceptional circumstances identified by the Court of Justice in Magill and IMS Health , paragraph 107 above, were present in this case, then proceeded to consider whether the justification put forward by Microsoft, on the basis of the alleged impact on its incentives to innovate, might prevail over those exceptional circumstances, including the circumstance that the refusal at issue limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC.

710. The Commission came to a negative conclusion but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft's incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned (recitals 713 to 729 to the contested decision), establishing that the disclosure of interoperability was widespread in the industry concerned (recitals 730 to 735 to the contested decision) and showing that IBM's commitment to the Commission in 1984 was not substantially different from what Microsoft was ordered to do in the contested decision (recitals 736 to 742 to the contested decision) and that its approach was consistent with Directive 91/250 (recitals 743 to 763 to the contested decision).

711. It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.

712. As the exceptional circumstances identified by the Court of Justice in Magill and IMS Health , paragraph 107 above, were also present in this case, the first part of the plea must be rejected as wholly unfounded.

2. Second part: Sun did not request Microsoft to supply the technology which the Commission orders it to disclose

a) Arguments of the parties

713. In the first place, Microsoft claims that Sun did not request access to interoperability information within the meaning of the contested decision.

714. The applicant refers to a passage in Sun's complaint and maintains that the request contained in the letter of 15 September 1998 did not relate to the full and complete specifications' for its communication protocols but to detailed information about the internal features of its Windows server operating systems.

715. Accordingly, even on the assumption that the letter of 6 October 1998 might be interpreted as containing a refusal, quod non , it cannot be claimed that Microsoft refused to supply Sun with the technology which, according to the contested decision, it did not disclose.

716. In addition, the breadth of Sun's request could not have put Microsoft on notice that Sun was seeking a licence [in respect of its] communication protocols'.

717. The applicant further observes that Sun's complaint contains no reference to communication protocols.

718. Last, in the letter of 15 September 1998, Sun expressed the belief that Microsoft should include a reference implementation and such other information as is necessary to insure, without reverse engineering, that COM objects and the compete set of Active Directory technologies will run in fully compatible fashion on Solaris'. Microsoft claims that access to such technology' would have enabled Sun to mimic virtually all the functionalities of Windows server operating systems; and, furthermore, Sun's request related to technology still under development', as Windows 2000 Server and Active Directory were not marketed until December 1999.

719. In the second place, Microsoft contends that Sun's request did not meet with a flat refusal' in the letter of 6 October 1998: the applicant invited Sun to discuss ways in which the two firms might improve interoperability between their respective products for the benefit of mutual customers'. That letter also mentioned various ways in which Sun might achieve interoperability'. The applicant cites recital 565 to the contested decision and asserts that the Commission cannot maintain that the technologies concerned were so complex that Sun could not be expected to know what technology it needed: Sun is a highly specialised distributor of server operating systems and in any event it was Sun's responsibility to clarify its request.

720. Microsoft claims, moreover, that Sun did not take up its invitation and observes, in particular, that Sun failed to attend a meeting which had been arranged in order to discuss the interoperability of their products.

721. Last, Microsoft contends that there is no contradiction between its position that it is unclear whether it would have refused to disclose the specifications of its communication protocols if Sun or anyone else' had asked it to do so and the fact that it seeks annulment of the contested decision. There is a significant difference between a negotiated cross-licensing agreement with another leading operating system vendor' and a duty to supply the entire world with proprietary technology under mandate from the public authority'.

722. In the third place, Microsoft maintains that Sun did not request it to license its intellectual property rights so that Sun could develop work group server operating systems in the EEA. Microsoft was therefore under no obligation, when it replied to the letter of 15 September 1998, to have regard to its special responsibility under Article 82 EC not to hinder effective and undistorted competition.

723. In that context, Microsoft points out that Sun is a United States company and that the letter of 15 September 1998 was sent from Sun's headquarters in the United States to the United States headquarters of Microsoft, which is also a United States company. In the absence of any connection with the EEA, and as the letter did not mention that the technology concerned was necessary for the development and distribution of work group server operating systems on the territory of the EEA, Microsoft had no reason to consider that Sun wished to obtain a licence for the EEA.

724. The Commission rejects Microsoft's arguments in their entirety.

725. In the first place, the Commission contends that Sun's request in the letter of 15 September 1998, although broader in certain respects than the scope of the [contested] decision', was sufficiently clear for Microsoft to understand (i) that Sun sought access to interoperability information and (ii) that some of that information pertained to certain features of Windows work group networks (the Active Directory domain') which were indispensable if Sun were to be able to exert viable

competition on the work group server operating systems market.

726. The Commission contends that Microsoft misrepresents Sun's request when it claims that the request related to source code and not interface information. In its request, Sun sought a means of enabling its products to seamlessly communicate' with the Windows environment and in the letter of 6 October 1998 Mr Maritz clearly stated that he understood that request as relating to interoperability information. Furthermore, Sun made clear in its complaint that it wished to have access to interface information'.

727. The Commission refers to recitals 713 to 722 to the contested decision and further submits that access to interoperability information will not allow Microsoft's competitors to clone' or mimic' the functionalities of Windows work group server operating systems.

728. The fact that Sun did not use the expression communication protocol' is irrelevant, since a request for access to the information necessary to interconnect and interact with Windows and a request for access to protocol specifications are one and the same thing'.

729. The Commission also observes that in the letter of 6 October 1998 Microsoft did not mention the fact that Sun's request related to technology still under development'. In any event, such an argument cannot be accepted, because when Sun sent the letter of 15 September 1998 to Microsoft it was already one year since the first beta version of Windows 2000 Server had been released.

730. In the second place, the Commission contends that Microsoft cannot deny having refused Sun's request.

731. First, Microsoft's position is inconsistent with its claim that Article 5 of the contested decision should be annulled.

732. Second, the Commission refers to recitals 194 to 198 to the contested decision and claims that Microsoft explicitly confirmed to the Commission that it refused to give access to certain interoperability information. As stated at recitals 573 to 577 to the contested decision, that refusal forms part of a general pattern of conduct. Likewise, during the interlocutory proceedings, Microsoft stated that the refusal was part of its business model'.

733. Third, the Commission is not convinced that Microsoft would have supplied the requested information to Sun if Sun had responded more positively to Microsoft's alleged offer' to discuss interoperability. The Commission refers to certain statements by Microsoft managers set out at recitals 576 and 778 to the contested decision. The Commission finds it unlikely that Mr Goldberg, the Microsoft employee referred to in the letter of 6 October 1998, was authorised to take decisions concerning such matters. Mr Terranova, of Sun, met Mr Goldberg on 25 November 1998 and Microsoft does not explain how the fact that Mr Terranova had to cancel a further meeting due to take place on 8 March 1999 prevented discussions on interoperability. Last, the Commission observes that the agenda of that last meeting, as suggested by Mr Goldberg, did not contain the slightest reference to the relevant technologies, such as Active Directory.

734. In the third place, the Commission considers it irrelevant that Sun did not specifically refer to the EEA in the letter of 15 September 1998. First, as the relevant geographic market was worldwide, the EEA was necessarily covered by the request in that letter and, second, Sun lodged a complaint with the Commission on 10 December 1998.

b) Findings of the Court

735. By its argument in support of the second part of its single plea, Microsoft seeks to establish that the Commission had no valid ground on which to find, in the contested decision, that Microsoft had abused its dominant position by refusing to disclose the interoperability information, since it cannot in fact be accused of any real refusal. In support of that argument, Microsoft relies,

in substance, on the exchange of letters between it and Sun in the latter part of 1998. Its argument comes under three main heads. In the first place, Microsoft claims that Sun's request in the letter of 15 September 1998 did not relate to interoperability information as referred to in the contested decision. In the second place, it denies in any event having refused that request in the letter of 6 October 1998. In the third place, Microsoft maintains that in the letter of 15 September 1998 Sun did not seek a licence covering intellectual property rights which Microsoft held in the EEA.

736. Each of those heads must be examined separately.

The scope of Sun's request

737. First of all, it is appropriate to recall the precise content of the letter of 15 September 1998 and the Commission's analysis of that letter in the contested decision.

738. In that letter, Sun identifies the information which it seeks from Microsoft, as follows:

- first, the complete information required to allow it to provide native support for COM objects on Solaris;

- second, the complete information required to allow Sun to provide native support for the complete set of Active Directory technologies on Solaris.

739. In the letter, Sun specified the extent of the information requested and also the objective of its request, indicating that:

- applications written to execute on Solaris should be able to seamlessly communicate via COM and/or Active Directory with the Windows operating systems and/or with Windows-based software;

- Microsoft should include a reference implementation and such other information as was necessary to ensure, without reverse engineering, that COM objects and the complete set of Active Directory technologies would run in fully compatible fashion on Solaris;

- the information should be provided for the full range of COM objects as well as for the full set of Active Directory technologies currently on the market;

- the information should be provided in a timely manner and on a continuing basis for COM objects and Active Directory technologies which would be released on the market in the future.

740. At recital 186 to the contested decision, the Commission interprets the second part of Sun's request in the letter of 15 September 1998 (see the second indent of paragraph 738 above) as meaning the ability for Solaris to act as fully compatible domain controller in Windows 2000 work group networks or as a member server (in particular as a file and print server) fully compatible with the Active Directory domain infrastructure (security, directory service)'. Furthermore, the fact that Sun's request covers both client/server interoperability and server/server interoperability is consistent with the fact that the Windows domain architecture' closely connects both types of interoperability. In other words, Sun's request encompassed the specifications for the protocols used by Windows work group servers in order to provide file, print and group and user administration services to Windows work group networks', which include both direct interconnection and interaction between a Windows work group server and a Windows client PC, as well as interconnection and interaction between a Windows work group server and a Windows client PC that is indirect and passes through another Windows work group server' (recital 187 to the contested decision).

741. At recital 188 to the contested decision, the Commission examines the first part of Sun's request (see the first indent of paragraph 738 above). The Commission observes that COM/DCOM is a technology which is relevant to the delivery of file, print and group and user administration in Windows' and considers that there is an overlap between that part of Sun's request and the second

part of its request, concerning Active Directory. At the following recital, the Commission states, however, that the only part of Sun's request for information concerning the COM technology that is relevant to the refusal to supply considered in [the contested decision] is what is encompassed in Sun's request for compatibility with Active Directory'. That observation must be compared with the Commission's statement at recital 566 to the contested decision that, first, the only refusal at stake in [the contested decision] is a refusal to provide a full specification of the protocols underlying the Windows domain architecture, which organises the way through which Windows work group servers deliver work group server services to Windows client PCs' and, second, [t]he fact that Microsoft has also turned down Sun's request for information that would facilitate cross-platform portability of COM does not form part of the conduct treated in [the contested decision] as a refusal to supply'.

742. The Commission further observes, at recital 190 to the contested decision, that it is implicit in Sun's request that Sun is seeking access to specification in order to be able to implement them in its products.

743. At recitals 199 to 207 to the contested decision, the Commission sets out a series of considerations in order to demonstrate that the information to which Sun requests access in the letter of 15 September 1998 is connected with interoperability. First, it rejects Microsoft's assertion in its response of 17 October 2003 to the third statement of objections that Sun wished Microsoft to create a version of Active Directory that could be used on Solaris. Second, the Commission rejects Microsoft's argument, also put forward during the administrative procedure, that Sun's request concerned the internal make-up of Windows server operating systems' and therefore went beyond interoperability information. On that last point, the Commission observes that in the letter of 15 September 1998 Sun expressly states that it is its intention to achieve seamless communication' between the Solaris environment and the Windows environment (recital 207 to the contested decision). The Commission also observes that the letter of 6 October 1998 shows that Microsoft had fully understood that Sun wished to have access to information on interoperability with certain features of Windows' (recital 207 to the contested decision).

744. Next, in the light of those various factors, the Court finds, first, that while, as the Commission itself recognises in the defence, the scope of the request in the letter of 15 September 1998 was wider in certain regards than that of the contested decision, the fact remains that in that letter Sun qualified the scope of its request by stating that all that it wanted was that its products should be able to seamlessly communicate' with the Windows environment. Likewise, Sun also stated in its letter that the information requested should insure, without reverse engineering, that COM objects and the complete set of Active Directory technologies will run in fully compatible fashion on Solaris'. In other words, it is clear from the wording of the letter of 15 September 1998 that Sun was seeking access to information and that the information should allow it to achieve interoperability between its products and the Windows environment.

745. It is also apparent from the wording of the letter of 15 September 1998 that Sun wished to be able to achieve a high level of interoperability between its products and the Windows domain architecture. In the letter of 6 October 1998, when Mr Maritz indicates that Microsoft has no plans to port the Active Directory to Solaris' and that there are varying levels of functionality [designed to allow other operating systems] to interoperate with the Active Directory', he clearly draws a distinction between the high level of interoperability that can be achieved when the elements of one operating system are ported' to another operating system and the lower or varying' levels that can be achieved by using the other methods suggested in that letter.

746. Second, Microsoft cannot reasonably rely on the fact that Sun did not use the expression communication protocols' in its complaint. As stated at recital 49 to the contested decision, and

as the Commission correctly observes in its pleadings, a protocol' represents a set of rules of interconnection and interaction between various pieces of software in a network (see also paragraphs 196 and 197 above). As stated at paragraph 740 above, it was precisely about such rules that Sun wished to obtain information. Microsoft's argument is all the less acceptable because it is purely formalistic. In the letter of 6 October 1998, Mr Maritz makes a number of references to interoperability between Microsoft's products and those of Sun or other software vendors. Microsoft had thus fully understood the scope of Sun's request, in spite of the fact that there is no formal reference to communication protocols' in the letter of 15 September 1998.

747. Third, Microsoft's assertion that access to the technology would have enabled Sun to mimic' virtually all the functionalities of the Windows server operating systems cannot be upheld. It is clear from the preceding considerations that Sun sought access to the information necessary to be able to achieve interoperability between its products and the Windows domain architecture. As stated at recitals 34, 570 and 571 to the contested decision, and as already stated at paragraphs 199 to 206 above, such a result may be achieved by communicating only the specifications of certain protocols, that is to say, without disclosing implementation details. In so far as Microsoft's assertion is based on the fact that Sun indicates in the letter of 15 September 1998 that Microsoft should communicate a reference implementation', the Court finds that even if Sun had thereby intended to request communication of details of Microsoft's source code, Sun's qualification of the scope of its request (see paragraph 744 above) meant that Microsoft could not conclude that Sun's request did not also relate to the protocol specifications referred to by the contested decision, while the conduct penalised by that decision is limited, as stated at recital 569 to the contested decision, to Microsoft's refusal to communicate those specifications.

748. Fourth, Microsoft cannot effectively claim that the request in Sun's letter of 15 September 1998 concerned technology still under development'. That assertion is wholly irrelevant to the question whether that request concerned interoperability information as referred to in the contested decision. Nor does it take account of the fact that, as stated at recitals 398 and 790 to the contested decision, Microsoft had already released the first beta version of Windows 2000 server on 23 September 1997, almost one year before the date of Sun's letter.

749. The Court concludes from all of the foregoing considerations that, contrary to Microsoft's assertion, Sun's request in the letter of 15 September 1998 clearly concerned the interoperability information referred to in the contested decision and forming the subject-matter of the remedy prescribed in Article 5 of that decision.

The scope of the letter of 6 October 1998

750. The second head of Microsoft's argument in support of the second part of the plea, namely the head relating to the letter of 6 October 1998, cannot be accepted either.

751. When the wording of that letter, examined in the light of the context in which it was written, the identity of its author, the extent of his knowledge of the technologies concerned and the approach adopted by Microsoft up to the time of the adoption of the contested decision, is taken into account, it must be concluded that the Commission was correct, in the contested decision, to interpret that letter as containing a refusal to disclose to Sun the information which it had requested.

752. It must be borne in mind, first of all, that, as stated in the first part of the plea, Microsoft's arguments concerning the refusal to supply and authorise the use of the interoperability information rely largely on the degree of interoperability that must be achieved between its own and its competitors' products. Throughout the administrative procedure and in these proceedings, Microsoft contended that it was sufficient that the various operating systems should be capable of exchanging information or of reciprocally supplying services, or, in other words, that they could work properly' together.

Microsoft maintains that the information and methods already available on the market allow such a result to be achieved, so that it cannot be required to disclose additional information, in particular the information relating to the communications that come within the blue bubble'. The applicant claims, in particular, that the Commission requires a degree of interoperability that goes far beyond what is envisaged by Directive 91/250 and which does not correspond to the way in which undertakings organise their computer networks in practice. It maintains that it is the Commission's intention that operating systems that compete with Microsoft's systems should function in all respects like a Windows server operating system, which would require Microsoft to communicate to its competitors much more than information on the interfaces of its products and would interfere with its intellectual property rights and reduce its incentives to innovate.

753. As the Court has already found at paragraphs 207 to 245 above, the way in which Microsoft interprets the degree of interoperability required by the Commission and, accordingly, the scope of the information referred to by the contested decision is incorrect.

754. It is necessary to take those factors into account when assessing the way in which the Commission interpreted the letter of 6 October 1998 and the arguments which Microsoft has put forward on that point.

755. As demonstrated at paragraph 746 above, Microsoft had fully grasped the scope of Sun's request in the letter of 15 September 1998 and, in particular, had understood that Sun sought to obtain the information necessary for its products to be able to seamlessly communicate' with the Windows environment or, in other words, to establish a high level of interoperability between its products and that environment.

756. Furthermore, the purpose of the letter of 15 September 1998 was clearly to obtain access to information belonging to Microsoft that was not already in the public domain or available by means of the licences offered on the market.

757. The response in the letter of 6 October 1998 contains the following six points:

- first, Mr Maritz thanks Mr Green for the letter of 15 September 1998 and informs him that Microsoft has always been willing to help its competitors to build the best possible products and interoperability for [its] platform';

- second, he draws Mr Green's attention to the fact that information about the services and interfaces of the Windows platform' is already available through the MSDN' product;

- third, he invites Sun to attend a conference organised by Microsoft to be held in Denver on 11-15 October 1998;

- fourth, he refers to a reference implementation of COM on Solaris that already exists and informs Mr Green that source code for COM can be licensed, notably from Software AG;

- fifth, he states that Microsoft has no plans to port' the Active Directory to Solaris, but mentions the existence of a number of methods, with varying levels of interoperability, of interoperating with Active Directory, including use of the standard LDAP protocol;

- sixth, he invites Sun, should it need additional support', to contact the account managers' of the Developer Relations Group', who are there to help developers who need additional support for Microsoft's platforms', naming Mr Goldberg as the person to contact for that purpose.

758. The Court notes, in the first place, that in the letter of 6 October 1998 Mr Maritz wholly fails to answer the specific requests made by Sun in the letter of 15 September 1998 and merely refers Sun to sources of information and methods which were already in the public domain or available under licence. As Mr Maritz was clearly aware of the significance of the specific requests stated

by Mr Green, such a reference cannot be interpreted as anything other than a refusal to communicate the information requested.

759. The fact that Mr Maritz states in the letter of 6 October 1998 that Microsoft has no plans to port' Active Directory to Solaris confirms the correctness of that interpretation, since it shows that Mr Maritz was fully aware that Microsoft's competitors, including Sun, aspired to achieve a higher level of interoperability than they could achieve by using the methods mentioned in that letter (see paragraph 745 above).

760. That point is established all the more clearly because, in the case, first of all, of MSDN, Microsoft does not dispute in the present part of the plea the Commission's analysis in the contested decision that that mechanism does not allow Microsoft's competitors to achieve a sufficient degree of interoperability with Windows client PC operating systems (recital 563 to the contested decision, which refers to Section 4.1.3 and, in particular, to recitals 209 and 210 to the contested decision).

761. As regards, next, the possibility that Sun could use a freely-available COM reference implementation, which Microsoft also mentions in the letter of 6 October 1998, Microsoft has also not maintained in the present part of the plea that the Commission had erred in considering, in the contested decision, that that product did not constitute a sufficient solution (recital 563 to the contested decision, which refers to Section 4.1.3 and, in particular, to recitals 218 to 230 to the contested decision; see also recitals 288 to 291 to the contested decision).

762. As regards, last, the possibility for Sun to use the LDAP protocol, which is also expressly mentioned in the letter of 6 October 1998, Microsoft has not maintained in the present part of the plea, and did not demonstrate in the preceding part of the plea, that the Commission had erred in concluding, particularly at recitals 194 and 195 and 243 to 250 to the contested decision, that that protocol was not sufficient to achieve a suitable level of interoperability with Active Directory.

763. In the second place, Microsoft cannot rely on Mr Maritz's offer of additional support from Mr Goldberg to substantiate its claim that that letter does not contain a refusal. The additional support mentioned in the final paragraph of that letter relates only to the information and methods mentioned in the second and third paragraphs of the letter. In essence, Microsoft thereby proposes to assist Sun only in the same way as the account managers' of the Developer Relations Group' assist any developer requiring support in connection with Microsoft's platforms'.

764. Nor can Microsoft usefully rely on the minute it prepared summarising the exchanges between itself and Sun in order to maintain that Sun had no intention of acting on Mr Goldberg's proposals. At no point in that minute, as the Commission correctly observed at recital 193 to the contested decision, is there any mention of a formal proposal by Microsoft to supply the information which Sun requested, that is to say, information going beyond that which was publicly available.

765. It should be added, in the third place, that in the contested decision the Commission had all the more reason to interpret the letter of 6 October 1998 as containing a refusal to give access to the interoperability information requested by Sun because, during the administrative procedure, Microsoft expressly recognised that it had not disclosed some of the information requested and that it continued to refuse to do so (see recitals 194 to 198 to the contested decision). Although at the hearing Microsoft questioned the exhaustive nature of one of the citations set out at recital 195 to the contested decision, it did not deny having stated during the administrative procedure that the replication among different copies of Active Directory was proprietary'.

766. Microsoft's argument that the letter of 6 October 1998 does not constitute a refusal must therefore be rejected as unfounded.

767. It is appropriate, moreover, to analyse the letter of 6 October 1998 in the more general context

described in the contested decision. In the decision, the Commission did not rely on that letter alone, but, as may be seen from recitals 194 to 198 and 573 to 577 to the contested decision in particular, it considered that the conduct which it evidenced formed part of a general pattern of conduct on Microsoft's part.

768. At recital 573 to the contested decision, which refers specifically to recital 194 to the contested decision, the Commission stated, in particular, that a number of Microsoft's competitors had confirmed that they did not obtain sufficient interoperability information and that some of them had also claimed that Microsoft had refused to provide information that they had requested, or had failed to answer their requests.

769. At recital 576 to the contested decision, moreover, the Commission reproduced excerpts from testimony given to the United States courts by a manager of the Windows Source Licensing Program, which, according to the Commission, indicates that Microsoft places restrictions on licence agreements concerning technologies necessary for interoperability with the Windows domain architecture.

770. Microsoft did not specifically deny those matters before the Court.

771. Furthermore, the Court observes that, at recital 778 to the contested decision, the Commission, in refuting Microsoft's denials of the existence of a refusal, given Microsoft's claim that it never had any reason to exclude competitors by leveraging, cited an extract from a speech given by Mr Gates, President of Microsoft, in February 1997 to members of Microsoft's sales force. That extract confirms the existence of a pattern of general conduct designed to restrict the communication of interoperability information, containing as it does, the following declaration:

What we are trying to do is use our server control to do new protocols and lock out Sun and Oracle specifically... Now, I don't know if we'll get to that or not, but that's what we are trying to do.'

The geographic scope of the request contained in the letter of 15 September 1998

772. The third head of the argument which Microsoft develops in support of the second part of its single plea is based on the fact that in the letter of 15 September 1998 Sun did not expressly request a licence over Microsoft's intellectual property rights in the EEA in order to develop work group server operating systems in the EEA. Microsoft concludes that when it responded to Sun it was under no obligation to have regard to its particular responsibility not to hinder effective and undistorted competition.

773. Those arguments are purely formal and must be rejected.

774. In the letter of 15 September 1998, Sun did not, admittedly, expressly request Microsoft to grant it a licence over intellectual property rights held in the EEA. However, there was no need for Sun to assess in its request whether the information to which it sought access was protected by intellectual property rights and whether the use of that information needed to be licensed by Microsoft. It is clear, moreover, that Sun wished Microsoft to supply the information at issue so that it would be able to implement that information in its own work group server operating systems. Furthermore, as the relevant geographic market for those systems is worldwide (see recital 427 to the contested decision), the territory of the EEA was necessarily covered by Sun's request, which was drafted in general terms. Last, as the Commission observes in its pleadings, as Sun had lodged a complaint pursuant to Article 3 of Regulation No 17 a few weeks later, Microsoft could in any event no longer fail to be aware that the EEA was also concerned.

775. It follows that the Commission was correct to find at recital 787 to the contested decision that when Microsoft had responded to the letter of 15 September 1998 it had not taken sufficiently into account its special responsibility not to hinder effective and undistorted competition in the

common market. The Commission was also correct to state, at the same recital, that that particular responsibility derived from Microsoft's quasi-monopoly' on the client PC operating systems market. As is apparent from the considerations set out at paragraph 740 above, the refusal at issue concerned interface specifications that organise a network of Windows work group servers and client PCs and that, as such, are not attributable to one of the two [types of product] at stake (client PCs or work group servers), but rather represent a rule of compatibility between those two products' (recital 787 to the contested decision).

776. It follows from all of the foregoing considerations that the second part of the single plea put forward by Microsoft in connection with the refusal to supply and authorise the use of the interoperability information must be rejected as unfounded.

3. Third part: the Commission did not take proper account of the obligations imposed on the Communities by the TRIPS Agreement

a) Arguments of the parties

777. Microsoft claims that, by requiring it to license to its competitors the communication protocol specifications which it owns, the contested decision infringes Article 13 of the TRIPS Agreement. It submits that the cumulative conditions laid down in that agreement are not met in the present case.

778. In the first place, the requirement in question goes further than is necessary to achieve interoperability and, consequently, violates the condition that limitations' or exceptions' can be applied to intellectual property rights only in special cases'. By imposing that requirement, the Commission seeks to enable other server operating systems suppliers to create products that mimic' the functionality of Windows server operating systems. Microsoft also criticises the requirement that it make its communication protocols available to its competitors, irrespective of whether or not they are affected by its allegedly anti-competitive conduct.

779. In the second place, Microsoft claims that the licensing requirement conflicts directly with the normal exploitation' of its intellectual property rights. Rather than license their innovative technologies to third parties, commercial software writers like the applicant normally exploit their intellectual property rights by developing and marketing products that implement those technologies. The requirement will also have negative effects on its sales, since its competitors will be able to use its communication protocols to create server operating systems that are interchangeable with its own products.

780. In the third place, Microsoft claims that the requirement unreasonably prejudice[s] [its] legitimate interests', because it is disproportionate to the Commission's stated objective of eliminating the effects of anti-competitive conduct. The Commission's new balancing test appears to legitimise compulsory licensing whenever a dominant undertaking's competitors would benefit from access to the applicant's intellectual property, regardless of whether such a measure is necessary to remedy anti-competitive conduct.

781. Last, Microsoft acknowledges that the TRIPS Agreement may not be directly applicable in Community law, but observes that the Court of Justice has established the principle that Community law, including Article 82 EC, must be interpreted in the light of the international agreements concluded by the Community, such as the TRIPS Agreement (Case C61/94 Commission v Germany [1996] ECR I3989, paragraph 52).

782. ACT maintains that the principle of interpretation referred to in the preceding paragraph must apply not only to secondary Community legislation but also to norms of primary Community law.

783. Next, ACT claims that the Commission's interpretation of Article 82 EC in the contested

decision is inconsistent with the Community's international obligations under the TRIPS Agreement, in three respects.

784. In the first place, the remedy prescribed in Article 5 of the contested decision is incompatible with Article 13 of that agreement.

785. In the second place, in so far as the remedy entails the compulsory licensing of Microsoft's patents, it violates Article 31 of the TRIPS Agreement.

786. More particularly, ACT observes that that article provides, in particular, the following:

Where the law of a Member allows for other use of the subject-matter of a patent with the authorisation of the right holder, including use by the Government or third parties authorised by the Government, the following provisions shall be respected:

a) authorisation of such use shall be considered on its individual merits'.

787. ACT maintains that that provision means that licences must be granted only on a case-by-case basis. However, Article 5 of the contested decision provides for compulsory licensing that sweeps within it patents that have been granted, those that are the subject of current applications, and all of those that may be applied for and granted in future'. That decision means the compulsory licensing of categories of inventions'.

788. In the third place, by reference to Article 39 of the TRIPS Agreement (the only article in Section 7 of that agreement), in so far as Article 5 of the contested decision requires Microsoft to disclose business secrets to its competitors, it not only means the loss of the right to control the use of those business secrets, but also results in the complete destruction' of those secrets.

789. The Commission observes, first of all, that it is settled case-law that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions' (Case C149/96 Portugal v Council [1999] ECR I8395, paragraph 47). In Joined Cases C300/98 and C392/98 Dior and Others [2000] ECR I11307, paragraph 44, moreover, the Court of Justice held that the provisions of [the TRIPS Agreement], an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the Courts by virtue of Community law'. Commission v Germany , paragraph 781 above, is not relevant to the present case, since it refers to the interpretation not of a provision of the EC Treaty but of a measure of secondary Community law. In any event, Microsoft's essential argument is that the contested decision is unlawful because it violates the TRIPS Agreement.

790. Next, the Commission contends that Microsoft's argument is based on the mistaken premiss that the contested decision requires it to license to its competitors the copyright specifications for its proprietary communication protocols. The question of copyright is, at most, purely incidental' in the present case, and as the right of disclosure' on which Microsoft relies is a moral right', it cannot be covered by the TRIPS Agreement.

791. Last, the Commission submits that Microsoft's assertion that the conditions laid down by Article 13 of the TRIPS Agreement are not met in the present case is based on erroneous assumptions'. What is claimed to be the compulsory licensing imposed by the decision does not go beyond what is necessary to attain interoperability and the Commission did not apply any new balancing test in this case.

792. The Commission contends that ACT's arguments must be rejected as inadmissible in so far as they are based on Articles 31 and 39 of the TRIPS Agreement, since they were not submitted by Microsoft. In any event, its arguments are wholly unfounded.

793. SIIA supports the Commission's arguments.

b) Findings of the Court

794. In the third part of this single plea, Microsoft criticises the Commission for having interpreted Article 82 EC in a way that is inconsistent with Article 13 of the TRIPS Agreement. The applicant contends that if the Commission had properly taken that provision into account, it would not have been able to conclude, in Article 2(a) of the contested decision, that the refusal at issue constituted an abuse of a dominant position, or have been able to impose the remedy provided for in Articles 4, 5 and 6 of that decision, in so far as that measure concerned interoperability information.

795. Microsoft bases its argument on paragraph 52 of Commission v Germany , paragraph 781 above, in which the Court stated that Community law, including Article 82 EC, must be interpreted in the light of binding international agreements, such as the TRIPS Agreement. At the hearing, Microsoft emphasised that it did not claim that the provisions of the TRIPS Agreement had direct effect.

796. The Court considers that Microsoft cannot properly rely on Commission v Germany , paragraph 781 above.

797. Paragraph 52 of that judgment states, in particular:

[T]he primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.'

798. The Court holds that the principle of consistent interpretation thus invoked by the Court of Justice applies only where the international agreement at issue prevails over the provision of Community law concerned. Since an international agreement, such as the TRIPS Agreement, does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC.

799. In the present case, moreover, unlike the situation referred to by paragraph 52 of Commission v Germany , paragraph 781 above, the Commission was not, strictly speaking, required to make a choice between several possible constructions of a text of Community law. The present case concerns a situation in which the Commission was required to apply Article 82 EC to the factual and legal circumstances of the particular case and in which it must be presumed, in the absence of proof to the contrary, that the conclusions which it reached in that regard are the only ones that it could validly adopt.

800. Furthermore, the Court considers that, under the guise of the principle of consistent interpretation, Microsoft is in reality simply challenging the legality of the contested decision on the ground that it is contrary to Article 13 of the TRIPS Agreement.

801. It is settled case-law that, given their nature and structure, WTO agreements are not in principle among the rules in the light of which the Community judicature is to review the legality of measures adopted by the Community institutions (Portugal v Council , paragraph 789 above, paragraph 47; Joined Cases C27/00 and C122/00 Omega Air and Others [2002] ECR I2569, paragraph 93; Case C76/00 P Petrotub and Republica v Council [2003] ECR I79, paragraph 53; and Case C93/02 P Biret International v Council [2003] ECR I10497, paragraph 52).

802. It is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Community judicature must review the legality of the Community measure in question in the light of the WTO rules (Portugal v Council , paragraph 789 above, paragraph 49, and Biret International v Council , paragraph 801 above, paragraph 53).

803. As the circumstances of the present case clearly do not correspond with either of the two situations described in the preceding paragraph, Microsoft cannot rely on Article 13 of the TRIPS Agreement in support of its claim for annulment of Articles 2, 4, 5 and 6 of the contested decision. Accordingly, there is no need to examine the arguments which Microsoft, supported by ACT, puts forward to substantiate its assertion that the conditions envisaged by Article 13 of the TRIPS Agreement are not satisfied in this case.

804. ACT's argument that Article 5 of the contested decision is incompatible with Articles 31 and 39 of the TRIPS Agreement (see paragraphs 785 to 788 above) must be rejected, for the same reasons as those set out at paragraphs 796 to 803 above.

805. Furthermore, ACT's argument that Article 5 of the contested decision fails to have regard to Article 31(a) of the TRIPS Agreement rests on the wholly erroneous idea that the remedy provides for the compulsory licensing of categories of inventions' and does not allow for any individual assessment. Even assuming that, in order to comply with Article 5 of the contested decision, Microsoft were obliged to grant licences authorising certain of its competitors to exploit one or more of its patents, there is nothing in the contested decision to prevent it from negotiating the terms of that licence on a case-by-case basis.

806. It follows from the contested decision that the remedy referred to in Article 5 must be implemented according to a three-stage procedure and which complies with the conditions set out at recitals 1005 to 1009 to the contested decision.

807. Thus, Microsoft is first of all required to draw up the interoperability information within the meaning of Article 1(1) of the contested decision and to implement the evaluation mechanism referred to in Article 5(c) of that decision.

808. At the second stage, Microsoft is required to give access to the interoperability information to the undertakings wishing to develop and distribute work group server operating systems in order to allow them to evaluate the business value to them of implementing that information in their products (recital 1008(i) to the contested decision). The conditions on which Microsoft authorises that evaluation must be reasonable and non-discriminatory.

809. At the third stage, Microsoft is required to give access to the information concerned to any undertaking interested in all or part of the interoperability and to authorise that undertaking to implement that information in work group server operating systems (recital 1003 to the contested decision). In that context too, the conditions which it intends to impose must be reasonable and non-discriminatory (recitals 1005 to 1008 to the contested decision).

810. It is clear from those various provisions of the contested decision that there is nothing to prevent Microsoft, where the interoperability information sought by a given undertaking relates to a technology covered by a patent (or by another form of intellectual property right), from giving access to and authorising the use of that information by granting a licence, subject to the application of reasonable and non-discriminatory conditions.

811. The mere fact that the contested decision requires that the conditions to which any licences are subject be reasonable and non-discriminatory does not mean that Microsoft must impose the same conditions on every undertaking seeking such licences. It is not precluded that the conditions may be adapted to the specific situation of each of those undertakings and vary, for example, according to the extent of the information to which they seek access or the type of products in which they intend to implement the information.

812. It follows from all of the foregoing considerations that the third part of the single plea must be rejected as unfounded.

813. It follows that the single plea put forward in connection with the first issue must be rejected as unfounded in its entirety.

C - The bundling of Windows Media Player with the Windows client PC operating system

814. In this second issue, Microsoft relies on two pleas: first, infringement of Article 82 EC and, second, breach of the principle of proportionality. The first plea concerns the Commission's finding that Microsoft's conduct in making the availability of the Windows client PC operating system conditional on the simultaneous acquisition of Windows Media Player constitutes an abusive tied sale (Article 2(b) of the contested decision). The second plea relates to the remedy prescribed in Article 6 of the contested decision.

815. Before examining those pleas, the Court will summarise a number of factual and technical findings in the contested decision forming the background to the conduct in question which the Court notes are not in effect disputed by Microsoft.

1. Factual and technical findings

816. At recitals 60 to 66 to the contested decision, the Commission describes digital media.

817. First of all, the Commission defines media players as software products that are able to play back' audio and video content, that is to say, to decode the corresponding data and translate them into instructions for the hardware, such as loudspeakers or a display (recital 60 to the contested decision).

818. Next, at recital 61 to the contested decision, the Commission explains that the audio and video content is arranged in digital media files according to certain specific formats and that compression and decompression algorithms have been developed in order to reduce the storage space required by that content without any loss of audio or video quality. Those algorithms are implemented in media players and in encoding software which make it possible to generate compressed files. The piece of code in a media player that implements a compression/decompression algorithm is called a codec' and, in order to be able to act correctly with a compressed media content in a specific format using a specific compression/decompression algorithm, a media player needs to understand that format and that compression/decompression algorithm, that is to say, it needs to implement the corresponding codec.

819. At recital 62 to the contested decision, the Commission explains that the end user is able to access audio and video content via the Internet by downloading the relevant file to his client PC, that is to say, by copying the file and transferring it to his client PC. Once it has been downloaded, the file may be played back' by a media player compatible with the file's format.

820. At recital 63 to the contested decision, the Commission states that the end user may also receive audio and video content streamed over the Internet. Where that method is used, there is no longer any need to wait for an entire file to be downloaded, as the file is sent to the client PC in the form of a sequence of small pieces, that is to say, as a stream' of data which the media player plays as it goes along. Streaming requires the presence of a streaming media player on the client PC.

821. The Commission points out that the streaming of audio and video content to an end user often entails specific streaming protocols which govern communications between the media player and the software server which distributes the content over the Internet. In order to access sound and video content streamed using a given protocol, the user must have a media player that understands' that protocol (recital 64 to the contested decision).

822. Last, at recital 66 to the contested decision, the Commission explains that by using encoding software streaming servers and media players which are compatible in terms of codec, format and

streaming protocol support, it is possible to build a software infrastructure for delivery and consumption of streamed digital audio or video content over IT networks. Such an infrastructure will also be able to provide a platform for the development of other applications, which will use the services provided by it. In particular, media players may exhibit APIs which other applications will call in order, for example, to trigger the playback of a file by the player.

823. At recitals 107 to 120 to the contested decision, the Commission briefly describes the economic factors that characterise supply, competition and consumption patterns in the digital media industry.

824. In the first place, at the beginning of the digital media content chain are the content owners, who generally have copyright in the content and can therefore control its reproduction and distribution (recital 108 to the contested decision).

825. In the second place, the content is then aggregated by content providers, who distribute the content to consumers, in particular by storing it on servers connected to the Internet which consumers are able to access from their client PCs (recitals 109 to 111 to the contested decision).

826. In the third place, the software infrastructure that enables the creation, transmission and playback of digital content is provided by software developers, including Microsoft, RealNetworks and Apple (recital 112 to the contested decision). Those three companies have the specific feature that, as well as supporting certain industry standard formats, they offer a comprehensive solution, from encoding software to player, based essentially on their own digital media technologies and on their own proprietary file formats (recital 113 to the contested decision). Thus, Microsoft owns the following formats: Windows Media Audio' (WMA), Windows Media Video' (WMV) and Advanced Streaming Format' (ASF). RealNetworks' formats are called RealAudio' and RealVideo', while Apple's QuickTime' formats have the file extensions .qt',.mov' and.moov'. Other software developers do not offer an end-to-end solution for delivery of media content, but generally license the technology from one of the three companies mentioned above or use open industry standards (recital 117 to the contested decision).

827. In the fourth place, there are various channels through which media players may be distributed to end users (recitals 119 and 120 to the contested decision).

828. First, media players may be installed on client PCs by OEMs under agreements between the OEMs and the software developers. End users thus find a media player and possibly other software pre-installed on their client PCs in addition to an operating system. According to recital 68 to the contested decision, OEMs are companies which assemble computers using a variety of components supplied by different manufacturers. That assembly generally includes the installation of an operating system supplied by a software developer or developed by the OEM itself, together with the bundling of several applications required by the end users. The devices thus assembled are then purchased by resellers', who resell them with additional software.

829. Second, end users may download media players on to their client PCs over the Internet.

830. Third, media players may be sold in retail outlets or distributed with other software products.

831. At recitals 121 to 143 to the contested decision, the Commission describes Microsoft's products and those of its competitors.

832. Microsoft's media player is called Windows Media Player and at the time of the contested decision the most recent version of that player was called Windows Media Player 9 Series' (WMP 9). WMP 9, which allows the playback of downloaded or streamed audio and video content, has been available since 7 January 2003 and since November 2003 has also worked with the Mac OS and UNIX operating systems. WMP 9 does not support the Real and QuickTime formats.

833. As regards Microsoft's competitors, the Commission describes, in particular, the products

of RealNetworks (recitals 125 to 134 to the contested decision) and Apple (recitals 135 to 140 to the contested decision).

834. In 1995, RealNetworks - which was then called Progressive Networks Inc. - was the first large company to market products allowing the streaming of digital audio content, including RealAudioPlayer'. In February 1997 RealNetworks released RealPlayer 4.0', which played live and on-demand audio and video.

835. Apple developed, in the early 1990s, a media player called QuickTime Player', which initially ran only on Macintosh computers. In November 1994 Apple released QuickTime 2.0 for Windows' and, in April 1999, QuickTime 4.0', which supported media streaming.

836. The Commission also mentions MusicMatch's MusicMatch Jukebox' and Nullsoft's Winamp Media Player', which rely not on their own codecs or file formats but on technologies owned by Microsoft, Apple or RealNetworks or on open formats (recitals 141 to 143 to the contested decision).

837. Recitals 302 to 314 to the contested decision contain a chronology of Microsoft's activities in the media software industry, which may be summarised as follows:

- in August 1991, Microsoft released a version of its Windows 3.0' operating system, which contained Multimedia Extensions' that allowed users to view still photographs and to listen to sounds, but did not enable media streaming;

- in 1993, Microsoft released Video for Windows', which included Media Player 2.0' and allowed users to play downloaded video files on their client PCs;

- in August 1995, Microsoft released the Windows 95' operating system, in which it subsequently integrated its Internet Explorer' browser, which included RealNetworks' RealAudio Player';

- in September 1996, Microsoft released NetShow 1.0', which was developed to work with Windows 95 and which allowed audio and video distributed over intranets to be played;

- on 21 July 1997, Microsoft and RealNetworks announced an agreement to collaborate on streaming media, under which Microsoft licensed from RealNetworks, first, RealAudio and RealVideo 4.0 codecs for inclusion in its NetShow software and, second, RealPlayer 4.0 for inclusion in Internet Explorer;

- in October 1997, Microsoft announced that RealPlayer 4.0 was included in Internet Explorer 4.0;

- on 4 May 1998, Microsoft released the beta version of Microsoft Media Player', which was capable of streaming media across the Internet and of supporting, in particular, MPEG, QuickTime, RealAudio and RealVideo formats, and also the beta version of its Netshow 3.0 Server' software;

- on 25 June 1998, Microsoft released its Windows 98' operating system, the installation CD of which included the NetShow 2.0' player, which played streamed content but did not feature in the default configurations which Windows 98 offered to users;

- on 7 July 1998, Microsoft released Windows Media Player 6' (WMP 6), which played content streamed over the Internet and worked with Windows 95, Windows 98 and Windows NT 4.0 and which supported RealAudio 4.0, RealVideo 4.0, ASF, AVI, WAV, MPEG and QuickTime;

- on 5 May 1999, Microsoft released Windows 98 Second Edition' for client PCs, which included the media player WMP 6; that media player could not be removed by OEMs or by users and was also included in subsequent versions of Windows, namely Windows Me', Windows 2000 Professional' and Windows XP';

- in August 1999, Microsoft released the Windows Media Technologies 4' architecture, which included

Windows Media Player, Windows Media Services', Windows Media Tools' and Microsoft's own digital rights management technology;

- that software no longer provided native support for RealNetworks' or QuickTime's formats;

- in September 2002, Microsoft announced the release of the beta version of its Windows Media 9 Series' technology, which included, inter alia, the WMP 9 player.

838. It should be noted that Microsoft complied with its obligation under the United States settlement to allow OEMs and consumers to enable or remove access to its middleware software, by releasing Windows 2000 Professional Service Pack 3 on 1 August 2002 and Windows XP Service Pack 1 on 9 September 2002 (recital 315 to the contested decision).

2. First plea, alleging infringement of Article 82 EC

839. The first plea raised by Microsoft in relation to the Windows Media Player issue may be broken down into four parts. In the first part, Microsoft claims that the Commission applied a new, speculative, argument with no basis in law, in order to establish the existence of a foreclosure effect. In the second part, it claims that the Commission failed to take sufficient account of the advantages flowing from the architectural concept' of its operating system. In the third part, it submits that the Commission failed to establish the existence of an infringement of Article 82 EC, and in particular of Article 82(d) EC. Last, in the fourth part, Microsoft maintains that the Commission failed to take account of the obligations imposed by the TRIPS Agreement.

840. Furthermore, by way of introduction to the arguments which it develops in connection with the Windows Media Player issue, Microsoft makes a number of assertions concerning the conditions necessary to establish the existence of abusive bundling.

841. The Court will first examine the assertions referred to in the preceding paragraph. Next, in the light of the conclusions which it reaches (see paragraph 869 below), it will analyse the arguments which Microsoft puts forward in the first three parts of the first plea. It will consider finally the fourth part of the plea.

a) The necessary conditions for a finding of abusive tying

Arguments of the parties

842. Microsoft refers to recital 794 to the contested decision and asserts that the Commission based its finding that there was abusive tying in the present case on the following factors:

- first, the tying and tied products are two separate products;

- second, the undertaking concerned is dominant in the market for the tying product;

- third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and

- fourth, the practice in question forecloses competition.

843. The applicant refers to recital 961 to the contested decision and observes that the Commission also took into account the fact that the tying was not objectively justified.

844. Microsoft asserts that those various factors depart from the conditions laid down in Article 82(d) EC, in two respects.

845. First, the applicant claims that the Commission replaced the condition that the conclusion of contracts [must be made] subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts' by the condition that the dominant undertaking does not give customers a choice

to obtain the tying product without the tied product'.

846. Second, the Commission is alleged to have added a foreclosure requirement, not expressly provided for in Article 82(d) EC and which is not normally taken into account when assessing the existence of abusive tying. More specifically, the Commission, after acknowledging at recital 841 to the contested decision that the present case was not a classical tying case', based its conclusion that there was a foreclosure effect on a new and highly speculative' theory that the widespread distribution of media functionality in Windows would compel content providers to encode their content in Windows Media format, which would have the effect of excluding all competing media players from the market and would then, indirectly, compel consumers to use only that media functionality.

847. Microsoft further submits that the contested decision is contradictory in that the Commission asserts at recital 792 to the contested decision that the conditions of Article 82(d) EC are satisfied in the present case, while at the same time taking into account conditions which derogate from that provision.

848. ACT claims that the Commission took three different categories of conditions into account in order to find that there had been abusive tying in the present case, namely, first, those laid down in Article 82(d) EC, second, those laid down in Article 82 EC in general and, third, the four conditions set out at recital 794 to the contested decision. ACT contends that, whatever category of conditions is applied, the Commission's appraisal is flawed.

849. The Commission, referring to recital 831 to the contested decision, claims that the tying at issue infringes Article 82 EC generally and Article 82(d) in particular'. It explains that it referred to those two provisions jointly in view of Microsoft's arguments during the administrative procedure and for the avoidance of doubt' and also to avoid semantic debate on the interpretation [of Article 82(d) EC]'. The conditions which the Commission applied in the present case in finding that there was abusive tying are consistent with those recognised in the case-law.

Findings of the Court

850. The Court finds that Microsoft's arguments are purely semantic and cannot be accepted.

851. It is appropriate to recall the way in which the Commission structures its argument relating to bundling in the contested decision.

852. At recital 794 to the contested decision, the Commission states that tying prohibited under Article 82 EC requires the presence of the four factors set out at paragraph 842 above.

853. Next, it examines Microsoft's conduct in the light of those four factors (recitals 799 to 954 to the contested decision).

854. So, the Commission first observes that Microsoft has a dominant position on the client PC operating systems market (recital 799 to the contested decision). The Court notes that Microsoft does not dispute that fact.

855. Second, the Commission says that streaming media players and client PC operating systems are two separate products (recitals 800 to 825 to the contested decision).

856. Third, the Commission states that Microsoft does not give customers the choice of obtaining Windows without Windows Media Player (recitals 826 to 834 to the contested decision).

857. Fourth, the Commission claims that the tying of Windows Media Player forecloses competition in the media players market (recitals 835 to 954 to the contested decision). It observes, in particular, that in classical tying cases both it and the Community Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product' (recital 841 to the contested decision). The Commission states, however, that in the present

case there are good reasons not to assume without further analysis that tying Windows Media Player constitutes conduct which by its very nature is liable to foreclose competition (ibid.). The Commission considers, in essence, that tying [Windows Media Player] with the dominant Windows makes [Windows Media Player] the platform of choice for complementary content and applications which in turn [creates a risk of] foreclosing competition in the market for media players' (recital 842 to the contested decision). Furthermore, [t]his has spillover effects on competition in related products such as media encoding and management software (often server-side), but also in client PC operating systems for which media players compatible with quality content are an important application' (ibid.).

858. Last, the Commission examines the basis on which Microsoft relies in its attempt to demonstrate that the abusive conduct imputed to it is objectively justified (recitals 955 to 970 to the contested decision).

859. The Court considers that the Commission's analysis of the constituent elements of bundling is correct and that it is consistent both with Article 82 EC and with the case-law. The Commission was correct to rely on the factors set out at recital 794 to the contested decision and on the fact that the tying was without objective justification in deciding whether Microsoft's conduct constituted abusive tying. Those factors can be deduced both from the very concept of bundling and from the case-law (see, in particular, Case T30/89 Hilti v Commission [1991] ECR II1439, upheld in Case C53/92 P Hilti v Commission [1994] ECR I667 (both cases being referred to below as Hilti ') and judgments of the Court of First Instance and the Court of Justice in Tetra Pak II , paragraph 293 above).

860. It must be borne in mind that the list of abusive practices set out in the second paragraph of Article 82 EC is not exhaustive and that the practices mentioned there are merely examples of abuse of a dominant position (see, to that effect, Case C-333/94 P Tetra Pak II , paragraph 293 above, paragraph 37). It is settled case-law that the list of practices contained in that provision is not an exhaustive enumeration of the abuses of a dominant position prohibited by the EC Treaty (Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 26, and Compagnie maritime belge transports and Others v Commission , paragraph 229 above, paragraph 112).

861. It follows that bundling by an undertaking in a dominant position may also infringe Article 82 EC where it does not correspond to the example given in Article 82(d) EC. Accordingly, in order to establish the existence of abusive bundling, the Commission was correct to rely in the contested decision on Article 82 EC in its entirety and not exclusively on Article 82(d) EC.

862. In any event, the Court holds that the constituent elements of abusive tying identified by the Commission at recital 794 to the contested decision coincide effectively with the conditions laid down in Article 82(d) EC.

863. The Court thus rejects Microsoft's argument that in the present case the Commission applied conditions which differ, from two perspectives, from those laid down in Article 82(d) EC.

864. In the first place, when the Commission states that it is necessary to examine whether the dominant undertaking does not give customers a choice to obtain the tying product without the tied product', it is merely expressing in different words the concept that bundling assumes that consumers are compelled, directly or indirectly, to accept supplementary obligations', such as those referred to in Article 82(d) EC.

865. In the present case, as the Court will explain in greater detail at paragraphs 962 and 965 below, that coercion is mainly applied first of all to OEMs, who then pass it on to the end user. The end user is directly exposed to that coercion in the less frequent situation in which, rather than deal through an OEM, he acquires a Windows client PC operating system directly from a retailer.

866. In the second place, it cannot be claimed that the Commission introduced a new condition relating to the foreclosure of competitors from the market in order to establish the existence of abusive bundling within the meaning of Article 82(d) EC.

867. In that regard, the Court observes that, while it is true that neither that provision nor, more generally, Article 82 EC as a whole contains any reference to the anti-competitive effect of bundling, the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition (see, to that effect, Case T203/01 Michelin v Commission [2003] ECR II4071 (Michelin II '), paragraph 237).

868. Furthermore, as will be made explicit at paragraphs 1031 to 1058 below, the applicant cannot claim that the Commission relied on a new and highly speculative theory to reach the conclusion that a foreclosure effect exists in the present case. As indicated at recital 841 to the contested decision, the Commission considered that, in light of the specific circumstances of the present case, it could not merely assume, as it normally does in cases of abusive tying, that the tying of a specific product and a dominant product has by its nature a foreclosure effect. The Commission therefore examined more closely the actual effects which the bundling had already had on the streaming media player market and also the way in which that market was likely to evolve.

869. In light of the foregoing, the Court considers that the question of the bundling must be assessed by reference to the four conditions set out at recital 794 to the contested decision (see paragraph 842 above) and to the condition relating to the absence of objective justification.

870. The second condition set out at recital 794 to the contested decision must be considered to be met, because it is common ground that Microsoft has a dominant position on the market for what is alleged to be the tying product, namely client PC operating systems. The arguments which Microsoft puts forward in relation to the first three parts of the first plea (see paragraph 839 above) will be examined in conjunction with the four other conditions which must be satisfied to substantiate the finding of abusive tying. In carrying out that examination, the Court will proceed as follows. First, it will examine the condition relating to the existence of two separate products in the light of the arguments advanced by Microsoft on the second and third parts of the plea. Second, it will examine the condition to the effect that the conclusion of contracts is made subject to supplementary obligations, in the light of the arguments which Microsoft puts forward in support of the third part of the plea. Third, the Court will analyse the condition relating to the restriction of competition on the market in the light of the submissions made by Microsoft in connection with the first part of the plea. Fourth, it will examine the objective justifications on which the applicant relies, taking into account the arguments which it puts forward in connection with the second part of the plea.

871. The fourth part, relating to the alleged failure to take into account the obligations imposed on the Communities by the TRIPS Agreement, will then be examined.

b) The existence of two separate products

Contested decision

872. The Commission deals with this first condition at recitals 800 to 825 to the contested decision. Its analysis comes under three heads. In the first place, it takes particular care to demonstrate that streaming media players and client PC operating systems are separate products (recitals 800 to 813 to the contested decision). In the second place, it rejects Microsoft's argument that it began to bundle its media player technology with its Windows operating system before 1999 (recitals 814 to 820 to the contested decision). In the third place, it rejects Microsoft's argument that bundling a streaming media player with an operating system is normal commercial practice (recitals 821 to 824 to the contested decision).

873. Under the first head of its analysis, the Commission explains, first, that, according to the case-law, the fact that there are independent manufacturers who specialise in the manufacture of the tied product indicates the existence of separate consumer demand and therefore of a distinct market for the tied product (recital 802 to the contested decision). The Commission therefore considers that the distinctness of products for the purposes of an analysis under Article 82 EC must be assessed in the light of consumer demand, in the sense that if there is no separate demand for what is alleged to be a tied product the products at issue are not distinct (recital 803 to the contested decision).

874. Second, the Commission observes that the market provides media players separately' and that there are vendors who develop and supply media players on a standalone basis, separately from operating systems (recital 804 to the contested decision).

875. Third, the Commission refers to Microsoft's practice of developing and distributing versions of Windows Media Player for Apple's Mac and Sun's Solaris operating systems (recital 805 to the contested decision). It also notes that Microsoft releases upgrades of its media player, distinct from Windows operating system releases or upgrades (recital 804 to the contested decision).

876. Fourth, the Commission states that a not insignificant number of consumers choose to obtain media players separately from their operating system, including RealPlayer from RealNetworks, which does not develop or sell operating systems (ibid.).

877. Fifth, the Commission points out that some operating system users will not need or want a media player (recital 807 to the contested decision).

878. Sixth, the Commission rejects Microsoft's argument that there is no material demand for operating systems without media player technologies (recital 809 to the contested decision).

879. Seventh, the Commission observes that Microsoft engages in specific promotions of Windows Media Player, independent of the operating system (recital 810 to the contested decision).

880. Eighth, the Commission explains that client PC operating systems and streaming media players are also different in terms of their functionalities (recital 811 to the contested decision).

881. Ninth, the Commission states that the two products involve' different industry structures, as may be seen from the fact that Microsoft still has some competitors on the media players market, whereas its competitors on the client PC operating systems market are insignificant (recital 812 to the contested decision). The price points of the two products are also different (ibid.).

882. Tenth, the Commission explains that Microsoft applies software developer's kit licences (SDK licences') which differ according to whether the software developer's kit (SDK') relates to the Windows operating systems or the Windows Media technologies (recital 813 to the contested decision).

883. Under the second head of its analysis, the Commission asserts that Microsoft's argument that its media player technology has been bundled with Windows since 1992 cannot affect the Commission's conclusion that there are two separate products. It states, in particular, that it takes issue with Microsoft's conduct at a juncture where tying became more harmful than it had previously been', and observes, in that regard, that in 1999 Microsoft tied a product (WMP 6) which matched other vendors' products in the essential functionality that many customers came to expect from a media player (media streaming over the Internet) and with which Micro soft had entered the market for streaming media players in 1998' (recital 816 to the contested decision). The Commission also observes that the first streaming media player which Microsoft distributed together with Windows, in 1995, was RealNetworks' RealAudio Player, as at the time Microsoft did not yet have a viable' streaming media player (recital 817 to the contested decision). The Commission states that the RealAudio Player software code could be fully uninstalled (ibid.).

884. Under the third head of its analysis, the Commission refutes Microsoft's argument that bundling a streaming media player with a client PC operating system is normal commercial practice. First, that argument does not take account of the fact that there are independent suppliers of the tied product; second, Sun and the Linux vendors do not bundle their own media players but third-party media players; and, third, none of those operating system vendors links the media player with the operating system in such a way that it cannot be uninstalled (recitals 821 to 823 to the contested decision).

Arguments of the parties

885. In the first place, Microsoft, supported by CompTIA, DMDsecure and Others, ACT, TeamSystem, Mamut and Exor, claims that the contested decision does not establish that Windows and its media functionality belong to two separate product markets.

886. The media functionality in question is a long-standing feature of the Windows operating system'. In Windows, the software code that permits users to play audio and video content is no different from the code that permits them to access other types of information, such as text or graphics. Furthermore, other parts of Windows and of third-party applications running on top of the Windows operating system call on the same software code.

887. Microsoft takes issue with the fact that in the contested decision the Commission considers only the question whether what it alleges to be the tied product, namely media functionality, is available separately from what it alleges to be the tying product, namely the client PC operating system. In reality, the appropriate question is whether the tying product is regularly offered without the tied product. In fact, there is no real consumer demand for a client PC operating system without media functionality and no operator therefore markets such a system.

888. Microsoft submits that the Commission punishes dominant undertakings which improve their products by integrating new features in them, when it requires that such features be made removable whenever a third party markets a standalone product that provides the same or similar functionalities.

889. Furthermore, the position adopted by the Commission is even less acceptable, because the alleged abuse is not the result of the integration of media functionality in Windows - which goes back to 1992 and has been the subject of continuous improvement - but of the improvement which Microsoft made to that functionality in 1999, when it added its own streaming capability. In other words, the Commission challenges the presence of media functionality in Windows only in so far as it permits audio and video content found on the Internet to be played before it is completely downloaded.

890. Microsoft also claims that all the other major client PC operating systems, namely Mac OS, Linux, OS/2 and Solaris, contain media functionality capable of playing content streamed over the Internet. Its competitors all consider that the integration of such functionality in client PC operating systems is normal commercial practice that responds to consumer demand. That shows that streaming capability is a natural feature' in client PC operating systems and not a separate product. In that regard, Microsoft emphasises that a product should be defined primarily in terms of customer expectations and demands'. As stated at recital 824 to the contested decision, however, the Commission appears to accept that customers do in fact want operating systems to have media functionality.

891. Microsoft further submits that the Commission expressly recognises, at recital 1013 to the contested decision, that it would not have committed an abuse if it had in 1999 offered two versions of Windows at the same price, namely one with Windows Media Player and the other without it. However, there is no evidence that there would have been any demand for a version of Windows that, at the same price, contained fewer features. That lack of demand also shows that Windows with media functionality' is a single product.

892. Furthermore, Microsoft, supported on this point by DMDsecure and Others and ACT, asserts that the Commission cannot rely on Tetra Pak II , paragraph 293 above, and Hilti , paragraph 859 above, to substantiate its argument that Windows and its media functionality belong to two separate product markets. First of all, those cases concerned consumable products which were used with durable equipment over the lifetime of that durable equipment and which were physically separate'. In those two cases, unlike in the present case, there was evidence of demand for the tying product without the tied product. In the present case, moreover, the Commission has never identified a customer wishing to obtain what is alleged to be the tying product without what is alleged to be the tied product.

893. Last, Microsoft takes issue with certain arguments put forward by the Commission in the defence to demonstrate that Windows is a separate product from Windows Media Player. First, it submits that the United States courts never found that Windows Media Player belonged to a separate market from the market to which the Windows operating system belonged. Second, it contends that the fact that it releases versions of Windows Media Player separately from Windows does not demonstrate the existence of demand for Windows without Windows Media Player. In addition, those versions of Windows Media Player are in fact merely updates of the media functionality present in Windows. Third, the Commission's assertion that the files that constitute Windows Media Player are readily identifiable is irrelevant. In any event, that assertion is incorrect.

894. Microsoft also asserts that the Commission has not demonstrated that the media functionality is not linked, by its nature or according to commercial usage, to the client PC operating systems.

895. The applicant claims that the integration of media functionality is a natural step' in the evolution of those operating systems, as may be seen from the fact that all vendors of operating systems include such functionality in their products. Microsoft is constantly seeking to improve Windows in response to technological advances and to changes in consumer demand, and Windows and other client PC operating systems have evolved over time to support an increasingly wider range of file types. For software developers and consumers, there is no fundamental difference between files that contain text or graphics and files that contain audio or video. In reality, a modern operating system is expected to support both types of files.

896. Operating systems and media functionalities have also become strongly connected' by commercial usage. The applicant integrated media functionality in Windows in 1992 and has steadily improved that functionality since then. The streaming capability which it added in 1999 was just one of the many capabilities [which it] added to keep pace with rapid changes in technology'.

897. Last, Microsoft contends that the Commission cannot rely on the Court of Justice's statement, at paragraph 37 its judgment in Tetra Pak II , paragraph 293 above, that even where tied sales of two products are in accordance with commercial usage, such sales may still constitute abuse within the meaning of Article 82 EC unless they are objectively justified. Unlike the situation in Tetra Pak II , suppliers of third-party media players are not excluded from the market by the presence of media functionality in Windows.

898. In the reply, Microsoft further contends that the Commission's argument that an undertaking in a dominant position may be deprived of the right to adopt a course of conduct which would be unobjectionable if it were adopted by an non-dominant undertaking, and that it is not permissible to refer to industry practice in certain circumstances, is irrelevant to the issue whether the Commission has demonstrated that the conditions laid down in Article 82(d) EC were satisfied.

899. The Commission, supported by SIIA, disputes Microsoft's assertion that the contested decision does not establish that Windows and its media functionality' belong to two separate markets.

900. The Commission makes the preliminary observation that Microsoft's argument rests on a diffuse

notion of media functionality'. What Microsoft calls media functionality' is not one general, indivisible block of code. In practice, Microsoft itself draws a distinction between the underlying media infrastructure of the operating system, which acts as a platform for media applications and provides basic system services to the rest of the operating system, and the media player application which runs on top of the operating system and which decodes, decompresses and plays digital audio and video files downloaded or streamed over the Internet: the Commission gives the example of Microsoft's product Windows XP Embedded'. The Commission emphasises that the contested decision is concerned with Microsoft's tying of the streaming media application Windows Media Player and not with the underlying media infrastructure.

901. The Commission refers to recital 802 to the contested decision and submits that the Community Courts have held that the existence of independent manufacturers which specialise in the manufacture of the tied product indicated a separate consumer demand and therefore a distinct market for the tied product. The distinction that Microsoft draws between the present case and Tetra Pak II and Hilti , on the basis that the latter cases concerned consumables that were physically separate from the equipment with which they were used, lacks conviction. The judgments delivered in those cases, paragraphs 293 and 859 above, cannot be interpreted as meaning that the application of Article 82 EC must be limited to the tying of consumables.

902. The Commission disputes Microsoft's assertion that it ought, rather, to have considered whether there was a demand for the tying product without the tied product, which in the Commission's submission amounts to an incorrect claim that complementary products cannot constitute two separate products for the purposes of Article 82 EC. The United States courts have rejected similar arguments which Microsoft had raised before them and have consistently held that there was a separate market for Intel-compatible client PC operating systems and excluded middleware' products (which include Windows Media Player) from that market.

903. The Commission also maintains that Microsoft's commercial practice of developing and distributing versions of Windows Media Player for Apple's Mac and Sun's Solaris operating systems, and even for non-PC platforms - notably television decoders - provides further indication that client PC operating systems and media players are not just parts of the same product (recital 805 to the contested decision). Likewise, Microsoft releases upgrades of Windows Media Player distinct from Windows operating systems releases or upgrades, engages in promotion specifically dedicated to Windows Media Player and applies different SDK licence agreements depending on whether the SDK concerns Windows or Windows Media technologies (recitals 805 and 813 to the contested decision).

904. Furthermore, particular importance should be attached to the role of OEMs, which, in their relationships with software vendors, act as intermediaries on behalf of end users and provide them with an out-of-the-box' product, by combining hardware, client PC operating system and applications for which there is demand (recitals 68 and 119 to the contested decision). The great majority (75%) of Microsoft's sales of client PC operating systems are made through OEMs and the fact that consumers want to find a media player pre-installed on their computers is no reason for Microsoft to tie its own media player with its PC operating system. OEMs could meet such consumer demand by adding a media player to the client PCs which they sell, just as they offer the possibility of other software applications being included. Microsoft's argument that there is no demand for a Windows operating system without a media player ignores the role thus played by OEMs.

905. The evidence in the Commission's possession shows that users of operating systems do not necessarily want those systems to have a streaming media player (recital 807 to the contested decision) and that, to the extent that they do, their demand for streaming media players is distinct from the demand [for] operating systems'.

906. The Commission refers to recitals 814 to 820 to the contested decision and submits that Microsoft's

assertion that the alleged abuse is the result of the improvement which it made to its media functionality in 1999 is misleading.

907. In response to Microsoft's arguments that other operating system vendors are doing exactly the same as it does, the Commission observes that tying practices have a different impact depending on whether or not they are engaged in by a dominant undertaking. Furthermore, some operating system vendors, such as Sun and Linux distributors, do not bundle their own media player with their operating system but bundle a different media player offered by independent suppliers, and they do not link the media player concerned with their operating system in such a way that it is impossible to remove it (recitals 822 and 823 to the contested decision).

908. The Commission denies having acknowledged, at recital 1013 to the contested decision or anywhere else in that decision, that Microsoft would not have committed an abuse if in 1999 it had offered, at the same price, two versions of Windows, one with and the other without Windows Media Player. Should Microsoft now decide to sell the unbundled version of Windows at the same price as the bundled version, the Commission would examine that price by reference to the present market situation and in the light of Microsoft's obligation to refrain from any measure having an equivalent effect to tying and, if necessary, adopt a new decision pursuant to Article 82 EC.

909. Last, the Commission disputes Microsoft's assertion that it has not been shown that media functionality is not linked, by its nature or according to commercial usage, to client PC operating systems.

910. The Commission refers to recital 961 to the contested decision and observes that a dominant undertaking may be deprived of the right to adopt a course of conduct which would be unobjectionable if it were adopted by a non-dominant undertaking. The Court of Justice held in Tetra Pak II , paragraph 293 above, that even if tied sales of two products are in accordance with commercial usage, they may none the less constitute abuse within the meaning of Article 82 EC unless they are objectively justified. In the Commission's submission, it is tautological' to refer to commercial usage or practice in an industry that is 95% controlled by Microsoft; and it is established case-law that reference to industry practice in a market where competition is already restricted by the very presence of a dominant undertaking is not admissible.

911. Last, the Commission disputes Microsoft's argument that the integration of media functionality in Windows client PC operating systems forms part of a natural evolution. Microsoft was unable to develop a streaming media player using its own technology and it was only after it acquired VXtreme in 1997 that it was able to create a media player capable of competing with RealNetworks' player. The Commission also refers to an email sent to Mr Gates in January 1997 by Mr Bay, a Microsoft executive, in which the latter proposed to reposition [the] streaming media battle from NetShow vs. Real to Windows vs. Real' and to follow the [Internet Explorer] strategy wherever appropriate'.

Findings of the Court

912. Microsoft contends, in substance, that media functionality is not a separate product from the Windows client PC operating system but forms an integral part of that system. As a result, what is at issue is a single product, namely the Windows client PC operating system, which is constantly evolving. In Microsoft's submission, customers expect that any client PC operating system will have the functionalities which they perceive as essential, including audio and video functionalities, and that those functionalities will be constantly updated.

913. The Court notes, by way of preliminary observation, that the IT and communications industry is an industry in constant and rapid evolution, so that what initially appear to be separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of the competition rules.

914. It is by reference to the factual and technical situation that existed at the time when, according to the Commission, the impugned conduct became harmful, and therefore the period after May 1999, that the Court must assess whether the Commission was correct to find that streaming media players and client PC operating systems constituted two separate products.

915. The Court must thus ascertain whether the Commission was correct to conclude in the contested decision that when, from May 1999, Microsoft released the version of Windows incorporating Windows Media Player, that conduct involved the bundling of two separate products for the purposes of Article 82 EC.

916. The Court notes, by way of further preliminary observation, that, as the Commission correctly explains, the argument which Microsoft puts forward in connection with the bundling of Windows and Windows Media Player relies to a large extent on the vague concept of media functionality. In that regard, it must be emphasised that it is clear from the contested decision that, so far as that issue is concerned, the impugned conduct concerns only the application software that is Windows Media Player, to the exclusion of any other media technology included in the Windows client PC operating system (see, in particular, recitals 1019 and 1020 to the contested decision). As the Commission and the parties intervening in its support observed in their pleadings and at the hearing, Microsoft itself differentiates, in its technical documentation, the files which constitute Windows Media Player from the other media files, in particular those relating to the basic media infrastructure of the operating system. It is also appropriate to mention the example of the Microsoft product called Windows XP Embedded, referred to at recitals 1028 to 1031 to the contested decision and discussed at the hearing. From the technical aspect, that product is a genuine client PC operating system, but Microsoft's licensing conditions limit its use to certain specialised machines, such as bank automatic teller machines and decoders. The particular feature of that product is that it enables IT engineers to select the components of the operating system. In order to do so, they use a tool called Target Designer' to access a menu of the components which they can include in, or exclude from, their operating systems. Those components specifically include Windows Media Player. Furthermore, the menu contains separate entries for the media infrastructure and for the media applications, and Windows Media Player is expressly included among the latter applications.

917. First of all, it must be observed that, as the Commission correctly states at recital 803 to the contested decision, the distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand. Furthermore, Microsoft clearly shares that opinion (see paragraph 890 above).

918. The Commission was also correct to state, at the same recital, that in the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying.

919. Microsoft's argument that the Commission thus applied the wrong test and that it ought in reality to have ascertained whether what was alleged to be the tying product was regularly offered without the tied product or whether customers want[ed] Windows without media functionality' cannot be accepted.

920. In the first place, the Commission's argument finds support in the case-law (see, to that effect, Case C333/94 P Tetra Pak II , paragraph 293 above, paragraph 36; Case T30/89 Hilti , paragraph 859 above, paragraph 67; and Case T83/91 Tetra Pak II , paragraph 293 above, paragraph 82).

921. In the second place, as the Commission correctly observes in its pleadings, Microsoft's argument, based on the concept that there is no demand for a Windows client PC operating system without a streaming media player, amounts to contending that complementary products cannot constitute separate

products for the purposes of Article 82 EC, which is contrary to the Community case-law on bundling. To take Hilti , for example, it may be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless. However, that did not prevent the Community Courts from concluding that those two products belonged to separate markets.

922. In the case of complementary products, such as client PC operating systems and application software, it is quite possible that customers will wish to obtain the products together, but from different sources. For example, the fact that most client PC users want their client PC operating system to come with word-processing software does not transform those separate products into a single product for the purposes of Article 82 EC.

923. Microsoft's argument ignores the particular intermediary role played by OEMs, who combine hardware and software from different sources in order to offer a ready-to-use PC to the end user. As the Commission very correctly observes at recital 809 to the contested decision, if OEMs and consumers were able to obtain Windows without Windows Media Player, that would not mean that they would choose to obtain Windows without a streaming media player. OEMs follow consumer demand for a pre-installed media player on the operating system and offer a software package including a streaming media player that works with Windows, the difference being that that player would not necessarily be Windows Media Player.

924. In the third place, and in any event, Microsoft's argument cannot succeed because, as the Commission observes at recital 807 to the contested decision, there exists a demand for client PC operating systems without streaming media players, for example by companies afraid that their staff might use them for non-work-related purposes. That fact is not disputed by Microsoft.

925. Next, the Court finds that a series of factors based on the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also Microsoft's commercial practice demonstrate the existence of separate consumer demand for streaming media players.

926. In the first place, it must be borne in mind that the Windows client PC operating system is system software while Windows Media Player is application software. As the Commission explains at recital 37 to the contested decision, [s]ystem software controls the hardware of the computer, to which it sends instructions on behalf of applications fulfilling a specific user need, such as word processing', and [o]perating systems are system software products that control the basic functions of a computer and enable the user to make use of such a computer and run application software on it'. More generally, it is clear from the description of those products at recitals 324 to 342 and 402 to 425 to the contested decision that client PC operating systems and streaming media players clearly differ in terms of functionalities.

927. In the second place, there are distributors who develop and supply streaming media players on an autonomous basis, independently of client PC operating systems. Thus, Apple supplies its QuickTime player separately from its client PC operating systems. A further particularly convincing example is that of RealNetworks, Microsoft's main competitor on the streaming media players market, which neither develops nor sells client PC operating systems. It must be pointed out, in that regard, that according to the case-law the fact that there are on the market independent companies specialising in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product (see, to that effect, Case C333/94 P Tetra Pak II , paragraph 293 above, paragraph 36; Case T30/89 Hilti , paragraph 859 above, paragraph 67; and Case T83/91 Tetra Pak II , paragraph 293 above, paragraph 82).

928. Likewise, in the third place, Microsoft, as it confirmed in answer to a written question put by the Court, develops and markets versions of Windows Media Player which are designed to work

with its competitors' client PC operating systems, namely Apple's Mac OS X and Sun's Solaris. Similarly, RealNetworks' RealPlayer works with, inter alia, the Windows, Mac OS X, Solaris and some UNIX operating systems.

929. In the fourth place, Windows Media Player can be downloaded, independently of the Windows client PC operating system, from Microsoft's Internet site. Likewise, Microsoft releases upgrades of Windows Media Player, independently of releases or upgrades of its Windows client PC operating system.

930. In the fifth place, Microsoft engages in promotions specifically dedicated to Windows Media Player (see recital 810 to the contested decision).

931. In the sixth place, as the Commission pertinently observes at recital 813 to the contested decision, Microsoft offers SDK licences which differ according to whether they relate to the Windows client PC operating system or to Windows Media technologies. There is thus a specific SDK licence for Windows Media Player.

932. Last, and in the seventh place, in spite of the bundling applied by Microsoft, a not insignificant number of customers continue to acquire media players from Microsoft's competitors, separately from their client PC operating system, which shows that they regard the two products as separate.

933. The foregoing facts demonstrate to the requisite legal standard that the Commission was correct to conclude that client PC operating systems and streaming media players constituted two separate products for the purposes of Article 82 EC.

934. That conclusion is not undermined by Microsoft's other arguments.

935. In the first place, as regards Microsoft's argument that the integration of Windows Media Player in the Windows operating system from May 1999 constitutes a normal and necessary step in the evolution of that system and is in keeping with the constant improvement of its media functionality, it is sufficient to observe that the fact that tying takes the form of the technical integration of one product in another does not have the consequence that, for the purpose of assessing its impact on the market, that integration cannot be qualified as the bundling of two separate products.

936. As Microsoft itself acknowledged in answer to a question put to it by the Court at the hearing, its decision to supply WMP 6 as a functionality integrated in the Windows operating system from May 1999 was not the consequence of a technical constraint. At that time there was nothing to prevent Microsoft from distributing WMP 6 in the same way as it had distributed its previous player, NetShow, which since June 1998 had been included on the Windows 98 installation CD: and none of the four Windows 98 default installations provided for the installation of NetShow, which had to be installed by users if they wished to use it.

937. Furthermore, Microsoft's argument that the integration of Windows Media Player in the Windows operating system was dictated by technical reasons is scarcely credible in the light of the content of certain of its own internal communications. Thus, it follows from Mr Bay's email of 3 January 1999 to Mr Gates (see paragraph 911 above) that the integration of Windows Media Player in Windows was primarily designed to make Windows Media Player more competitive with RealPlayer by presenting it as a constituent part of Windows and not as application software that might be compared with RealPlayer.

938. In the second place, Microsoft cannot claim that the Commission fails to show that media functionality is not linked, by nature or according to commercial usage, to client PC operating systems.

939. First, it follows from the considerations set out at paragraphs 925 to 932 above that client PC operating systems and streaming media players do not, by their nature, constitute indissociable

products. While it is true that there is a link between a client PC operating system such as Windows and application software such as Windows Media Player, in the sense that both products are on the same computer from the user's perspective and that a media player will only work when an operating system is present, that does not mean that the two products are not dissociable in economic and commercial terms for the purpose of competition rules.

940. Second, as the Commission rightly observes, it is difficult to speak of commercial usage in an industry that is 95% controlled by Microsoft.

941. Third, Microsoft cannot rely on the fact that vendors of competing client PC operating systems also bundle those systems with a streaming media player. On the one hand, Microsoft has not adduced any evidence that such bundling was already carried out by its competitors at the time when the abusive bundling commenced. On the other hand, moreover, it is clear that the commercial conduct of those competitors, far from invalidating the Commission's argument, corroborates it. As may be seen from recitals 822 and 823 to the contested decision and as the Commission observes in its pleadings, some vendors of non-Microsoft operating systems who supply their operating systems with a media player make the installation of the media player optional, or allow it to be uninstalled, or offer a selection of different media players.

942. Fourth, and in any event, it is settled case-law that even when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute abuse within the meaning of Article 82 EC, unless it is objectively justified (Case C-333/94 P Tetra Pak II , paragraph 293 above, paragraph 37).

943. Finally, in the third place, the argument which Microsoft put forward at the hearing, that the unbundled version of Windows which it placed on the market pursuant to the remedy had met with no success, must also be rejected. As already stated at paragraph 260 above, the lawfulness of a Community measure must be assessed on the basis of the matters of fact and of law existing at the time when the measure was adopted. Furthermore, any doubts as to the effectiveness of the remedy ordered by the Commission do not in themselves prove that its finding as to the existence of two separate products is wrong.

944. The Court concludes from all of the foregoing considerations that the Commission was correct to find that client PC operating systems and streaming media players constituted separate products.

c) Consumers are unable to choose to obtain the tying product without the tied product

Contested decision

945. At recitals 826 to 834 to the contested decision, the Commission seeks to demonstrate that the third condition necessary for a finding of abusing bundling, namely the condition relating to coercion, is satisfied in the present case, in that Microsoft does not give consumers the option of obtaining the Windows client PC operating system without Windows Media Player.

946. In the first place, the Commission states that the OEMs who license the Windows operating system from Microsoft for pre-installation on a client PC are direct addressees' of that coercion and pass it on to end-users (recital 827 to the contested decision). It explains that under Microsoft's licensing system, OEMs must license the Windows operating system with Windows Media Player pre-installed. In effect, Microsoft does not license Windows without Windows Media Player. OEMs who wish to install a different media player on Windows can do so only by adding it to Windows Media Player. At recital 829 to the contested decision, the Commission adds that there are no technical means of uninstalling Windows Media Player.

947. In the second place, the Commission asserts that the United States settlement does not alter that situation, since [r]emoval of end-user access does not restore the choice of Microsoft's customers

as to whether to acquire Windows without [Windows Media Player]' (recital 828 to the contested decision).

948. In the third place, the Commission considers that Microsoft cannot rely on the fact that consumers are not required to pay extra for Window Media Player, since Article 82(d) EC makes no mention of paying' where it refers to supplementa[ry] obligations' (recital 831 to the contested decision). Furthermore, the price of Windows Media Player is probably hidden' in the overall price for the bundle of Windows and Windows Media Player (footnote 971 to the contested decision).

949. In the fourth place, the Commission observes that there is no suggestion in the language of Article 82 EC that consumers must be compelled to use the tied' product. It submits that, in so far as the tied sale gives rise to a risk that competition will be restricted, it is immaterial whether consumers are forced to buy or use Windows Media Player (recitals 832 and 833 to the contested decision).

Arguments of the parties

950. Microsoft, supported by CompTIA, DMDsecure and Others, ACT, TeamSystem, Mamut and Exor, claims that the question of supplementary obligations' within the meaning of Article 82(d) EC does not arise in the present case.

951. In support of that assertion, Microsoft submits, first of all, that consumers are not required to pay anything extra for the media functionality of Windows. Media functionality is a feature of Windows and is included in the overall price of the operating system. Unlike the situation in Hoffmann-La Roche v Commission , paragraph 664 above, and Hilti , Microsoft does not impose any financial disadvantage that might discourage consumers from using its competitors' products.

952. Nor are consumers required to use the media functionality in Windows. They can even use the Set Program Access & Defaults' function in Windows, which Microsoft created pursuant to the United States settlement, confirmed by decision of the District Court of 1 November 2002, to remove all end-user access to that functionality and set a competing media player as the default handler of various media file types.

953. Last, Microsoft contends that, unlike in Tetra Pak II and Hilti , consumers are not prevented from installing and using third-party media players instead of, or in addition to, the media functionality in Windows. At recital 860 to the contested decision, moreover, the Commission notes that consumers use on average 1.7 media players each month and states that that figure is increasing.

954. In the reply, Microsoft further submits that the Commission's argument has the consequence of depriving Article 82 EC of its useful effect. If the Commission's argument were to be accepted, it would have the consequence of eliminating the requirement of coercion' as an element of abusive tying, which would be contrary to sound economic principles.

955. The Commission submits that the arguments which Microsoft puts forward in support of its proposition that the question of supplementary payments' within the meaning of Article 82(d) EC does not arise in the present case have already been rejected at recitals 826 to 834, 960 and 961 to the contested decision. Those arguments find no support in the case-law and would deprive Article 82 EC of its useful effect. Coercion exists when a dominant undertaking deprives its customers of the realistic choice of buying the tying product without the tied product.

956. Article 82(d) EC makes no mention of payment'. By its arguments, Microsoft suggests that there can be no question of harm to competition where a dominant undertaking charges a uniform price, rather than two separate prices, for two products or imposes a product on consumers without charging a supplement. Microsoft is thus confusing the question of coercion and the question of harm to competition.

957. Nor, in the Commission's submission, does it follow from the wording of Article 82 EC that

customers must be forced to use the tied product or prevented from using competitors' substitutes for the tied product. The question whether or not consumers or suppliers of complementary software and content are likely to use the bundled product at the expense of competing non-bundled products is clearly relevant to the examination of the condition relating to foreclosure of competition.

958. In response to Microsoft's assertion that an average of 1.7 media players are used each month by consumers, the Commission contends that consumers cannot replace Windows Media Player by another media player on their PCs, but can only add a second media player. That average figure of 1.7 must not obscure the fact that Windows Media Player is always pre-installed on Windows PCs.

959. Last, in answer to a written question put by the Court, the Commission stated that the United States settlement did not require Microsoft to suppress end-user access to Windows Media Player but only to hide that access, so that Windows Media Player remained pre-installed and fully active on the PC. OEMs and end users are therefore still compelled to acquire Windows Media Player and Windows simultaneously. Referring to recital 852 to the contested decision, the Commission also maintained, in its answer, that Microsoft had conceived the hiding' mechanism in such a way that Windows Media Player could override the default parameters and reappear when the user accessed media files streamed over the Internet via Internet Explorer.

Findings of the Court

960. Microsoft contends, in essence, that the fact that it integrated Windows Media Player in the Windows client PC operating system does not entail any coercion or supplementary obligation within the meaning of Article 82(d) EC. In support of its argument, it emphasises, in the first place, that customers pay nothing extra for the media functionality of Windows; in the second place, that they are not obliged to use that functionality; and, in the third place, that they are not prevented from installing and using competitors' media players.

961. The Court observes that it cannot be disputed that, in consequence of the impugned conduct, consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means (see paragraph 864 above) that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied.

962. As the Commission correctly states at recital 827 to the contested decision, in most cases that coercion is applied primarily to OEMs, and is then passed on to consumers. OEMs, who assemble client PCs, install on those PCs a client PC operating system provided by a software producer or developed by themselves. OEMs who wish to install a Windows operating system on the client PCs which they assemble must obtain a licence from Microsoft in order to do so. Under Microsoft's licensing system, it is not possible to obtain a licence on the Windows operating system without Windows Media Player. The Court notes, in that regard, that it is common ground that the vast majority of sales of Windows client PC operating systems are made through OEMs, that is to say, by means of licences purchased when a client PC is purchased, while only 10% of sales of those systems are generated by the sale of individual Windows licences.

963. The coercion thus applied to OEMs is not just contractual in nature, but also technical. In effect, it is common ground that it was not technically possible to uninstall Windows Media Player.

964. As OEMs act in their relationships with software producers as intermediaries on behalf of end users, and as they supply end users with an out-of-the-box' PC, the impossibility of acquiring the Windows client PC operating system without simultaneously acquiring Windows Media Player applies ultimately to those users.

965. In the less common case where the end user acquires a Windows client PC operating system directly from a retailer, the abovementioned contractual and technical coercion is applied directly to that end user.

966. The Court considers that the arguments which Microsoft puts forward must be rejected.

967. Thus, in the first place, Microsoft cannot rely on the fact that customers are not required to pay anything extra for Windows Media Player.

968. First, while it is true that Microsoft does not charge a separate price for Windows Media Player, it cannot be inferred that the media player is provided free of charge. As is evident from paragraph 232 of Microsoft's application, the price of Windows Media Player is included in the total price of the Windows client PC operating system.

969. Second, and in any event, it does not follow from either Article 82(d) EC or the case-law on bundling that consumers must necessarily pay a certain price for the tied product in order for it to be concluded that they are subject to supplementary obligations within the meaning of that provision.

970. Nor, in the second place, is it relevant for the purposes of the examination of the present condition that, as Microsoft claims, consumers are not obliged to use the Windows Media Player which they find pre-installed on their client PC and that they can install and use other undertakings' media players on their PCs. Again, neither Article 82(d) EC nor the case-law on bundling requires that consumers must be forced to use the tied product or prevented from using the same product supplied by a competitor of the dominant undertaking in order for the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations to be capable of being regarded as satisfied. For example, as the Commission correctly observes at recital 832 to the contested decision, in Hilti users were not forced to use the Hilti branded nails which they obtained with the Hilti branded nail gun.

971. The Court observes that, as will be explained in greater detail when it examines the condition relating to the restriction of competition on the market due to the bundling in question, first, OEMs are deterred from pre-installing a second streaming media player on client PCs and, second, consumers have an incentive to use Windows Media Player at the expense of competing media players, notwithstanding that the latter players are of better quality.

972. The argument which Microsoft bases on certain measures which it adopted pursuant to the United States settlement (see paragraph 952 above) must also be rejected.

973. First, it was only in November 2001 that that settlement was concluded and only in August and September 2002 that Microsoft adopted the measures required by that settlement concerning middleware (including Windows Media Player); however, the abusive bundling began in May 1999. Furthermore, the United States settlement was concluded for a limited period, until 2007.

974. Second, as the Commission correctly observes at recital 828 to the contested decision, the measures which Microsoft adopted under the United States settlement did not have the consequence of allowing consumers to acquire the Windows client PC operating system without having to acquire Windows Media Player at the same time. Under that settlement, Microsoft was only required to remove the Windows Media Player icon which appeared on the screen and the similar points of access and also to disable the automatic implementation of that player. As Windows Media Player thus remained pre-installed and fully active, OEMs and customers continued to be compelled to acquire both products together. Furthermore, as stated at recital 852 to the contested decision, Microsoft devised the mechanism in such a way that Windows Media Player could override the default setting and reappear when the user used Internet Explorer to access media files streamed over the Internet.

975. It follows from all of the foregoing considerations that the Commission was correct to find that the condition relating to the imposition of supplementary obligations was satisfied in the present case.

d) The foreclosure of competition

Contested decision

976. At recitals 835 to 954 to the contested decision, the Commission analyses the fourth condition necessary for a finding of abusive bundling, namely the condition relating to the foreclosure of competition.

977. The Commission's analysis takes as its starting point recital 841 to the contested decision, which is worded as follows:

There are ... circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case. While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the Internet, sometimes [free of charge]. There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition.'

978. Next, the Commission's reasoning in the contested decision follows three stages.

979. In the first stage, it establishes that the tied sale ensures that Windows Media Player is ubiquitous on client PCs worldwide (recitals 843 to 878 to the contested decision).

980. In that context, first, the Commission observes that the Windows client PC operating system is pre-installed on more than 90% of client PCs shipped worldwide, so that, by bundling Windows Media Player with Windows, Microsoft ensures that its media player is as ubiquitous as Windows on client PCs. Users who find Windows Media Player pre-installed on their client PCs are generally less inclined to use another media player (recitals 843 to 848 to the contested decision).

981. Second, the Commission considers that the option of entering into distribution agreements with OEMs constitutes a less efficient means of obtaining media player distribution than Microsoft's bundling (recitals 849 to 857 to the contested decision).

982. Third, the Commission asserts that neither the downloading of media players from the Internet nor other distribution channels, including the tied sale of a media player with other software or Internet access services and retail sale of media players, can offset Windows Media Player's ubiquity (recitals 858 to 876 to the contested decision).

983. In the second stage, the Commission examines the effects of that bundling on content providers and software developers, and on certain adjacent markets (recitals 879 to 899 to the contested decision). The Commission considers, in substance, that in view of the indirect network effects that obtain in the media player market, the ubiquitous presence of the [Windows Media Player] code provides [that media player] with a significant competitive advantage, which is liable to have a harmful effect on the structure of competition in that market' (recital 878 to the contested decision).

984. In that context, the Commission emphasises, first of all, that it is on the basis of the percentages of installation and use of media players that content providers and software developers choose the technology for which they will develop their complementary software. Those operators tend to develop their solutions on the basis of Windows Media Player, since that enables them to reach all users of Windows, that is, more than 90% of client PC users. Furthermore, once complementary software

is encoded in the proprietary Windows media formats, it will work with competitors' media players only if Microsoft licenses the relevant technology.

985. At recitals 883 to 891 to the contested decision, the Commission examines, more particularly, the situation of content providers. More particularly, since supporting many different technologies generates additional development, infrastructure and administration costs, content providers tend to give priority to a single set of technologies. Furthermore, the fact that a given media player incorporating a number of media technologies is widely installed is an important factor likely to convince content providers to create media content for the technologies used by that player. By supporting the most widely-disseminated media player, content providers maximise the potential reach of their own products. The Commission concludes that the ubiquity of Windows Media Player on Windows client PCs therefore gives Microsoft a competitive advantage unrelated to the intrinsic qualities of its product.

986. At recitals 892 to 896 to the contested decision, the Commission examines the situation of software developers. In substance, software developers have an incentive to create applications designed to run on Windows Media Player alone, rather than on several different platforms, as they can thereby reach virtually all potential users of their products, recover their costs and make the most efficient use of their limited development resources. The Commission emphasises that some results of the 2003 market enquiry show that designing applications which support several media technologies gives rise to additional costs.

987. At recitals 897 to 899 to the contested decision, the Commission states that the ubiquity of Windows Media Player on client PCs has effects on certain adjacent markets, such as the markets for media players on wireless information devices, set-top boxes, DRM (Digital Rights Management) solutions and on-line music delivery.

988. Last, in the third stage, the Commission examines market development in the light of market surveys carried out by Media Metrix, Synovate and Nielsen/NetRatings (recitals 900 to 944 to the contested decision). In substance, the data obtained in those surveys consistently point to a trend in favour of usage of [Windows Media Player] and Windows Media formats to the detriment of the main competing media players (and media player technologies)' (recital 944 to the contested decision).

Arguments of the parties

989. First of all, Microsoft claims that the Commission added a further condition, namely foreclosure, which is not normally taken into account for the purpose of assessing the existence of abusive tying. At recital 841 to the contested decision, the Commission acknowledged that the present case was not a classical tying case' and that there were good reasons not to assume without further analysis that tying [Windows Media Player] constitute[d] conduct which by its very nature [was] liable to foreclose competition'. The Commission then concluded that there was a foreclosure effect, and in reaching that conclusion it relied on a new and highly speculative theory (see paragraph 846 above).

990. Microsoft refers to recital 842 to the contested decision and submits that the Commission's new theory is based on the existence of indirect network effects and on the notion that competition may be foreclosed at some unidentified point in the future if, as a result of the widespread distribution of media functionality in Windows, software developers and content providers have an incentive to design their products solely for Windows Media Player. That theory thus bases a presumption that anti-competitive effects exist on a single prediction about the future conduct of third parties over which Microsoft has no control.

991. Next, Microsoft claims that it took all necessary measures to ensure that the integration

of media functionality in Windows did not have the effect of excluding competing media players from the market. Furthermore, a number of those measures were codified' in the decision of the District Court of 1 November 2002.

992. In support of that argument, Microsoft relies, in the first place, on a series of considerations about the way in which it designs Windows.

993. First, it ensures that the inclusion of media functionality does not interfere with the functioning of third-party media players. It is thus technically possible - and indeed common practice - for a Windows-based client PC to run one or more third-party media players in addition to the media functionality in Windows. Second, third-party media players are easily accessible from the Windows user interface. Third, Microsoft designs Windows in such a way that third-party media players can automatically supply certain aspects of the media functionality that Windows itself is capable of supplying. Fourth, OEMs and consumers can use a dedicated tool created by Microsoft to remove end-user access to Windows Media Player. Fifth, Microsoft facilitates the development of applications that compete with the media functionality in Windows by exposing that functionality through published APIs.

994. In the second place, Microsoft claims that in its agreements with Windows distributors - that is, essentially, OEMs - it ensures that vendors of competing media players retain the possibility of distributing their own products. Thus, it expressly provides that OEMs are free to install whatever software products they please on client PCs running Windows, including media players that compete with Windows Media Player. It also authorises them to offer Internet access by placing icons on the Start' menu and on the Windows desktop, by showing those offers on screen when Windows is started for the first time. In fact, Internet access providers frequently distribute and promote third-party media players.

995. In the third place, Microsoft states that in its contracts with software developers, content providers or anyone else, it never requires them to distribute or otherwise promote Windows Media Player either exclusively or as a fixed percentage of their total distribution of media software.

996. In the fourth place, Microsoft contends that the integration of media functionality into Windows does not prevent the use of third-party media players on Windows or their widespread distribution'. Media players can be distributed by various methods, including pre-installation by OEMs on new client PCs, downloading from the Internet or corporate intranets, inclusion in other developers' software and distribution to users of products and services by content providers or Internet service providers.

997. In the same context, Microsoft states, with reference to an analysis in annex A.24.1 to the application, that a recent survey shows that most OEMs, both in the United States and in Western Europe, install media players that compete with Windows Media Player, such as RealPlayer and QuickTime, on their client PCs. The Commission's assertion that OEMs will not install third-party media players on a client PC unless they can remove Windows Media Player is therefore untrue. Furthermore, even the market data set out in the contested decision show that the use of third-party media players continues to increase, sometimes as much as or more than growth in the use of the media functionality in Windows.

998. Last, Microsoft, supported on this point by ACT, claims that the Commission's foreclosure theory fails to take account of certain relevant factors and that it is based on predictions which are contradicted by the facts. The applicant emphasises that the burden of proof borne by the Commission is particularly heavy when it carries out such a prospective analysis.

999. In the first place, Microsoft submits that the Commission ignored the factors that lead content providers to write to formats other than Windows Media format'. There is no basis for the belief

that it is the extent of distribution of media software associated with a particular format that determines a content provider's choice of the format in which it will encode its products. Microsoft criticises the Commission for not having asked content providers, in the 2003 market enquiry, whether other factors influenced their encoding decisions.

1000. Microsoft criticises the Commission's assertion that content providers bear additional costs when they make their products available in more than one format. The Commission ought to have proved that the costs involved in providing content in an additional format outweigh the benefits of doing so. In reality, the Commission collected, but ignored, evidence that the costs of making content available in a given media format represented an insignificant portion of overall costs. Microsoft refers to recital 894 to the contested decision and further submits that encoding in a second media technology costs only 50% as much as to support the first'. Supported on this point by CompTIA and ACT, the applicant concludes that offering several media formats brings economies of scale and that a second format will be offered even if it is much less popular with users.

1001. Microsoft also submits that even some content providers who rely on only one format did not choose Windows Media, even after the alleged abuse began. Thus, Apple does not use Windows media technology either for its iPod or for its iTunes music store. Furthermore, software developers informed the Commission that they used on average two or three major sets of APIs (Windows, Real or QuickTime)'.

1002. In the reply, Microsoft, supported on this point by DMDsecure and Others, claims, with reference to a report drawn up by one of its experts (annex C.16 to the reply), that media players would be susceptible to tipping' only if (i) users or content providers faced significant costs if they used multiple media players and (ii) media players were perceived as homogeneous with respect to their intrinsic characteristics and the content accessible by such media players. Neither of those two conditions is met in the present case.

1003. In the second place, Microsoft claims that the prediction made at recital 984 to the contested decision that tipping' in favour of Windows Media format will occur in the foreseeable future' is contradicted by the facts and by the evidence in the file, which show that content providers continue to make content available in different formats; that, far from having disappeared from the market, third-party media players are flourishing; and that consumers are not forced to use Windows Media Player.

1004. In that regard, Microsoft observes, first, that the 2003 market enquiry shows that 10 of the 12 content providers who encoded their content in Windows Media format also encoded it in other formats. Thus, numerous content providers continue to use formats developed by Apple, RealNetworks or other producers. A survey of the 1 000 Web sites most visited in the United States between 2001 and 2004 shows that the number of sites with any media content' rose by 47%, whereas the number of sites using RealNetworks' formats rose by 59% and the number of sites using QuickTime formats rose by 79%.

1005. Second, Microsoft asserts that OEMs continue to offer several media players on the PCs which they sell. Thus, in May 2004, the average number of third-party media players installed on home or small office computers sold by the main OEMs was 4.3 on United States models and 2.4 on European models.

1006. Third, Microsoft claims that the average number of media players per person used each month rose from 1.5 at the end of 1999 to 2.1 in 2004. The Commission's contention that the number of users of Windows Media Player is increasing is irrelevant; what matters is whether the number of users of other formats is sufficient for content providers to find it worthwhile to encode their products in those formats. Microsoft also disputes the relevance of the analogy which the Commission draws with Netscape Navigator.

1007. Microsoft further submits that the Commission's foreclosure theory clearly lacks objectivity. It is apparent from the contested decision that that theory applies only where the media functionality bundled with Windows is developed by Microsoft. In particular, the Commission did not apply that theory between 1995 and 1998, when RealNetworks' streaming media player was integrated into Windows.

1008. DMDsecure and Others, ACT, TeamSystem, Mamut and Exor put forward essentially the same arguments as Microsoft.

1009. The Commission first of all recalls the findings made at recital 841 to the contested decision and claims that it follows from earlier well-known cases' that the mere fact that an undertaking in a dominant position bundles a separate product with a dominant product in itself permits the conclusion that there is a foreclosure effect on the market. In the present case, however, the particular features of the market led the Commission to consider that there [were] therefore ... good reasons not to assume without further analysis that tying [Windows Media Player] [constituted] conduct which by its very nature [was] liable to foreclose competition'. The Commission did not conclude that the impugned conduct was not abusive in itself but considered that it must be analysed in its specific market context'. The Commission finds it surprising that Microsoft should criticise it for having taken the trouble to examine the real foreclosure effect created by the tying at issue and contends that the fact that it demonstrated such a foreclosure effect in a case where it is normally presumed does not mean that it applied a new legal theory.

1010. The Commission claims that it found, at the close of its analysis, that Microsoft thus [interfered] with the normal competitive process' (recital 980 to the contested decision) and that there [was] therefore a reasonable likelihood that tying [Windows Media Player] with Windows [would] lead to a lessening of competition so that the maintenance of an effective competition structure [would] not be ensured in the foreseeable future' (recital 984 to the contested decision). Contrary to Microsoft's contention, the Commission did not assert at recital 984 to the contested decision, or at any other point in that decision, that the abusive conduct at issue would lead to the elimination of all third-party media players in the foreseeable future. It demonstrated that Microsoft distort[ed] the choices and incentives of market participants through its tying' and maintains that such a distortion of the competitive process amounts to a restriction of competition within the meaning of the case-law, as it is liable to foreclose competition'. The Commission also analysed the actual foreclosure effects of Microsoft's abusive conduct on the basis of data on the development of the market and submits, with reference to recital 944 to the contested decision, that those data point to a consistent trend in favour of Windows Media Player and the Windows Media formats and confirm that there was already a degree of foreclosure on the market.

1011. Next, the Commission disputes Microsoft's assertion that it took all necessary steps to ensure that the tying at issue did not foreclose third-party media players from the market. That abusive conduct began in May 1999 and was still continuing on the date on which the defence was lodged. The United States settlement was not concluded until November 2001 and the measures adopted pursuant to that agreement were not taken until August and September 2002. Furthermore, those measures are clearly insufficient to remedy the tying abuse found in the contested decision. As for the various methods of distributing third-party media players described by Microsoft, the Commission states, with reference to recitals 849 to 877 to the contested decision, that they do not allow those players to achieve the ubiquity that Microsoft can ensure for Windows Media Player by bundling it with Windows.

1012. The Commission also reviews the findings of foreclosure of competition which it made in the contested decision, in particular at recitals 844 to 846 and 879 to 882 to the contested decision.

1013. Supported on this point by SIIA, the Commission contends that its finding that the tying at issue created a risk of foreclosure of competition on the market is not speculative but is based on a factual assessment of the specific characteristics of the market and also of the incentives of content providers and software developers. It follows from Case T65/98 Van den Bergh Foods v Commission [2003] ECR II4653 that it is acceptable to take into account the likely reactions of third parties, and in particular competitors or customers, to the unilateral action of a dominant undertaking when assessing whether that action is likely to lead to foreclosure. In the present case, it is beyond dispute that Microsoft does not give customers the choice to acquire Windows without Windows Media Player. Furthermore, the tying at issue has a direct influence on third parties and therefore interferes with their free choice (recitals 845, 851, 870, 883, 884 and 895 to the contested decision).

1014. The Commission refers to recitals 879 to 896 to the contested decision and observes, in that context, that it undertook a detailed analysis of the impact of the impugned conduct, including by sending extensive questionnaires to a large number of content providers, software developers and content owners.

1015. On the basis of the responses to those questionnaires, the Commission made the following findings:

- all the content providers that responded to the questionnaires stated that the creation of specific content for more than one technology generated additional costs (recital 884 to the contested decision);

- those content providers considered that the number of users of a given technology and the presence of media software on PCs were significant factors in deciding which technology to support (recital 886 to the contested decision);

- some of those providers even stated that the number of users of a given technology was the single most important factor' (recital 889 to the contested decision);

- so long as third-party media players' usage is still significant, the trade-off of supporting additional formats may be positive for content providers (recital 890 to the contested decision);

- software developers responded along the same lines as content providers (recitals 893 to 896 to the contested decision);

- thus, 12 software developers out of 13 answered in the affirmative the question whether the additional costs of multiple format support' were in the future likely to influence their decisions on whether to develop applications for technologies other than Windows Media (recital 890 to the contested decision);

- by tying Windows Media Player to Windows, Microsoft assures content providers and software developers that end users will be able to play back their content, in other words that they will reach a wide audience; the ubiquity of Windows Media Player on Windows client PCs therefore secures Microsoft a competitive advantage unrelated to the merits of that product (recital 891 to the contested decision).

1016. Last, the Commission rejects Microsoft's assertion that the theory applied in the present case does not take account of certain relevant factors and is based on predictions that are contradicted by the facts.

1017. In the first place, the Commission denies having ignor[ed] factors that lead content providers to write to non-Windows Media formats'. In the requests for information which it sent to those content providers, it did not refer solely to the question of the reach' of a media reader; and in the contested decision it did not state that reach was the only relevant factor, but merely highlighted the importance of that factor. In any event, Microsoft recognises that content providers take that factor into consideration when choosing the encoding format of their products and therefore implicitly accepts that the unmatched ubiquity achieved through [its] tie distorts that [choice]'.

1018. It follows from the questions put to content providers and software developers, moreover, that those third parties do balance and give more weight to the costs of multi-technology support than to its benefits. The Commission observes that Microsoft itself has stated that to encode streaming content for delivery to multiple formats [was] expensive and time-consuming for content providers' (recital 883 to the contested decision) and refers to certain evidence gathered in the 2003 market enquiry (recital 884 to the contested decision). Even if the cost of supporting several technologies is not the only factor that determines content providers' choice of whether or not to encode in several formats, it is clearly one significant factor that they do take into consideration. The Commission also denies having gathered, in the 2003 market enquiry, evidence showing that the cost of making content available in a specific media format represented only a trivial portion of overall costs. On the contrary, the feedback which the Commission received on the estimation of content preparation costs rather indicates that those costs are significant.

1019. The Commission also disputes the merits of the findings in the report in annex C.16 to the reply (see paragraph 1002 above). First of all, the contested decision demonstrates that downloading cannot offset the ubiquity that Windows Media Player acquires through the tying at issue and that its ubiquity distorts the incentives of content providers. Next, the Commission's conclusion that there is an abuse of a dominant position does not rely on a finding of complete elimination of competition or tipping' of the market. Last, the author of that report (i) does not substantiate his claim, (ii) ignores various material aspects of the present case, such as the distortions caused to network effects by monopoly leveraging' and (iii) does not demonstrate that the conditions which he claims are necessary for tipping have not been fulfilled.

1020. In the second place, the Commission, supported on this point by SIIA, disputes Microsoft's assertion that the analysis of foreclosure in the contested decision is contradicted by the facts.

1021. The Commission reiterates, first of all, that Microsoft has misrepresented recital 984 to the contested decision, which does not refer to the tipping' of the market but states only that Microsoft's tying is likely to affect the structure of competition on the media player market.

1022. Next, the Commission submits that the industry data which it used in the contested decision invariably reveal a tendency in favour of the use of Windows Media Player and Windows Media formats to the detriment of the main competing media players (recitals 906 to 942 to the contested decision). Those data show that until the second quarter of 1999 RealPlayer was the market leader, with almost twice as many users as Windows Media Player and QuickTime (recital 906 to the contested decision). From the second quarter of 1999 to the second quarter of 2002, on the other hand, the total number of users of Windows Media Player increased by approximately 39 million, which was roughly equal to the combined increase in users of RealNetworks' and Apple's media players (recital 907 to the contested decision). More recent data from Nielsen/NetRatings show that Windows Media Player attained a distinct lead over RealPlayer (more than 50% more unique users) and QuickTime (three times as many users) and that its lead increased further between October 2002 and January 2004 (recital 922 to the contested decision). That trend is similar to the situation on the web browser market, which was the subject of the proceedings for violation of United States antitrust law.

1023. The Commission maintains that Microsoft does not contest those various data, but presents new data, some of which postdate the adoption of the contested decision and for that reason clearly could not be taken into consideration.

1024. Last, the Commission claims that in any event the foreclosure effect established in the contested decision is confirmed by more recent data.

1025. Thus, first, the Commission states that the data relating to content providers presented by Microsoft (see paragraph 1004 above) are not substantiated and that Microsoft's presentation of them is misleading. The Commission maintains that it is clear that during the period 2001-04 the number of Internet sites with any' media content increased, so that it is not surprising that there are more Internet sites which offer non-Windows Media formats. Microsoft also fails to mention that during the same period the number of Internet sites supporting Windows Media formats rose by 141%, or to give any real indication of the actual quantity of content in non-Windows Media format offered by the Internet sites in question or of the actual usage of the content in those media formats.

1026. Second, the Commission asserts that the data relating to the average number of media players pre-installed on client PCs by OEMs are not conclusive (see paragraph 1005 above). In any event, Microsoft's evidence shows that more than 70% of PCs shipped in Europe and more than 80% of those shipped worldwide typically have just one media player and that, because of the tie, that player is always Windows Media Player. Furthermore, in so far as OEMs pre-install competing media players on PCs, that pre-installation is overshadowed' by the fact that Windows Media Player is automatically present on 95% of PCs shipped worldwide. Last, Microsoft's data are not reliable, since they relate in particular to competing media players which were pre-installed following legacy deals' which were not renewed and to software which does not satisfy the streaming media player' criteria.

1027. Third, the Commission claims that there is a clear trend in favour of Windows Media Player and Windows Media format usage. The Nielsen/NetRatings data on United States media player usage show that in March 2005 Windows Media Player's usage share had risen to over 80%, RealPlayer's usage share had fallen to below 40% and QuickTime's usage share had fallen to just over 10%. Recent Nielsen/NetRatings data also show that Windows Media Player's share of exclusive users has steadily increased, with 53 to 55% of users currently using Windows Media Player exclusively, against 10 to 13% for RealPlayer and 3 or 4% for QuickTime Player.

1028. In response to Microsoft's assertion that the foreclosure theory lacks objectivity, in that it did not apply when RealNetworks' media player was integrated in Windows (see paragraph 1007 above), the Commission refers to recital 818 to the contested decision and observes that it cannot be precluded from pursuing a given infringement of Community competition law on the ground that it did not pursue another possible infringement.

1029. SIIA makes essentially the same arguments as the Commission.

1030. Audiobanner claims that the bundling in question has a negative impact on third-party investment in non-Microsoft technologies, on innovation in the digital streaming media industry and on consumers. On that last point, Audiobanner emphasises that bundling precludes competition on the merits.

Findings of the Court

1031. Microsoft claims, in substance, that the Commission has failed to prove that the integration of Windows Media Player in the Windows client PC operating system involved foreclosure of competition, so that the fourth constituent element of abusive tying, as set out at recital 794 to the contested decision, is not fulfilled in this case.

1032. In particular, Microsoft contends that the Commission, recognising that it was not dealing with a classical tying case, had to apply a new and highly speculative theory, relying on a prospective analysis of the possible reactions of third parties, in order to reach the conclusion that the tying at issue was likely to foreclose competition.

1033. The Court considers that Microsoft's arguments are unfounded and that they are based on a selective and inaccurate reading of the contested decision. Those arguments essentially focus on the second of the three stages of the Commission's reasoning set out at recitals 835 to 954 to the contested decision.

1034. In fact, it is clear that in the contested decision, the Commission clearly demonstrated, inter alia, that the fact that from May 1999 Microsoft offered OEMs, for pre-installation on client PCs, only the version of Windows bundled with Windows Media Player had the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of the other operators.

1035. As already observed at paragraph 868 above, the fact that the Commission examined the actual effects which the bundling had already had on the market and the way in which that market was likely to evolve, rather than merely considering - as it normally does in cases of abusive tying - that the tying has by its nature a foreclosure effect, does not mean that it adopted a new legal theory.

1036. The Commission's analysis of the foreclosure condition begins at recital 841 to the contested decision, where the Commission states that in the present case there are good reasons not to assume without further analysis that the bundling of Windows and Windows Media Player constitutes conduct which by its very nature is liable to foreclose competition (sere paragraph 977 above). In substance, the conclusion which the Commission reached is based on the finding that the bundling of Windows Media Player with the Windows client PC operating system - the operating system pre-installed on the great majority of client PCs sold throughout the world - without the possibility of removing that media player from the operating system, allows Windows Media Player to benefit from the ubiquity of that operating system on client PCs, which cannot be counterbalanced by the other methods of distributing media players.

1037. The Court considers that that finding, which is the subject-matter of the first stage of the Commission's reasoning (see recitals 843 to 878 to the contested decision, as summarised at paragraphs 979 to 982 above), is entirely well founded.

1038. Thus, in the first place, it is clear that owing to the bundling, Windows Media Player enjoyed an unparalleled presence on client PCs throughout the world, because it thereby automatically achieved a level of market penetration corresponding to that of the Windows client PC operating system and did so without having to compete on the merits with competing products. It must be borne in mind that it is common ground that Microsoft's market share on the client PC operating systems market is more than 90% and that the great majority of sales of Windows client PC operating systems (approximately 75%) are made through OEMs, who pre-install Windows on the client PCs which they assemble and distribute. Thus, the figures cited at recital 843 to the contested decision show that in 2002 Microsoft had a market share of 93.8% by units shipped on the client PC operating systems market (see also recital 431 to the contested decision) and that Windows - and, as a result, Windows Media Player - was pre-installed on 196 million of the 207 million client PCs shipped in the world between October 2001 and March 2003.

1039. As will be explained in greater detail below, no third-party media player could achieve such a level of market penetration without having the advantage in terms of distribution that Windows Media Player enjoys as a result of Microsoft's use of its Windows client PC operating system.

1040. It should be added that Microsoft's combined offer of the Windows operating system and the NetShow 2.0 player from June 1998 did not guarantee NetShow 2.0 the same degree of presence on client PCs. As already explained at paragraphs 837 and 936 above, NetShow 2.0 was included on the Windows 98 installation CD but was not installed by any of the four default installations of that system. In other words, users had to make the effort to install NetShow 2.0 separately and could therefore decide not to install it. Similarly, that combined offer did not prevent developers of third-party media players from competing with Microsoft on the intrinsic merits of their products or prevent OEMs from taking advantage of that competition.

1041. In the second place, it is clear that, as the Commission correctly states at recital 845 to the contested decision, [u]sers who find [Windows Media Player] pre-installed on their client PCs are indeed in general less likely to use alternative media players as they already have an application which delivers media streaming and playback functionality'. The Court therefore considers that, in the absence of the bundling, consumers wishing to have a streaming media player would be induced to choose one from among those available on the market.

1042. In that regard, it is necessary to bear in mind the circumstance to which the Commission refers at recitals 119, 848, 869 and 956 to the contested decision, namely the importance that users attach to being able to buy out-of-the-box' client PCs or systems, that is to say, those that can be installed and used with a minimum of effort. Thus, the supplier whose software is initially pre-installed on the client PC and is launched automatically as soon as the PC is started clearly has a competitive advantage over any other supplier of similar products.

1043. In the third place, the Court considers that the Commission was correct to state, at recital 857 to the contested decision, that the impugned conduct created disincentives for OEMs to ship third-party media players on their client PCs.

1044. On the one hand, as stated at recital 851 to the contested decision, OEMs are reluctant to add a second media player to the package which they offer consumers, as a second media player uses hard-disk capacity on the client PC while offering functionality similar, in essence, to that of Windows Media Player and when it is unlikely that consumers will be prepared to pay a higher price for such a bundle.

1045. On the other hand, the presence of several media players on the same client PC creates a risk of confusion on the part of users and an increase in customer support and testing costs (see recital 852 to the contested decision). The Court points out in that regard that during the administrative procedure Microsoft itself emphasised that OEMs generally operate on thin profit margins and that they would therefore prefer to avoid having to bear such costs (see footnote 1006 to the contested decision).

1046. Thus, the release of the bundled version of Windows and Windows Media Player as the only version of the Windows operating system capable of being pre-installed by OEMs on new client PCs had the direct and immediate consequence of depriving OEMs of the possibility previously open to them of assembling the products which they deemed most attractive for consumers and, more particularly, of preventing them from choosing one of Windows Media Player's competitors as the only media player. On this last point, it must be borne in mind that at the time RealPlayer had a significant commercial advantage as market leader. As Microsoft itself acknowledges, it was only in 1999 that it succeeded in developing a streaming media player that performed well enough, given that its previous player, NetShow, was unpopular with customers because it did not work very well' (recital 819 to the contested decision). It must also be borne in mind that between August 1995 and July 1998 it was RealNetworks' products - first RealAudio Player, then RealPlayer - that were distributed with Windows. There is therefore good reason to conclude that if Microsoft had not adopted the impugned conduct competition between RealPlayer and Windows Media Player would have been decided on the basis of the intrinsic merits of the two products.

1047. Furthermore, even if developers of media players competing with Microsoft succeeded in reaching an agreement with OEMs for the pre-installation of their product, they would still be in a disadvantageous competitive position by comparison with Microsoft. First, as Windows Media Player cannot be removed by OEMs or by users from the package consisting of Windows and Windows Media Player, the third-party media player could never be the only media player on the client PC. In particular, the bundling prevents developers of third-party media players from competing with Microsoft for that purpose on the intrinsic merits of the products. Second, as the number of media players that OEMs are prepared to pre-install on client PCs is limited, developers of third-party media players compete with each other in order to have their products pre-installed, while, owing to the bundling, Microsoft evades that competition and the significant additional costs which it entails. On this last point, it is pertinent to refer to recital 856 to the contested decision, where the Commission mentions the distribution agreement for RealPlayer concluded in 2001 between RealNetworks and Compaq and also the fact that Microsoft acknowledged during the administrative procedure that RealNetworks paid OEMs to pre-install its products.

1048. It follows from those findings that the Commission was correct to conclude that the option of entering into agreements with OEMs [was] a less efficient and effective means of obtaining media player distribution in the face of Microsoft's tying' (recital 849 to the contested decision).

1049. In the fourth place, the Court finds that the Commission was also correct to find that methods of distributing media players other than pre-installation by OEMs could not offset Windows Media Player's ubiquity (recitals 858 to 876 to the contested decision).

1050. First, while it is true that downloading via the Internet enables suppliers to reach a large number of users, it is less effective than pre-installation by OEMs. First, downloading does not guarantee competing media players distribution equivalent to Windows Media Player's (recital 861 to the contested decision). Second, downloading, unlike using a pre-installed product, is seen as complicated by a significant number of users. Third, as the Commission observes at recital 866 to the contested decision, a significant number of download attempts - more than 50%, according to tests carried out by RealNetworks in 2003 - are not successfully concluded. While it is true that broadband makes downloading faster and less complex, it must be borne in mind that in 2002 only one in six households in Europe with Internet access had a broadband connection (recital 867 and footnote 1037 to the contested decision). Fourth, users will probably tend to consider that a media player integrated in the client PC which they have bought will work better than a product which they install themselves (recital 869 to the contested decision). Fifth and last, in most undertakings employees cannot download software from the Internet as that complicates the work of the network administrators (ibid.).

1051. Some data provided by Microsoft itself during the administrative procedure, and mentioned at recitals 909 to 911 to the contested decision, confirm that downloading via the Internet is less effective as a method of distribution than pre-installation by OEMs. Microsoft stated that 8.8 million copies of WMP 6 were downloaded during the 12 months following its release and also that it sold 7.9 million Windows 98 SE operating systems between July and September 1999. In other words, in three months WMP 6 obtained almost the same distribution by being bundled with the Windows operating system as it achieved in a year by downloading.

1052. As the Commission asserts at recital 870 to the contested decision, while downloading is in itself a technically inexpensive way of distributing media players, vendors must deploy major resources to overcome end-users' inertia and persuade them to ignore the pre-installation of [Windows Media Player]'.

1053. Second, Microsoft has put forward no argument capable of calling in question the Commission's finding that the other methods of distributing streaming media players mentioned in the contested decision, namely bundling the media player with other software or Internet access services, and retail sale, are only a second-best solution and [do] not rival the efficiency and effectiveness of distributing software pre-installed on [Windows] PCs' (recitals 872 to 876 to the contested decision).

1054. It follows from the foregoing that in the analysis set out at recitals 843 to 878 to the contested decision, which is the first stage of its reasoning, the Commission demonstrated to the requisite legal standard that the bundling of Windows and Windows Media Player from May 1999 inevitably had significant consequences for the structure of competition. That practice allowed Microsoft to obtain an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world, thus providing a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs.

1055. Admittedly, as Microsoft contends, a number of OEMs continue to add third-party media players to the packages which they offer to their customers. It is also common ground that the number of media players and the extent of the use of multiple players are continually increasing. However, those factors do not invalidate the Commission's conclusion that the impugned conduct was likely to weaken competition within the meaning of the case-law. Since May 1999 vendors of third-party media players have no longer been able to compete through OEMs to have their own products placed instead of Windows Media Player as the only media player on the client PCs assembled and sold by OEMs.

1056. It should further be noted that the merits of the findings made above are borne out by data examined by the Commission in the third stage of its reasoning. More particularly, as will be explained at paragraphs 1080 to 1084 below, the data mentioned at recitals 905 to 926 to the contested decision show a clear tendency in favour of using Windows Media Player to the detriment of competing media players.

1057. It follows from information communicated by Microsoft itself during the administrative procedure and referred to at recitals 948 to 951 to the contested decision that the significant growth in the use of Windows Media Player has not come about because that player is of better quality than competing players or because those media players, and particularly RealPlayer, have certain defects.

1058. In the light of all the foregoing considerations, the Court concludes that the Commission's findings in the first stage of its reasoning are in themselves sufficient to establish that the fourth constituent element of abusive bundling is present in this case. Those findings are not based on any new or speculative theory, but on the nature of the impugned conduct, on the conditions of the market and on the essential features of the relevant products. They are based on accurate, reliable and consistent evidence which Microsoft, by merely contending that it is pure conjecture, has not succeeded in showing to be incorrect.

1059. It follows from the foregoing that it is not necessary to examine the arguments which Microsoft puts forward against the findings made by the Commission in the other two stages of its reasoning. None the less, the Court considers that it should examine them briefly.

1060. In the second stage of its reasoning, the Commission seeks to establish that the ubiquity of Windows Media Player as a result of its bundling with Windows is capable of having an appreciable impact on content providers and software designers.

1061. The Commission's theory is based on the fact that the market for streaming media players is characterised by significant indirect network effects or, to use the expression employed by Mr Gates, on the existence of a positive feedback loop' (recital 882 to the contested decision). That expression describes the phenomenon where, the greater the number of users of a given software platform, the more there will be invested in developing products compatible with that platform, which, in turn reinforces the popularity of that platform with users.

1062. The Court considers that the Commission was correct to find that such a phenomenon existed in the present case and to find that it was on the basis of the percentages of installation and use of media players that content providers and software developers chose the technology for which they would develop their own products (recital 879 to the contested decision). The Commission correctly stated, first, that those operators tended primarily to use Windows Media Player as that allowed them to reach the very large majority of client PC users in the world and, second, that the transmission of content and applications compatible with a given media player was in itself a significant competitive factor, since it increased the popularity of that media player, and, in turn, favoured the use of the underlying media technology, including codecs, formats (including DRM) and server software (recitals 880 and 881 to the contested decision).

1063. First, as to the effects of the bundling on content providers, the Court considers that the Commission's assessment of that issue at recitals 883 to 891 to the contested decision is well founded.

1064. More particularly, the Commission was quite correct to find that the provision of several different technologies gave rise to additional development, infrastructure and administrative costs for content providers, who were therefore inclined to use only one technology for their products if that allowed them to reach a wide audience.

1065. Thus, it follows from the evidence gathered by the Commission, and especially from the replies to the requests for information which it sent to content providers in connection with the 2003 market enquiry, that encoding streamed content in several formats is expensive and time-consuming. In its request for information of 16 April 2003, the Commission asked those content providers, inter alia, whether it cost more for them to make available the same content based on more than one technology (question 19). All the entities who responded did so in the affirmative, mentioning mainly additional person/hours for content preparation, additional hardware/infrastructure costs and additional licensing costs. When asked to estimate those costs, the entities concerned put them within a range of 20 to 100% by reference to the initial costs of providing content in only one format, or on average additional costs of approximately 50% (question 20). As the Commission observes at recital 884 to the contested decision, one of the entities questioned even stated that the relatively high costs of content preparation [might] reduce the economic incentive for record companies and/or online portals to support multiple formats with different reaches' and that [i]ndividual record companies [would] balance these additional costs against the benefits of extended reach and supporting multiple [t]echnologies'.

1066. The Court notes that, contrary to Microsoft's contention, the Commission examined whether the advantages resulting from encoding in several formats could outweigh the additional costs created by such encoding. The Commission had questioned content providers about that point in the 2003 market enquiry and the content providers expressed their views on the subject (see recitals 884, 887, 889 and 890 to the contested decision).

1067. It is also apparent from the evidence gathered by the Commission that the more widely distributed a media player is, the more content providers are inclined to create content for the technology implemented in that media player. As the Commission rightly states at recital 885 to the contested decision, by supporting the widely disseminated media player, developers maximise the potential reach of their own products.

1068. Thus, as stated at recital 886 to the contested decision, in its request for information of 16 April 2003 the Commission had asked content providers whether a particular technology's reach and the presence of media client software on client PCs were significant factors in deciding which technology to support (questions 33 and 34). All the companies which answered those questions did so in the affirmative.

1069. In view of the foregoing, and of the fact that Windows is present on almost all client PCs in the world, it must be held that the Commission was correct to conclude, at recital 891 to the contested decision, that [b]y tying [Windows Media Player], Microsoft [could] assure content providers that end-users [would] be able to play back their content, that is to say, that they [would] reach a wide audience', that [u]biquity of [Windows Media Player] on Windows PCs therefore [secured] Microsoft a competitive advantage unrelated to the merits of its product' and that, [once] content based on a given format [was] widespread, the competitive standing of compatible media players [was] reinforced [and] entry for new contenders [was] difficult'.

1070. It must be borne in mind, in that context, that Article 82 EC is intended to prohibit a dominant undertaking from strengthening its position by recourse to means other than those based on competition on the merits (Case T229/94 Deutsche Bahn v Commission [1997] ECR II1689, paragraph 78, and Van den Bergh Foods v Commission , paragraph 1013 above, paragraph 157).

1071. In the second place, the Court considers that the Commission, at recitals 892 to 896 to the contested decision, correctly assessed the effects of the bundling on software developers.

1072. More particularly, the Commission was correct to observe, at recital 892 to the contested decision, that software developers were inclined to create applications for a single platform if that enabled them to reach virtually all potential users of their products, whereas porting, marketing and supporting other platforms gave rise to additional costs.

1073. Thus, it is apparent from the answers to a number of questions which the Commission asked software developers in connection with the 2003 market enquiry (see, in particular, questions 8 and 48 of the request for information of 16 April 2003) that the development of software for several media technologies entails additional costs in terms of person/hours, licensing and customer support. The software developers concerned placed those additional costs on a scale of 1 to 100% by reference to the costs of developing applications for a single technology, or an average additional cost of approximately 58% (see recital 894 to the contested decision).

1074. It is also apparent from the answers to the request for information of 16 April 2003 that the fact that the development of applications for additional technologies, other than Microsoft's, entails additional costs for software developers is likely to influence their decision on whether to develop applications for additional technologies (see recital 894 to the contested decision; see also the statement of Entity T30 at recital 893 to the contested decision).

1075. In view of those factors, and of the fact that, owing to the bundling, Windows Media Player is present on the great majority of client PCs in the world, it must be held that the Commission was correct to find, at recital 895 to the contested decision, that software developers who wrote applications that relied on a media player had incentives to write foremost to Windows Media Player. It should be noted, in that regard, that in the 2003 market enquiry the Commission had requested the software developers questioned to state the factors which determined their choice of the technology for which they wrote their applications (question 7 of the request for information of 16 April 2003). Of the 14 entities who answered that question, 10 identified the degree of presence of a media player on PCs as being the most important or the second most important factor (recital 896 to the contested decision). The Commission had also asked the software developers whether it was important to them that the interfaces of Windows Media Player were on almost all Windows PCs (question 14 of the request for information of 16 April 2003). Of the 13 entities who answered that question, 10 did so in the affirmative (recital 896 to the contested decision).

1076. In the third place, the Court recalls that, at recitals 897 to 899 to the contested decision, the Commission states that the ubiquity which Windows Media Player enjoys by virtue of the bundling also has effects on adjacent markets, such as media players on wireless information devices, set-top boxes, DRM solutions and on-line music delivery. On that point, it is sufficient to state that

Microsoft has put forward no argument capable of vitiating that assessment.

1077. In light of the foregoing considerations, the Court concludes that the second stage of the Commission's reasoning is well founded.

1078. In the third stage of its reasoning, the Commission examines the evolution of the market in light of market surveys carried out by Media Metrix, Synovate and Nielsen/NetRatings and concludes that the data in those surveys consistently point to a trend in favour of usage of [Windows Media Player] and Windows Media formats to the detriment of the main competing media players (and media player technologies)' (recital 944 to the contested decision).

1079. The Court finds that the conclusion referred to in the preceding paragraph is correct.

1080. Thus, in first place, as regards media players usage, it is apparent from the data gathered by Media Metrix that until the second quarter of 1999, when the bundling began, Windows Media Player was a considerable way behind the market leader, RealPlayer, which had almost twice as many users (recitals 905 and 906 to the contested decision). Between the second quarter of 1999 and the second quarter of 2002, on the other hand, the total number of users of Windows Media Player increased by more than 39 million, which was comparable with the combined increase in the number of users of RealPlayer and QuickTime Player (tables 8 and 9 of recital 907 to the contested decision).

1081. The data gathered by Synovate on behalf of Microsoft and mentioned at recitals 918 to 920 to the contested decision also clearly show a tendency towards Windows Media Player and away from RealPlayer and QuickTime Player.

1082. In particular, it is apparent from the Synovate data set out at recital 920 to the contested decision that while a number of users did make use of more than one media player, in August 2003 45% of the multiple users' questioned stated that the media player which they used most often was Windows Media Player, against 19% for RealPlayer and 11% for QuickTime Player. By comparison, in October 1999 the media player most used by multiple users was RealPlayer (50%), followed first by Windows Media Player (22%) and then QuickTime Player (15%).

1083. In that context, it is appropriate to add that Microsoft's assertion that consumers used an average of 1.7 media players in June 2002 - a figure which had increased to 2.1 in 2004 - must be put in context. As the Commission correctly observes at recital 860 to the contested decision, downloading over the Internet - even though it is less effective as a means of distribution than pre-installation by OEMs - at the most enables users to add a second media player to their client PC and not to replace Windows Media Player. Windows Media Player is always present on the client PC, while the additional player is RealPlayer in some cases and QuickTime Player in others, or a different third-party media player.

1084. Last, the data gathered by Nielsen/NetRatings (see recitals 921 and 922 to the contested decision) also show that between October 2002 and January 2004 Windows Media Player significantly increased its lead over both RealPlayer and QuickTime Player.

1085. In second place, as regards the use of formats, the Nielsen/NetRatings data mentioned at recitals 930 to 932 to the contested decision clearly show a tendency towards the Windows Media formats and away from the RealNetworks formats and Apple's QuickTime formats.

1086. In third place, the Court considers that the Commission was correct to find, at recitals 934 to 942 to the contested decision, that the data on the media formats used on Internet sites gathered by Netcraft, a company providing Internet services, which Microsoft had submitted during the administrative procedure were not conclusive. In particular, the Commission demonstrated to the requisite legal standard that the faulty methodology affecting Netcraft's surveys, as identified at recitals 940 to 942 to the contested decision, undermined Microsoft's assertion that in November

2002, RealNetworks' formats continued to be much more common on the [Internet]' (recital 937 to the contested decision).

1087. Last and in fourth place, the Court considers that the Commission was correct to reject, at recital 943 to the contested decision, the argument which Microsoft based on the fact that in 2001 RealPlayer was present on 92% of home PCs in the United States and therefore had an installed base comparable with Windows Media Player's for client PCs. In fact, as stated at the same recital, by 2003 RealPlayer was present on only 60 to 70% of home PCs in the United States. Furthermore, it must be borne in mind that the rate of installation of Windows Media Player is 100% on Windows client PCs and more than 90% on client PCs, whether for home or work use, worldwide.

1088. It follows from the foregoing considerations that the final conclusion which the Commission sets out at recitals 978 to 984 to the contested decision concerning the anti-competitive effects of the bundling is well founded. The Commission is correct to make the following findings:

- Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market (recital 979 to the contested decision);

- because of the bundling, Microsoft's competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player (ibid.);

- Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits (recital 980 to the contested decision);

- the bundling increases the content and applications barriers to entry, which protect Windows, and facilitates the erection of such barriers for Windows Media Player (ibid.);

- Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players (recital 981 to the contested decision);

- by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers (recital 982 to the contested decision);

- by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future (recital 983 to the contested decision).

1089. The Commission therefore had ground to state, at recital 984 to the contested decision, that there was a reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition so that the maintenance of an effective competition structure would not be ensured in the foreseeable future. It must be made clear that the Commission did not state that the tying would lead to the elimination of all competition on the market for streaming media players. Microsoft's argument that, several years after the beginning of the abuse at issue, a number of third-party media players are still present on the market therefore does not invalidate the Commission's argument.

1090. It follows from all of the foregoing considerations that Microsoft has put forward no argument capable of vitiating the merits of the findings made by the Commission in the contested decision concerning the condition relating to the foreclosure of competition. The Court must therefore conclude that the Commission has demonstrated to the requisite legal standard that the condition was satisfied in the present case.

e) The absence of objective justification

Contested decision

1091. At recitals 955 to 970 to the contested decision the Commission examines the argument whereby Microsoft seeks to show that the bundling produces efficiency gains that would outweigh the anti-competitive effects identified.

1092. In the first place, the Commission rejects Microsoft's argument that the bundling produces efficiencies related to distribution (recitals 955 to 961 to the contested decision).

1093. First of all, the Commission considers that Microsoft cannot claim that the fact that a set of options are defined by default on an out-of-the-box' computer has advantages for consumers by saving time and reducing the risk of confusion. Microsoft is thus confusing the benefit to consumers of having a media player pre-installed along with the client PC operating system and Microsoft selecting the media player for consumers' (recital 956 to the contested decision).

1094. Next, the Commission emphasises the role played by OEMs and, in particular, the fact that they customise client PCs with respect to both hardware and software in order to differentiate them from competing products and to meet specific consumer demand. It explains that [t]he market would therefore respond to the efficiencies associated with the purchase of a full package [consisting of] hardware, operating system and software applications such as media players and, in addition, the market would be free to offer the variety that consumers demand' (recital 957 to the contested decision). Consumers could choose, from among the bundles of client PC operating systems and media players offered by OEMs, the one that suited them the best.

1095. The Commission further considers that Microsoft is also unable to rely on the fact that the economies made by the tied sale of two products can mean a saving in financial resources which would otherwise be spent on maintaining a distribution system for the second product and that those economies would be passed on to consumers, who could save costs related to a second purchasing act, including selection and installation of the product' (recital 958 to the contested decision). It contrasts, in particular, the low distribution costs associated with software licensing with the importance of consumer choice and innovation regarding software such as media players.

1096. Last, the Commission rejects Microsoft's assertion that by prohibiting the bundling it placed Microsoft at a competitive disadvantage by comparison with most of its competitors, who provide multimedia capabilities with their operating systems. First, the contested decision does not prevent Microsoft from entering into agreements with OEMs to pre-install the Windows operating system and a media player - possibly Windows Media Player - in order to meet consumer demand. It emphasises that [w]hat is abusive is that Microsoft invariably imposes its own media player through tying' (recital 959 to the contested decision). In addition, Microsoft fails to take account of the fact that tying has different effects on the market, depending on whether it is done by an undertaking in a dominant position or by an undertaking not having such a position. Furthermore, an undertaking in a dominant position may be deprived of the right to adopt a course of conduct which would not be objectionable if it were adopted by non-dominant undertakings.

1097. In the second place, the Commission rejects Microsoft's argument that the tying at issue produces efficiencies related to Windows Media Player as a platform for content and applications (recitals 962 to 969 to the contested decision).

1098. The Commission asserts, in substance, that Microsoft has not adduced evidence that the integration of Windows Media Player in Windows enhances the technical performance of the product or, more generally, that the tying at issue is indispensable in order for the pro-competitive effects on which it relies to be achieved. In particular, Microsoft neither claims nor demonstrates that software developers would not have been able to develop applications if Windows Media Player had been distributed independently of the Windows client PC operating system (recital 965 to the contested decision).

1099. The Commission also states that the fact that media players of different makes are able to work with Windows has contributed significantly to the dissemination of multimedia streaming technology and to the consequent development of a host of multimedia-enabled applications (recital 966 to the contested decision).

1100. In the third place, the Commission concludes, at recital 970 to the contested decision, that Microsoft has not established to the requisite legal standard that the tying at issue was objectively justified by pro-competitive effects which would outweigh the barrier to competition caused by that practice. The benefits which Microsoft presents as being the result of the tying could be achieved without it. Furthermore, the other benefits on which Microsoft relies consist essentially in increased profitability for Microsoft and are disproportionate to the anti-competitive effects of the tying.

1101. At recitals 1026 to 1042 to the contested decision, the Commission examines the arguments which Microsoft bases on the alleged interdependencies between Windows and Windows Media Player and also on those between Windows and third-party applications.

Arguments of the parties

1102. By way of introduction to the arguments which it develops in connection with the bundling of Windows and Windows Media Player, Microsoft makes a series of factual observations.

1103. Thus, first, it claims that the integration of new functionalities generally into successive releases of its Windows client PC operating system brings benefits for software developers, OEMs and consumers.

1104. Microsoft states, first of all, that for software developers the Windows client PC operating system provides a stable and well-defined platform for software development. The integration of new functionality into Windows makes it easier and faster to develop software that works with Windows. The fact that software developers are able to use the functionality offered by Windows enables them to reduce the number of functionalities which they need to design, develop and test in their own products and also the overall size of those products. Last, Microsoft observes that the less software code an application contains, the less likely it is that the application will malfunction and require technical support.

1105. OEMs, according to Microsoft, depend on the addition of functionality to Windows to create PCs that will appeal to customers and that will support the creation of interesting new applications'.

1106. Consumers expect that Windows will be continually improved. In addition, new users of PCs, particularly those with limited technical knowledge, want PCs to be easy to set up and use.

1107. Second, Microsoft describes the benefits that result from the integration, more particularly, of multimedia functionality in Windows. First, third-party applications can call upon that functionality, which makes it easier for software developers to include audio and video content in their products. The uniform presence of media functionality in Windows, which is exposed to software developers through published APIs, encouraged the creation of numerous applications that make use of such content. Next, media functionality in Windows offers a series of functions, such as the ability to play audio CDs and video DVDs and to download music over the Internet, which are popular with consumers and help to increase sales of client PCs. Last, the presence of media functionality in Windows makes PCs more attractive and easier to use for consumers.

1108. Microsoft submits that the main justification for its conduct is that the integration of new functionality into operating systems in response to technological advances and changes in consumer demand is a core element of competition in the operating system business and has served the industry well for more than 20 years. The integration of streaming capacity into Windows is one of the aspects of its successful business model' and has contributed to the increasing use of digital media. Supported on this point by DMDsecure and Others and Exor, Microsoft claims that the Commission made a manifest error of assessment by not sufficiently considering the real benefits flowing from the integration of new functionality into the Windows operating system.

1109. In support of the arguments set out in the preceding paragraph, Microsoft formulates three series of considerations.

1110. In the first place, Microsoft, supported by DMDsecure and Others, TeamSystem, Mamut and Exor, contends that the integration of media functionality in Windows is essential to allow software developers and Internet site creators to make efficient use of the stable and well-defined' Windows platform. By calling on that functionality, those software developers and Internet site creators can easily include audio and video content in their products and thus do not need to develop the complex software code required to play such content and are able to concentrate on improving the features of their products.

1111. Microsoft refutes the Commission's assertion at recital 1031 to the contested decision that it does not matter whether the media functionality bundled with Windows is provided by Microsoft or by a third party, because it is possible to redistribute the software code that supplies that functionality or to rely on functionality supplied by third-party media players. It claims that if software developers did not have a common platform that provides a reliable set of system services they would need to determine in each individual case what functionality is present on the version of Windows installed on a particular customer's PC and then to supplement that functionality as necessary. That would render applications larger and more complex and thus more expensive to develop, test and support.

1112. Microsoft, supported on this point by Exor, submits that adding components to Windows on a piecemeal basis is likely to create conflicts between the different versions of those components, which would cause Windows or the application being installed to malfunction.

1113. Microsoft also claims that, as regards applications that are already in broad use', there is no ready mechanism to distribute the components of Windows on which they rely in order to obtain media functionality. Those applications will no longer work correctly with a version of Windows without Windows Media Player. Furthermore, the media functionality in Windows is not fungible', so that an application designed to call on that functionality cannot call on similar functionality provided by a competing media player without being substantially revised.

1114. Microsoft further disputes the Commission's assertion that competing media players are capable of replacing Windows Media Player for much of its functionality. It claims, in particular, that the Commission does not demonstrate that any third party will decide to offer substitute functionality for all the media functionality integrated into Windows'.

1115. In Microsoft's submission, the absence of media functionality in some copies of Windows will also be damaging for Internet site creators, who rely on it to distribute audio and video content. If they can no longer count on the uniform presence of media functionality in Windows, they will have to incorporate in their products mechanisms for detecting the presence of the requisite media functionality and, if it is missing, for downloading the necessary software code to the user's PC.

1116. Last, in the reply, Microsoft disputes the Commission's assertion that the benefits flowing from the integration of media functionality in Windows cannot constitute valid justification under Community law. When the Commission applies Article 82 EC it cannot ignore the benefits that flow from the conduct regarded as abusive; and, furthermore, it is not correct to claim that the standardisation that would come about in the present case would not be the result of a competitive process.

1117. In the second place, Microsoft contends that the integration of media functionality in Windows is indispensable to achieving other benefits'.

1118. The applicant explains that Windows is composed of a large number of specialised blocks of software that perform specific functions. In order to avoid duplicating the same functionality in each of those blocks, particular blocks of software code - the components' - call upon one another to perform specific tasks. A single component may thus be used to perform several functions. For example, a component which plays audio content may be used both for the Help' system in Windows and for the text-to-voice narration feature that makes Windows more accessible to the visually impaired. That method of software design, known as componentisation', relies on the interdependency of the components, so that if one of them were removed many others will malfunction. Thus, numerous features of Windows XP, including the Help system, will no longer work if media functionality is removed from the operating system. Furthermore, because of the interdependency of the components, Microsoft will be unable to develop other parts of Windows that are designed to rely on the media function if it cannot be sure that that functionality will be present in all Windows client PCs. Computer manufacturers must not therefore be free to remove the components of Windows, especially those that supply media functionality.

1119. In the reply, Microsoft denies that it has never argued that the integration of Windows Media Player in Windows produced efficiencies. It explained in detail the reasons why it was technically efficient to include media functionality in Windows that is available to be called upon by other parts of the operating system as well as by applications running on top of the operating system'. In addition, the fact that many software developers freely choose to rely on the media functionality in Windows is itself evidence that uniform integration' of such functionality generates technical efficiencies. Last, Microsoft claims to have shown during the administrative procedure that Windows operated faster' when media functionality was integrated.

1120. In the third place, Microsoft claims that enforcement of the remedy prescribed in Article 6(a) of the contested decision will have harmful consequences.

1121. First, it submits that removing components from the integrated whole made up of Windows and Windows Media Player would degrade the operating system, especially when those components are used to provide basic services, such as the ability to play audio and video content.

1122. Second, Microsoft asserts that if the contested decision were to apply as precedent against future integration in its Windows operating system, it would quickly become impossible to design, develop and test that operating system. For each block of software code that had to be made removable, Microsoft would face an exponential increase in the amount of work required. Thus, for example, if the Commission decided to apply to a second block of software codes the same principles as those established in the contested decision, it would have to offer four different versions of Windows. Such fragmentation' would have the effect that it would be impossible to know whether any given copy of the operating systems contained functionality on which software developers, manufacturers of peripherals or users wished to rely. There would therefore be one version, or indeed several versions, of Windows per computer manufacturer, each offering a different set of functionalities. In the long term, the ability to remove Windows functionalities would reduce consumer choice, since consumers would be tied to particular brands of client PCs running idiosyncratic versions of Windows, with no assurance that applications, such as graphics, would work on other versions of Windows. It would also become much more difficult to mix and match different brands of client PCs within the same computer network. In Microsoft's submission, the only way to avoid such fragmentation would be to freeze' Windows in its current version.

1123. The Commission first of all rejects the factual observations formulated by Microsoft. It claims, in particular, that the applicant's general assertions concerning the benefits of the integration of new functionalities unrelated to Windows Media Player into client PC operating systems are irrelevant.

1124. Next, the Commission, supported by SIIA, submits that Microsoft has failed to show that the impugned conduct is objectively justified.

1125. In the first place, at recitals 955 to 970 to the contested decision, the Commission rejected Microsoft's argument that the tying at issue produced efficiencies capable of outweighing the anti-competitive effects identified. As regards, more particularly, the alleged distribution efficiencies, the Commission observes that Microsoft's arguments are based on confusion between the benefits to consumers of having a media player pre-installed along with the client PC operating system, and Microsoft selecting the media player for consumers'. Referring to recital 962 to the contested decision, the Commission further submits that Microsoft has not put forward any technical efficiency for which integration of Windows Media Player into Windows would be a precondition. Microsoft's assertion, first submitted in the reply, that Windows operates faster when media functionality is integrated, is not supported by any evidence. Last, by the tying at issue, Microsoft shields itself from effective competition from vendors of potentially more efficient media player vendors which could challenge its position. Microsoft thus reduces the talent and capital invested in innovation in respect of media players and reduces its own incentive to innovate in that sphere.

1126. In the second place, the Commission examines the three series of considerations formulated by Microsoft.

1127. First, the Commission observes that media players exhibit both application and platform software characteristics. In other words, although they build on the client PC operating system, other applications may build on them. Media players offer their platform services irrespective of whether or not they are tied to a PC operating system.

1128. The Commission claims that the benefit that the bundling offers to software developers and content providers is that it allows them to avoid the efforts of competition', which cannot constitute valid justification under Community competition law. Because of the bundling of Windows Media Player with the ubiquity of the Windows monopoly', software developers and content providers who base their products on Windows Media Player do not need to convince users to install that player. By contrast, those who base their products on a third-party media player platform typically provide an incentive for users to install the necessary media play er on their own computer, for example by including links for downloading the player through the Internet.

1129. The Commission further submits that the bundling has the effect of increasing the costs which vendors of competing media players and third-party software developers who rely on those media players necessarily incur in convincing users to install those media players, because competitors need to overcome the disincentives generated by the automatic presence of Windows Media Player to install a different media player product, but with essentially similar characteristics (learning, support, and storage costs are examples of such disincentives)'.

1130. The Commission also maintains that Microsoft's arguments relating to the uniform platform' amount to asserting that it should be allowed to extend the Windows monopoly by tying other software products to Windows, for the simple reason that such other software products also offer platform capabilities to third-party developers. Microsoft essentially claims that the integration of Windows Media Player in Windows leads to de facto standardisation and that this provides benefits to third parties, since they know that Windows Media Player will always be present in Windows. However, standardisation cannot be imposed unilaterally by a dominant undertaking through tying (recital 969 to the contested decision).

1131. Furthermore, even if software code is not completely fungible (see paragraph 1113 above), the fact remains that competing media players can replace Windows Media Player for a large part of its functionality. As regards other functionality, third-party media player vendors may choose not to implement it at present because they know that it is available in Windows Media Player. However, that does not exclude the possibility that they will develop that functionality immediately after implementation of the remedy in order to take advantage of the unbundled version of Windows and to meet the demand of software developers.

1132. In the rejoinder, the Commission insists that it never asserted that third-party media players were complete substitutes' for the media functionality in Windows. It merely explained in the contested decision that third-party media players running on top of an unbundled version of Windows could to a large extent replace features' of Windows Media Player. Streaming media players compete on the basis of a number of parameters, such as the quality of streaming, the method of organising content and the format in which the file is provided.

1133. Last, the Commission refutes Microsoft's assertion that some applications will no longer work properly when they are used with the version of Windows imposed by Article 6(a) of the contested decision. Referring to the example given at recital 1038 to the contested decision, moreover, the Commission observes that professional Internet sites normally incorporate mechanisms that automatically detect the absence of components needed to run an Internet page and allow them to be downloaded. In the rejoinder, it further submits that in any event developers who base their products on Windows Media Player have a variety of ways of dealing with the possibility that a PC user has not already installed Windows Media Player.

1134. Second, the Commission rejects the arguments which Microsoft bases on componentisation.

1135. It claims, first of all, that those arguments are wholly abstract, as Microsoft refers to media functionality in general. It reiterates that the remedy prescribed in Article 6(a) to the contested decision does not affect the basic media functionality of Windows.

1136. Next, the Commission submits that the files constituting Windows Media Player which must be removed pursuant to the contested decision have been clearly identified by Microsoft. It refers to a letter of 13 September 2004 from Mr Heiner, a Microsoft employee, and contends that Microsoft cannot claim that it is not technically feasible' to design an unbundled version of Windows.

1137. The Commission further observes that the contested decision requires Microsoft to develop and offer an unbundled version of Windows without Windows Media Player and to ensure that that version is full-functioning and of good quality, but does not prevent Microsoft from continuing to offer a version of Windows bundled with Windows Media Player in line with its current software design methodology'.

1138. Last, the Commission observes that Microsoft gives only a single example of component cross-dependency', namely the Windows XP Help' system. In so far as that Help system relies on audio and video, it relies on media infrastructure that will remain in the unbundled version of Windows without Windows Media Player. It will therefore work well irrespective of the presence of Windows Media Player, as has been demonstrated by a test report submitted by RealNetworks in the interim measures proceedings. Furthermore, Microsoft's assertion that numerous other features of Windows XP will no longer work if media functionality is removed from the system consisting of Windows and Windows Media Player is wholly unfounded.

1139. The Commission further submits that it examined in detail, at recitals 1026 to 1042 to the contested decision, the question of the alleged interdependencies between Windows and Windows Media Player. It noted that it was obvious that if Windows Media Player were removed from Windows certain functionalities which it normally delivered would not be available (recital 1033 to the contested decision). That does not mean, however, that the operating system will not work properly or that the product will be degraded'. In addition, the example of Windows XP Embedded shows that it is technically possible for Windows to cope with the absence of multimedia capabilities caused by code removal without entailing the breakdown of operating system functionality (recitals 1028 to 1030 to the contested decision).

1140. Third, the Commission contends that the arguments which Microsoft puts forward concerning the future negative effects of the remedy prescribed in Article 6(a) of the contested decision are hypothetical, conjectural and wholly irrelevant.

1141. First of all, pursuant to the contested decision, Microsoft is to retain the right to offer the bundled version of Windows.

1142. Next, the Commission, supported on this point by SIIA, observes that Microsoft already markets a number of different versions of its client PC operating system which are not all interchangeable, such as Windows 98, Windows 2000, Windows Millennium Edition, Windows NT and Windows XP. Those different versions of Windows do not support the same applications.

1143. Last, the Commission rejects Microsoft's assertion that it would have to freeze' Windows in its current version. The remedy prescribed in Article 6(a) of the contested decision fully preserves Microsoft's incentives to innovate both in the media player market and in the client PC operating systems market and it allows consumers to exercise their choice on the basis of the merits of the products. Supported on this point by Audiobanner.com, the Commission claims that, in reality, it is the bundling that deters innovation, in particular on the media player market (recital 981 to the contested decision). Furthermore, that practice discourages investment in all the technologies in which Microsoft could conceivably take an interest in the future (recital 983 to the contested decision).

Findings of the Court

1144. It must be borne in mind, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

1145. In its pleadings, Microsoft submits in substance two series of arguments to justify its conduct, which to a large extent cover those which it submitted to the same end during the administrative procedure and which were examined and correctly rejected by the Commission at recitals 955 to 970 and 1026 to 1042 to the contested decision, as appears from the following paragraphs.

1146. First, Microsoft takes issue with the Commission for having ignored the benefits flowing from its business model, which entails the ongoing integration of new functionality into Windows. In that context, it claims, more particularly, that the integration of media functionality in Windows is indispensable in order for software developers and Internet site creators to be able to continue to benefit from the significant advantages offered by the stable and well-defined' Windows platform.

1147. Second, Microsoft claims that the removal of media functionality from the system consisting of Windows and Windows Media Player would create a series of problems to the detriment of consumers, software developers and Internet site creators. It refers, in particular, to the fact that its Windows operating system relies on the method know as componentisation' (see paragraph 1118 above) and that the withdrawal of media functionality would result in the degrading and fragmentation' of that system.

1148. As regards the first series of arguments invoked by Microsoft, it is appropriate, first of all, to recall the precise scope of the abuse found in Article 2(b) of the contested decision and of the remedy prescribed in Article 6(a) of that decision.

1149. The circumstance to which the Commission takes exception in the contested decision is not that Microsoft integrates Windows Media Player in Windows, but that it offers on the market only a version of Windows in which Windows Media Player is integrated, that is to say, that it does not allow OEMs or consumers to obtain Windows without Windows Media Player or, at least, to remove Windows Media Player from the system consisting of Windows and Windows Media Player. Thus, while Article 6(a) of the contested decision requires Microsoft to offer a full-functioning version of the Windows Client PC Operating System which does not incorporate Windows Media Player', it expressly states that Microsoft... retains the right to offer a bundle of the Windows Client PC Operating System and Windows Media Player' (see, to the same effect, recitals 1011 and 1023 to the contested decision).

1150. Thus, the Commission does not interfere with Microsoft's business model in so far as that model includes the integration of a streaming media player in its client PC operating system or the possibility for that operating system to allow software developers and Internet site creators to take advantage of the benefits offered by the stable and well-defined' Windows platform. The Commission takes issue with the fact that Microsoft does not market the version of Windows that corresponds to its business model and at the same time a version of that system without Windows Media Player, thus permitting OEMs or end users wishing to do so to install the product of their choice on their client PC as the first streaming media player.

1151. Next, the Court considers that Microsoft is not entitled to rely on the fact that the bundling ensures the uniform presence of media functionality in Windows, which enables software developers and Internet site creators to avoid the need to include in their products mechanisms which make it possible to ascertain what media player is present on a particular client PC and where necessary to install the necessary functionality (see paragraphs 1107, 1111 and 1115 above). The fact that that tying enables software developers and Internet site creators to be sure that Windows Media Player is present on virtually all client PCs in the world is precisely one of the main reasons why the Commission correctly took the view that the bundling led to the foreclosure of competing media players from the market. Although the uniform presence to which Microsoft refers may have advantages for those operators, that cannot suffice to offset the anti-competitive effects of the tying at issue.

1152. As the Commission correctly observes (see paragraph 1130 above), by such an argument Microsoft is in fact claiming that the integration of Windows Media Player in Windows and the marketing of Windows in that form alone lead to the de facto standardisation of the Windows Media Player platform, which has beneficial effects on the market. Although, generally, standardisation may effectively present certain advantages, it cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

1153. The Court further notes that it cannot be ruled out that third parties will not want the de facto standardisation advocated by Microsoft but will prefer it if different platforms continue to compete, on the ground that that will stimulate innovation between the various platforms.

1154. Furthermore, as the Commission and SIIA rightly submit, the other benefits on which Microsoft relies could just as easily be obtained in the absence of the impugned conduct.

1155. Thus, consumer demand for an out-of-the-box' client PC incorporating a streaming media player can be fully satisfied by OEMs, who are in the business of assembling such PCs and combining, inter alia, a client PC operating system with the applications desired by consumers (recitals 68 and 119 to the contested decision). Nor does the contested decision prevent Microsoft from continuing to offer the bundled version of Windows and Windows Media Player to consumers who prefer that solution.

1156. Similarly, Microsoft cannot rely on the fact that OEMs depend on the addition of functionality to Windows to create PCs that will appeal to customers and that will support the creation of interesting new applications'. OEMs are capable of offering client PCs with such features by pre-installing on them applications obtained from software developers. In the same way, the functionalities offered by Windows Media Player may be supplied by Microsoft on an independent basis, that is to say, without that media player being tied to the Windows operating system.

1157. Nor can Microsoft claim that the integration of media functionality in Windows is essential in order to enable software developers and Internet site creators to use the Windows platform effectively and that it enables those operators to avoid having to develop the requisite software code themselves.

1158. For the reasons set out at recitals 962 to 967 to the contested decision, that argument must be rejected as unfounded. It must be borne in mind, in that regard, that although streaming media players - and this applies both to Windows Media Player and to competing media players - constitute application software, they none the less expose APIs and may therefore also serve as platforms for third-party applications. It is wholly unnecessary for a streaming media player to be integrated in a client PC operating system in order to be able to provide such platform services. In particular, contrary to the impression that Microsoft would give, the absence of such integration does not have the consequence that software developers must write the requisite software code. Thus, as stated at recital 966 to the contested decision, a large number of software developers and Internet content providers develop their products using APIs exposed by RealPlayer even though that is not integrated in any client PC operating system. Similarly, the Court notes that software developers can - and do - write applications designed to work with WMP 9, although that player was not pre-installed on Windows (recital 965 to the contested decision).

1159. Last, the Court notes that, as the Commission observes both in the contested decision and in its pleadings, Microsoft does not show that the integration of Windows Media Player in Windows creates technical efficiencies or, in other words, that it lead[s] to superior technical product performance' (recital 962 to the contested decision).

1160. In the reply, Microsoft asserts, for the first time, that Windows ... operate[s] faster when media functionality is integrated'. In that regard, it is sufficient to state that that assertion is unsupported.

1161. Also in the reply, Microsoft asserts that the fact that numerous software developers freely choose to call on the media functionality in Windows shows that the uniform integration' of such functionality creates technical efficiencies. That assertion must be rejected: the contested decision refers to Windows Media Player and not to media functionality in general, and the mere fact that software developers rely on Windows Media Player does not prove that the tying produces technical efficiencies.

1162. The second series of arguments on which Microsoft relies must also be rejected.

1163. First of all, as regards Microsoft's claim that applications that are already in broad use' will no longer work correctly when they are implemented on the version of Windows without Windows Media Player, it is sufficient to state that this has not been demonstrated to the requisite legal standard.

1164. Next, the Court finds that Microsoft's assertion that the removal of media functionality from the system consisting of Windows and Windows Media Player will affect the functioning of parts of the Windows operating system itself is unfounded. The only examples that Microsoft provides on that point, namely the examples of the Help' system and the text-to-voice system contained in

Windows, are unconvincing. Those systems rely on the basic media infrastructure of the Windows operating system and not on Windows Media Player. As already stated at paragraph 916 above in connection with the bundling issue, the impugned conduct concerns only the application software that constitutes Windows Media Player, to the exclusion of any other multimedia technology in the Windows client PC operating system, and the basic multimedia infrastructure of that system remains in the version of Windows imposed by Article 6(a) of the contested decision. It was also stated at paragraph 916 above that Microsoft itself differentiates in its technical literature the files which constitute Windows Media Player from the other multimedia files, notably those relating to the basic multimedia infrastructure.

1165. The Court further considers that Microsoft cannot contend that the removal of Windows Media Player from the system consisting of Windows Media Player and Windows will entail a degrading of the operating system. Thus, Windows XP Embedded can be configured in such a way as not to include Windows Media Player without having any effect on the integrity of the other functionality of the operating system. Furthermore, throughout the period between June 1998 and May 1999, when Microsoft first integrated WMP 6 in its Windows client PC operating system without allowing OEMs or users to remov e it from that system, Microsoft offered its streaming media player as separate application software, without any effect on the functioning of the Windows operating system. The Court further notes that, pursuant to the remedy prescribed in Article 6(a) of the contested decision, Microsoft placed on the market a version of Windows without Windows Media Player and that that version is fully functional.

1166. Last, the Court also rejects Microsoft's argument based on the risk of fragmentation' of its Windows operating system (see paragraph 1122 above). As the Commission states in the defence, that argument is hypothetical and speculative. Furthermore, it is inconsistent with Microsoft's own business practice. Thus, over recent years, Microsoft has successively marketed a number of different versions of its Windows operating system which are not all interchangeable, namely Windows 98, Windows 2000, Windows Me, Windows NT and Windows XP. In addition, as regards, for example, Windows XP, that operating system can be broken down into seven distinct versions.

1167. It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for the abusive bundling of Windows Media Player with the Windows client PC operating system.

f) Failure to comply with the obligations imposed on the Communities by the TRIPS Agreement

Contested decision

1168. At recitals 1049 to 1053 to the contested decision, the Commission examines Microsoft's argument that the remedy for the abusive refusal to supply fails to comply with the obligations imposed on the Community by the TRIPS Agreement and also the argument that the remedy for the abusive tying fails to comply with the Agreement on Technical Barriers to Trade (TBT) of 15 April 1994 (Annex 1A to the Agreement establishing the WTO (the WTO Agreement').

1169. The Commission maintains, in effect, that the contested decision is fully consistent with its obligations under the TRIPS Agreement and the WTO Agreement (recital 1052 to the contested decision).

1170. The Commission further asserts that, for the reasons set out at paragraphs 801 and 802 above, Microsoft cannot invoke those agreements in order to challenge the legality of the contested decision (recital 1053 to the contested decision).

Arguments of the parties

1171. Microsoft claims that the contested decision forces it to develop a version of its Windows operating system from which nearly all' the media functionality has been removed and to offer that degraded product', under the Microsoft and Windows trade marks, to consumers in Europe. The contested decision thereby infringes its trade mark rights and its copyright, two categories of rights which the Communities are legally bound to protect under the TRIPS Agreement.

1172. In the first place, Microsoft claims that the contested decision infringes its trade mark rights, contrary to Articles 17 to 20 of the TRIPS Agreement. Under Article 17 of the TRIPS Agreement, any exceptions to trade mark rights must be limited and must take account of the legitimate interests of the owner of the trade mark and of third parties, while Article 20 of the TRIPS Agreement provides that the use of a trade mark cannot be unjustifiably encumbered by special requirements, such as use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings'.

1173. Microsoft maintains that by requiring it to offer to license a version of Windows without media functionality, the Commission requires it to place its most valuable' trade mark on a product which it did not design and which it knows will not work in the desired way. In addition, there is a likelihood of confusion between the version of Windows without media functionality and the version with media functionality. The contested decision also infringes Microsoft's right to control the quality of the products to which the trade mark is affixed and, in that regard, the applicant reiterates that the version of Windows imposed by Article 6(a) of the contested decision will affect the functioning of a series of elements of the Windows operating system itself and also applications and Internet sites which call on that media functionality. The encumbrances' thus created by the contested decision do not form part of the type of limited' exceptions envisaged by Article 17 of the TRIPS Agreement and the requirement that it place its Windows and Microsoft trade marks on inferior products over which it is unable to exercise design control runs directly counter to its own interests and also to those of consumers and third-party software developers.

1174. There is a breach of Article 20 of the TRIPS Agreement in so far as, in spite of the existence of equally effective alternatives, the Commission forces Microsoft to encumber the Windows trade mark in a manner that reduces its function as an indicator of source and quality, which causes confusion in the minds of consumers and harms the goodwill of the trade mark.

1175. In the second place, as regards its copyright, Microsoft claims that the contested decision infringes its exclusive rights - protected by the TRIPS Agreement - to authorise adaptations, arrangements and other alterations of its works, to authorise the reproduction of its works, in any manner or form, and to distribute copies of Windows to the public. The contested decision forces it to create an adaptation of Windows which is not of the applicant's own design and which represents a substantial alteration of its copyrighted work, and also to license the use of copies of that compelled adaptation of its copyrighted work'. The compulsory licensing of a copyrighted work is authorised by the TRIPS Agreement only on the conditions laid down in Article 13 of that agreement, which are not fulfilled in this case.

1176. The Commission claims, primarily, that the legality of the contested decision cannot be reviewed by reference to the TRIPS Agreement (see paragraph 789 above).

1177. In the alternative, the Commission contends that Microsoft's arguments are in any event wholly unfounded.

1178. In the first place, the Commission rejects Microsoft's arguments relating to its trade marks.

1179. First of all, it submits that those arguments are difficult to understand and that Microsoft fails to make clear whether the alleged breach of the TRIPS Agreement refers to the finding of the tying abuse made in the contested decision or to the remedy for that abuse.

1180. Next, the Commission submits that, under Article 16(1) of the TRIPS Agreement, the owner of a registered trade mark is to have the exclusive right to prevent third parties acting without its consent from using identical or similar signs. Microsoft fails to explain how that right would be affected by the contested decision or to what extent the use of its trade marks might, on account of the contested decision, be unjustifiably encumbered by special requirements within the meaning of Article 20 of the TRIPS Agreement. In the Commission's submission, the exclusive right referred to above is therefore preserved in the present case, as is the function of the trade mark as a guarantee of origin of the products.

1181. The Commission further submits that the remedy prescribed by Article 6(a) of the contested decision does not infringe Microsoft's right to control the quality of the products to which the trade mark is affixed, since Microsoft would retain total control of the quality of its own products'. Furthermore, the argument that the version of Windows without Windows Media Player was a degraded product has already been refuted, and the risk of confusion on which Microsoft relies can be avoided with adequate information and labelling.

1182. Last, the Commission asserts that, even on the assumption that the contested decision does infringe Microsoft's trade marks, the derogation provided for in Article 17 of the TRIPS Agreement, read together with Article 8(2) and Article 40(2) of that agreement, would allow the infringement of competition law identified in the contested decision to be brought to an end.

1183. In the second place, the Commission rejects the arguments which Microsoft bases on its copyright.

1184. First of all, the contested decision does not authorise any third party to adapt or reproduce Microsoft's copyright works and Microsoft cannot rely on an integrity right', which is a moral right and is therefore not covered by the TRIPS Agreement.

1185. Next, the Commission submits that the arguments which Microsoft bases on Article 13 of the TRIPS Agreement cannot be upheld. In particular, the contested decision deals with a special case' within the meaning of that article, since it applies to instances of tying which would constitute an abuse of a dominant position'.

1186. Last, the Commission contends that, even on the assumption that the contested decision does infringe Microsoft's copyright, the exception provided for in Article 13 of the TRIPS Agreement, read together with Article 8(2) and Article 40(2) of that agreement, would allow the infringement of competition law identified in the contested decision to be brought to an end.

1187. SIIA essentially supports the Commission's arguments.

Findings of the Court

1188. The Court notes that Microsoft is challenging the legality of the contested decision on the ground that it is contrary to various provisions of the TRIPS Agreement, and in particular to Articles 13, 17 and 20 of that agreement.

1189. However, as the Court has already stated at paragraph 801 above, it is settled case-law that, given their nature and structure, WTO Agreements are not in principle among the rules by reference to which the Community judicature will review the legality of measures adopted by the Community institutions.

1190. As the Court has also already observed at paragraph 802 above, it is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO Agreements that the Community judicature must review the legality of the Community measure in question in the light of the WTO rules. As the circumstances of the present case clearly do not correspond to either of those two situations, Microsoft cannot rely on the TRIPS Agreement, in particular its Articles 13, 17 and 20, in support of its application for annulment of the contested decision in so far as it concerns the bundling of Windows and Windows Media Player.

1191. It follows that this part of the first plea must be rejected without there being any need to examine the arguments which Microsoft has raised in support of it.

1192. In any event, there is nothing in the provisions of the TRIPS Agreement to prevent the competition authorities of the members of the WTO from imposing remedies which limit or regulate the exploitation of intellectual property rights held by an undertaking in a dominant position where that undertaking exercises those rights in an anti-competitive manner. Thus, as the Commission correctly observes, it follows expressly from Article 40(2) of the TRIPS Agreement that the members of the WTO are entitled to regulate the abusive use of such rights in order to avoid effects which harm competition. Article 40(2) provides as follows:

Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.'

1193. It follows from all of the foregoing that the first plea must be rejected as unfounded in its entirety.

3. Second plea, alleging breach of the principle of proportionality

a) Contested decision

1194. By way of remedy for the abusive tying referred to in Article 2(b) of the contested decision, Article 6 of that decision orders Microsoft to offer, within 90 days of the date of notification of that decision, a full-functioning version of its Windows client PC operating system which does not incorporate Windows Media Player, although Microsoft is to retain the right to offer a bundle of its Windows client PC operating system and Windows Media Player. Article 6 also provides that Microsoft is to communicate to the Commission, within the same period, all the measures which it has taken to comply with that obligation.

1195. At recitals 1011 to 1042 to the contested decision, the Commission provides details of that remedy.

1196. In the first place, the Commission describes the scope of the remedy (recitals 1011 to 1014 to the contested decision).

1197. In particular, the obligation imposed on Microsoft to offer a version of Windows without Windows Media Player applies both where Windows is licensed directly to end users and where it is licensed to OEMs. Likewise, the option which Microsoft retains to offer a bundle of Windows and Windows Media Player applies with respect both to end users and to OEMs.

1198. The Commission also prohibits Microsoft from adopting any technological, commercial, contractual or other measure which would have an effect equivalent to tying Windows and Windows Media Player, and states in particular that the version of Windows without Windows Media Player must perform as well as the version of Windows with Windows Media Player. Recital 1013 to the contested decision contains a non-exhaustive list of practices which are prohibited on that ground.

1199. In the second place, the Commission fixes at 90 days the period within which Microsoft must implement the remedy in question (recitals 1015 to 1017 to the contested decision).

1200. In the third place, the Commission rejects Microsoft's assertion that the remedy prescribed in Article 6(a) of the contested decision is not sufficiently precise, since Microsoft knows exactly what software code it must remove from its product (recitals 1018 to 1021 to the contested decision). The Commission gives, inter alia, the example of Windows XP Embedded and makes clear that the contested decision does not require Microsoft to remove all media files from Windows, but only those which constitute Windows Media Player.

1201. In the fourth place, the Commission puts forward a series of considerations in order to demonstrate that the remedy in question is proportionate (recitals 1022 to 1042 to the contested decision).

1202. First, it maintains that the remedy is necessary to remove the restriction of competition resulting from Microsoft's conduct (recital 1022 to the contested decision).

1203. Second, the remedy prescribed in Article 6(a) of the contested decision does not prevent Microsoft from marketing its media player and places no restrictions on Microsoft apart from prohibiting the tying practice at issue or the adoption of any measures having an equivalent effect to that practice (recital 1023 to the contested decision). The Commission reiterates that Microsoft can continue to market a bundle of Windows and Windows Media Player (ibid.).

1204. Third, the Commission rejects Microsoft's argument that there is no significant consumer demand for client PC operating systems without multimedia functionality (recitals 1024 and 1025 to the contested decision). The Commission states, in substance, that OEMs can respond to consumer expectations by pre-installing the media player chosen by the consumer on the client PCs which they sell to them.

1205. Fourth, at recitals 1026 to 1034 to the contested decision, the Commission examines Microsoft's arguments concerning the interdependencies between Windows and Windows Media Player. Referring again to the example of Windows XP Embedded, the Commission rejects the assertion that the elimination of the Windows Media Player code would harm the integrity of the operating system. It also contends that Microsoft has not shown that the integration of Windows Media Player in Windows was a precondition for efficiency gains, and asserts, in particular, that [i]f developers devise their own solutions or integrate a third party's redistributable code in their application, they do not depend on the presence of the media player on the user's client PC' (recital 1032 to the contested decision).

1206. Last, and fifth, at recitals 1035 to 1042 to the contested decision the Commission examines Microsoft's arguments relating to the alleged interdependencies between Windows and third-party applications. More specifically, it rejects the assertion that the elimination of the Windows Media Player code would have harmful consequences for content providers and software developers. The Commission submits that it is not uncommon for content providers to implement solutions which determine what media player is installed on a given client PC and that they foresee the measures to be taken where the presentation of their content requires a particular media player or a particular version of a given media player (recital 1037 to the contested decision), and it rejects Microsoft's argument that there is an advantage in preserving Windows as a consistent platform' (recital 1041 to the contested decision). The Commission considers, in substance, that Microsoft cannot rely on the fact that its practice allows software developers whose products rely on media players to have a focal point' for that purpose, since that practice distorts competition on the merits (recital 1042 to the contested decision).

b) Arguments of the parties

1207. Microsoft claims that the remedy prescribed in Article 6(a) of the contested decision infringes the principle of proportionality from three perspectives.

1208. In the first place, the remedy ignores the legitimate interest of software developers and

Internet site creators in preserving Windows as a stable and consistent platform'.

1209. In the second place, the remedy infringes Microsoft's moral rights by requiring it to degrade its Windows operating system and to license that degraded version of its product to third parties. In particular, the remedy ignores Microsoft's right to object to changes in its work or to the deformation, mutilation or other impairment of it.

1210. In the third place, Microsoft maintains that the remedy prescribed in Article 6(a) of the contested decision is internally inconsistent' and impossible for Microsoft to comply with, because it is required to remove important functionality from Windows and at the same time ensure that the degraded version of Windows is not less performing than the version with Windows Media Player.

1211. The Commission contends that the remedy is proportionate, especially since Microsoft retains the right to offer a bundled version of Windows with Windows Media Player. Nor does the remedy prevent Microsoft from marketing its media player or from continuing to offer it separately for downloading.

1212. The Commission disputes Microsoft's assertion that it is impossible to identify the software code of Windows Media Player or to comply with the remedy prescribed in Article 6(a) of the contested decision, and points out that Microsoft itself acknowledges that it has already developed an unbundled version of Windows which is ready to be placed on the market. It refers, moreover, to recitals 1018 to 1021 to the contested decision.

1213. The Commission further contends that Microsoft has adduced no evidence capable of showing that third parties would suffer harm or that the operating system would be degraded as a result of the remedy.

1214. As regards the alleged infringement of Microsoft's moral rights, the Commission asserts that Microsoft is not normally considered [to be] the rightholder of moral rights in Europe'. Nor does the remedy prevent the authors of the work from claiming paternity' or involve any disclosure of the code.

1215. Last, the Commission, supported on this point by SIIA, contends that the measures provided for by the judgment of the District Court of 1 November 2002 are not sufficient to remedy the tying abuse identified in the contested decision. That judgment does not require Microsoft to remove the Windows Media Player code from the client PC operating system, but only to provide a means for OEMs and end users to hide the on-screen icon and menu entries used to access the Windows Media Player software. Furthermore, Microsoft designed the hiding' mechanism in such a way that Windows Media Player can be reactivated and can override the default settings chosen by users. The remedies referred to in that judgment therefore do not affect the ubiquity of the Windows Media Player code on client PCs or, consequently, the incentives for software developers and content providers to focus on Windows Media Player as the platform technology for their complementary offerings'.

c) Findings of the Court

1216. First of all, the Court notes that, in support of the present plea, Microsoft reiterates in essence the same arguments it submitted in the first plea on the condition relating to the absence of objective justification (see paragraphs 1102 to 1122 above).

1217. The grounds on which the Court held that those arguments were unfounded must apply also in the examination of the present plea.

1218. Thus, in the first place, as regards the argument that the Commission failed to take account of the interest of software developers and Internet site creators in having a stable and well-defined platform, it is sufficient to refer to paragraphs 1148 to 1153 above.

1219. In the second place, Microsoft's argument that the remedy prescribed in Article 6(a) of the contested decision requires it to degrade its Windows operating system and to license such a degraded version of its product to third parties has already been refuted at paragraph 1165 above.

1220. In that regard, it must be borne in mind that the contested decision does not require Microsoft to offer a version of Windows from which all multimedia files, including those relating to the basic multimedia infrastructure of the operating system, have been removed. The only files affected are the files constituting Windows Media Player, which Microsoft itself distinguishes from the other files in its technical documentation (see paragraphs 916 to 1164 above). It must also be borne in mind that the example of Windows XP Embedded shows that the absence of Windows Media Player from the operating system does not harm the integrity of the other functionalities of that system (see paragraph 1165 above).

1221. Furthermore, between June 1998 and May 1999 Microsoft offered its streaming media player as separate application software, without any effect on the Windows operating system. As already stated at paragraph 936 above, Microsoft acknowledged at the hearing that there was no technical reason in May 1999 to prevent it from continuing to supply its media player in that form, that is to say, without integrating it in the Windows 98 Second Edition operating system.

1222. In the third place, it follows from the considerations set out at paragraphs 1219 to 1221 above that Microsoft's assertion that the remedy prescribed in Article 6(a) of the contested decision is internally inconsistent and impossible to comply with is unfounded. That assertion rests on the incorrect premiss that the version of Windows imposed by Article 6(a) is a degraded version of Microsoft's operating system. As the Commission correctly submits in its pleadings, while it is clear that when Windows Media Player is removed from Windows the functionalities offered by that player are no longer available on such a version of the operating system, it cannot be inferred that that version is degraded or that it performs less well in other respects than a version of the operating system bundled with Windows Media Player. The requirement that Microsoft offer a full-functioning' version of its Windows client PC operating system without Windows Media Player (Article 6(a) of the contested decision) must be seen in the light of, in particular, the requirement at recital 1012 to the contested decision that [t]he unbundled version of Windows must in particular not be less performing than the version of Windows which comes bundled with [Windows Media Player], regard being had to [Windows Media Player]'s functionality which, by definition, will not be part of the unbundled version of Windows'.

1223. Next, the Court considers that, far from being disproportionate, the remedy prescribed in Article 6(a) of the contested decision is an appropriate means of putting an end to the abuse in question and of resolving the competition issues identified, while causing the least possible inconvenience to Microsoft and its business model.

1224. Thus, the implementation of that measure does not entail any change in Microsoft's current technical practice other than the development of the version of Windows imposed by Article 6(a) of the contested decision.

1225. In particular, Microsoft retains the right to continue to offer the bundle of Windows and Windows Media Player. It must be borne in mind that the Commission's sole intention is to make it possible for consumers to obtain Windows without Windows Media Player.

1226. Furthermore, as the Commission correctly observes, the remedy does not affect Microsoft's ability to market its media player and, in particular, to offer it for downloading over the Internet.

1227. Last, the Court finds that, for the reasons set out at paragraph 974 above, the Commission was correct to consider that the measures taken by Microsoft pursuant to the United States settlement were not sufficient to put an end to the abuse and to resolve the competition issues identified.

1228. It follows from all of the foregoing considerations that the second plea must be rejected as unfounded.

1229. It follows that the claims relating to the annulment of the contested decision must be rejected in so far as they concern the bundling of Windows and Windows Media Player.

D - The independent monitoring trustee

1. Contested decision

1230. The first paragraph of Article 4 of the contested decision provides that Microsoft is to bring to an end the abusive conduct established in Article 2, in accordance with the procedures laid down in Articles 5 and 6 of that decision. Microsoft is also required to refrain from repeating any act or conduct having the same or equivalent object or effect as that abusive conduct (second paragraph of Article 4).

1231. By way of remedy for the abusive refusal to supply the interoperability information, Article 5 of the contested decision orders Microsoft to disclose, within 120 days of notification of that decision, that information to any undertaking having an interest in developing and distributing work group server operating systems and to allow, on reasonable and non-discriminatory terms, those undertakings to use the information in question to develop and distribute work group server operating systems. Microsoft is also required to ensure that the interoperability information disclosed is kept updated on an ongoing basis and in a timely manner. Last, Article 5 of the contested decision orders Microsoft, within 120 days of the date of notification of that decision, to set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the interoperability information.

1232. By way of remedy for the abusive bundling of the Windows client PC operating system and Windows Media Player, Article 6 of the contested decision orders Microsoft, inter alia, to offer, within 90 days of notification of the decision, a full-functioning version of its Windows client PC operating system which does not incorporate Windows Media Player, although Microsoft is to retain the right to offer a bundle of the Windows client PC operating system and Windows Media Player.

1233. Article 7 of the contested decision, moreover, provides for the establishment of a suitable mechanism to assist the Commission in monitoring Microsoft's compliance with the contested decision and including, in particular, the appointment of an independent monitoring trustee. Article 7 provides that that mechanism is to form the subject-matter of a proposal by Microsoft within 30 days of notification of the decision, while in the event that the Commission considers that the proposed mechanism is not suitable, it is to retain the right to impose such a mechanism by way of a decision'.

1234. At recitals 1043 to 1048 to the contested decision, the Commission describes in greater detail the monitoring mechanism referred to in the preceding paragraph and, in particular, sets out the [g]uiding principles for Microsoft [when it draws up its proposal for the appointment of an independent monitoring trustee]' (recital 1044 to the contested decision).

1235. Thus, at recital 1045 to the contested decision, the Commission states that the monitoring trustee's primary responsibility' is to issue opinions, and to do so upon application by a third party or by the Commission, or on his own initiative, on whether Microsoft has, in a specific instance, failed to comply with [the contested decision], or on any issue that may be of interest with respect to the effective enforcement of [that decision]'.

1236. At recitals 1046 and 1047 to the contested decision, the Commission describes the task of the monitoring trustee with respect to each of the two abuses at issue (see paragraph 1261 below).

1237. At recital 1048 to the contested decision, the Commission establishes the principles which

Microsoft must take into account in its proposal concerning the monitoring trustee. In the first place, the monitoring trustee is to be appointed by the Commission from a list of persons submitted by Microsoft and Microsoft is to devise a procedure which allows the Commission to appoint a monitoring trustee of its choosing if it does not deem any of the persons proposed by Microsoft adequate for the task. In the second place, the monitoring trustee must be independent of Microsoft and provisions [must] be established to ensure that [he] is not and will not become exposed to a conflict of interest'. The monitoring trustee must possess the necessary qualifications to carry out his mandate and it should be possible for him to hire experts to carry out certain precisely-defined tasks on his behalf. In the third place, provisions must be established in order to guarantee that the monitoring trustee has access to Microsoft's assistance, information, documents, premises and employees to the extent that he may reasonably require such access in carrying out his mandate'. In the fourth place, the monitoring trustee must have full access to the source code of the relevant Microsoft products. Last, in the fifth place, all costs of establishment of the monitoring trustee, including a fair remuneration for the monitoring trustee's activities, should be borne by Microsoft'.

2. Arguments of the parties

1238. Microsoft contends that the obligation imposed on it by Article 7 of the contested decision to appoint an independent monitoring trustee is unlawful, since the Commission lacks authority, first, to delegate to a private individual the enforcement powers conferred on it by Regulation No 17 and, second, to require Microsoft to bear the costs of monitoring its compliance with the contested decision, including remuneration of the monitoring trustee.

1239. As a preliminary point, Microsoft denies that its application for annulment of Article 7 of the contested decision is premature. In particular, the Commission cannot rely on the fact that it could have imposed a monitoring mechanism by adopting a separate decision if it had not been satisfied with Microsoft's proposal and that Microsoft could then have sought annulment of that decision.

1240. Next, in the first place, Microsoft asserts that it is clear from recitals 1043 to 1048 to the contested decision that the powers delegated to the monitoring trustee in the present case are powers of investigation and enforcement that normally belong to the Commission. Although the monitoring trustee's primary task is to issue opinions on compliance with the contested decision, he also has the power to investigate the measures taken by Microsoft to comply with that decision. Microsoft points out that footnote 1317 to the contested decision states that [t]he monitoring trustee should not only be reactive, but should play a proactive role in the monitoring of Microsoft's compliance'. The contested decision is thus intended to establish an independent source of measures of investigation and enforcement.

1241. Under Articles 11 and 14 of Regulation No 17 and Articles 18 to 21 of Council Regulation (EC) No 1/2003 on the implementation of the competition rules laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), however, the powers of investigation and enforcement in connection with those rules belong exclusively to the Commission and the national competition authorities. Neither of those regulations authorises the Commission to delegate those powers to third parties or, a fortiori , to private individuals.

1242. Furthermore, by thus delegating its powers, the Commission deprives Microsoft of guarantees recognised to undertakings by the case-law to safeguard their rights of defence.

1243. In the reply, Microsoft makes clear that it has no objection to an independent monitoring trustee advising the Commission on technical questions. However, the Commission ought to have appointed its own expert for that purpose.

1244. In the second place, Microsoft observes that Article 7 of the contested decision, read with recital 1048(v) thereto, requires it to bear all costs of establishment of the monitoring trustee, including a fair remuneration for the monitoring trustee's activities'. In applying the competition rules, the Commission cannot impose on the undertaking concerned any pecuniary charges other than fines and periodic penalty payments.

1245. Microsoft submits that the Commission cannot invoke its power to order an undertaking to bring an infringement to an end as a ground for making that undertaking responsible for the costs associated with the monitoring trustee. The imposition of such a pecuniary charge has no legal basis in Regulation No 17, Regulation No 1/2003 or any other provision.

1246. The Commission contends, primarily, that Microsoft's arguments concerning the question of the monitoring trustee are inadmissible in that they are premature, conjectural and insufficient to warrant annulment of Article 7 of the contested decision. That article requires Microsoft to submit a proposal for the establishment of a monitoring mechanism, while reserving to the Commission the right to impose such a mechanism by adopting a decision should it consider that Microsoft's proposed mechanism is not suitable. Recitals 1044 to 1048 to the contested decision set out the guiding principles that Microsoft should take into account in drawing up that proposal, but most of those principles are not imposed on Microsoft by Article 7 of the contested decision. In particular, that article does not specify either the independent monitoring trustee's precise functions or the source' of his remuneration. Microsoft is thus free to suggest a narrower scope of action than that envisaged in the contested decision and different arrangements for remuneration. The Commission would then be able to reject those proposals and impose a differently-worded mandate by decision. Such a decision would not merely be confirmatory of the contested decision and would be open to challenge.

1247. In the alternative, the Commission contends that Microsoft's arguments are unfounded.

1248. In the first place, the Commission submits that it does not follow from recitals 1044 to 1048 to the contested decision that it delegated to a private individual the powers of investigation and enforcement conferred on it by Articles 81 EC and 82 EC. From the perspective of information-gathering', the contested decision provides only for a consensual mechanism' which permits the swift resolution of many of the technical issues that are likely to arise concerning the implementation of the remedies. Admittedly, recital 1048 and footnote 1317 to the contested decision provide that the independent monitoring trustee can put questions to Microsoft and have access to documents and to the source code of the relevant products, but there is nothing to prevent Microsoft from specifying in its proposal for the mandate that it could refuse to answer such questions or to grant access to the requested information. In the event of such a refusal, the Commission would consider whether it would be appropriate to take action pursuant to Chapter V of Regulation No 1/2003 and would thus retain full discretion as concerns the use of its powers of investigation.

1249. In answer to a written question put by the Court, the Commission stated that Article 7 of the contested decision was based on Article 3 of Regulation No 17 and that it constituted an expression' of the power conferred on it by that article to adopt decisions ordering undertakings to bring an infringement to an end.

1250. In the second place, the Commission claims that the obligation imposed on Microsoft to bear the costs associated with the remuneration of the monitoring trustee clearly does not form part of the sanctions provided for in Regulation No 17 and Regulation No 1/2003. If Article 7 of the contested decision must be understood as imposing an obligation as regards the remuneration of the monitoring trustee, that obligation must have its legal basis in Article 3 of Regulation No 17. A decision adopted on the basis of that article may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty and will entail some costs for the addressee. The Commission refers to recital 1044 to the contested decision and observes that the implementation of the remedies requires effective monitoring of compliance with the obligations imposed on Microsoft by the contested decision.

3. Findings of the Court

1251. Microsoft seeks annulment of Article 7 of the contested decision on the ground that, by unlawfully delegating its powers of investigation and enforcement to a third party, the Commission exceeded its powers under Article 82 EC and Regulation No 17. Microsoft maintains that the imposition on an undertaking of a monitoring mechanism such as that referred to in Article 7 of the contested decision, and the charging to that undertaking of the remuneration of a third party appointed by the Commission to assist its task of monitoring compliance with the remedies ordered in an infringement decision, have no legal basis in Community law.

1252. The Commission contends that that application for annulment is premature and therefore inadmissible, in that Article 7 of the contested decision imposes no obligation on Microsoft but merely invites it to submit a proposal for the establishment of a monitoring mechanism; and in any event, that article entails no delegation of the Commission's powers. The Commission claims that that monitoring mechanism and the charging to Microsoft of the remuneration of the independent monitoring trustee have their basis in Article 3 of Regulation No 17, which allows it to order the undertakings concerned to bring to an end an infringement which the Commission has found.

1253. It must be borne in mind that the legality of Article 7 of the contested decision falls to be assessed by reference to the facts and the law as they existed at the time of adoption of the contested decision. At that time Regulation No 17 was still in force, whereas Regulation No 1/2003, which replaced it, became applicable on 1 May 2004.

1254. It must also be borne in mind that the powers of investigation and enforcement which the Commission enjoyed at the time of adoption of the contested decision, in so far as they are relevant to the application for annulment of Article 7 of that decision, were its power under Article 3(1) of Regulation No 17 to require the undertakings concerned to bring to an end an infringement, its powers under Article 11 of that regulation to request information, its powers of investigation under Article 14 of that regulation and the power under Article 16 of that regulation to impose periodic penalty payments on undertakings in order to compel them to put an end to the infringement found.

1255. First of all, the Court rejects the Commission's argument that the application for annulment of Article 7 is premature in that the article merely invites Microsoft to submit a proposal prior to the adoption by the Commission of a final decision on the establishment of a monitoring mechanism. The fact that Article 7 of the contested decision contains an invitation to submit a proposal cannot alter the binding nature of that article in so far as it constitutes the exercise by the Commission of its power to order that an infringement be brought to an end.

1256. When the Commission finds in a decision that an undertaking has infringed Article 82 EC, that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision. Where remedies are provided for in the decision, the undertaking concerned is required to implement them - and to assume all the costs associated with their implementation -, failing which it exposes itself to liability for periodic penalty payments imposed pursuant to Article 16 of Regulation No 17 (see paragraph 1259 below).

1257. It follows from the wording of Article 7 of the contested decision, and in particular from the period of 30 days imposed on Microsoft, that it was precisely such a binding measure that was provided for by that provision. Although the first reaction envisaged in the event that Microsoft should fail to submit a suitable proposal is that referred to in the second paragraph of Article 7, namely the imposition of a monitoring mechanism by way of a decision, the fact remains that if Microsoft fails to comply with the obligation to submit a proposal it also incurs the risk of periodic penalty payments. The binding nature of the measure thus ordered cannot be affected by the mere fact that the Commission retains the right to impose such a mechanism itself in the event that it considers that Microsoft's proposal is not suitable. Failure to comply with such a specific measure ordered in a decision designed to put an end to an infringement of Article 82 EC constitutes a separate infringement of Community law, in this particular case Article 3 of Regulation No 17.

1258. That assessment is not invalidated by the Commission's argument that Microsoft could have submitted a different proposal better tailored to its own perception of what the Commission was entitled to require it to do. It is settled case-law that the operative part of an act is indissociably linked to the statement of reasons for it and when it has to be interpreted account must be taken of the reasons that led to its adoption (Case C355/95 P TWD v Commission [1997] ECR I2549, paragraph 21; Case C91/01 Italy v Commission [2004] ECR I4355, paragraph 49; and Case T137/02 Pollmeier Malchow v Commission [2004] ECR II3541, paragraph 60).

1259. The Court considers that in the light of the role which the Commission envisages for the monitoring trustee, as summarised at paragraph 1261 below, and of the powers conferred on the Commission by Articles 3 and 16 of Regulation No 17, Article 7 of the contested decision has the effect that if Microsoft failed, within the prescribed period of 30 days, to submit a proposal consistent with the principles set out, in particular, at recitals 1045 to 1048 to the decision, it would infringe the contested decision and incur the risk of being ordered to pay periodic penalty payments pursuant to Article 16 of Regulation No 17. It follows that Microsoft's legal situation was directly affected by Article 7 of the contested decision and that the application for annulment of that provision cannot be characterised as premature or as speculative, as the Commission contends.

1260. Next, the Court considers it appropriate to examine whether Article 7 of the contested decision has a legal basis in Regulation No 17 or whether, as Microsoft maintains, the Commission exceeded its powers of investigation and enforcement in so far as it ordered Microsoft to accept the establishment of an independent monitoring trustee endowed with the role and powers in question.

1261. It follows from recitals 1043 to 1048 to the contested decision that the monitoring trustee's task includes, in particular, the following functions:

- his primary responsibility' is to issue opinions on whether Microsoft has, in a specific instance, failed to comply with the contested decision (including compliance with the obligation to implement the remedies correctly);

- those opinions will be given either upon application by a third party or by the Commission, or by the monitoring trustee acting on his own initiative;

- on that point, the monitoring trustee must not only be reactive but must play a proactive role in the monitoring of Microsoft's compliance (footnote 1317 to the contested decision);

- as regards the abusive refusal to disclose the interoperability information, the monitoring trustee is required to assess whether the information made available by Microsoft is complete and accurate, whether the terms under which Microsoft makes the specifications available and authorises their use are reasonable and non-discriminatory and whether the ongoing disclosures are made in a timely manner;

- as regards the abusive tying, the monitoring trustee is required to advise the Commission whether substantiated complaints by third parties about Microsoft's compliance with the contested decision are well founded from a technical point of view and, in particular, whether the version of Windows without Windows Media Player is less performing than any bundled version of Windows that Microsoft would continue to market. The monitoring trustee is also required to advise whether Microsoft hinders the performance of rival media players through selective, inadequate or untimely disclosures of Windows APIs.

1262. At recital 1048 to the contested decision, the Commission sets out the principles which Microsoft must take into account in its proposal concerning the independent monitoring trustee pursuant to the decision. Those principles are, in particular, as follows:

- (i) the monitoring trustee should be appointed by the Commission from a list of persons submitted by Microsoft;

- (ii) the monitoring trustee is to be independent of Microsoft and provisions should be established to ensure that the monitoring trustee is not and will not become exposed to a conflict of interests; he should possess the necessary qualifications to carry out his mandate, and be entitled to hire experts to carry out certain precisely-defined tasks on his behalf;

- (iii) provisions are to be established in order to guarantee that the monitoring trustee has access to Microsoft's assistance, information, documents, premises and employees to the extent that he may reasonably require such access in carrying out his mandate;

- (iv) the monitoring trustee should have full access to the source code of the relevant Microsoft products (any controversy as to the accuracy and completeness of the specifications that will be disclosed can only be resolved if the technical information is checked against the actual source code of Microsoft's products);

- (v) all costs of establishment of the monitoring trustee, including a fair remuneration for the monitoring trustee's activities, are to be borne by Microsoft.

1263. It is clear from that description that the Commission sees the monitoring trustee's role as being to evaluate and monitor the implementation of the remedies, by having access where necessary to the resources referred to in the preceding paragraph, at (iii) and (iv), while acting independently and, indeed, on his own initiative.

1264. The Commission expressly acknowledges in its pleadings that it is not entitled to delegate to a third party the powers of investigation and enforcement conferred on it by Regulation No 17. It does not accept, however, that the monitoring mechanism provided for in the contested decision entails such a delegation of powers.

1265. On the other hand, as Microsoft acknowledges, the Commission is entitled to monitor the implementation by the undertaking concerned of the remedies ordered in an infringement decision and to ensure that the other measures necessary to put an end to the anti-competitive effects of the infringement are fully implemented without delay. For those purposes, it is entitled to use the powers of investigation provided for in Article 14 of Regulation No 17 and, where necessary, to use an external expert in order, inter alia, to resolve technical issues.

1266. Nor can it be disputed that where the Commission decides to obtain the assistance of an external expert it may communicate to that expert any information and documents which it may have obtained in the exercise of its powers of investigation under Article 14 of Regulation No 17.

1267. Under Article 11(4) and Article 14(3) of Regulation No 17, undertakings are required to provide the information requested by the Commission and to submit to the investigations which it orders. However, such requests and investigations are subject where necessary to the control of the Community Courts.

1268. The Court considers that by establishing a monitoring mechanism involving the appointment of an independent monitoring trustee as referred to in Article 7 of the contested decision, and charged with the functions set out, in particular, at recital 1048(iii) and (iv) to that decision, the Commission went far beyond the situation in which it retains its own external expert to provide advice when it investigates the implementation of the remedies prescribed in Articles 4, 5 and 6 of the contested decision.

1269. In effect, by Article 7 of the contested decision, the Commission requires the appointment of a trustee who, in the performance of his tasks, is independent not only of Microsoft but also of the Commission itself, in so far as he is required to act on his own initiative and upon application by third parties in the exercise of his powers. As the Commission observes at recital 1043 to the contested decision, that requirement goes beyond a mere obligation to report to the Commission on Microsoft's actions.

1270. Furthermore, the role envisaged for the monitoring trustee is not limited to putting questions to Microsoft and reporting the answers to the Commission, or to advice concerning the implementation of the remedies. As regards the obligation imposed on Microsoft to allow the monitoring trustee, independently of the Commission, access to information, documents, premises and employees and also to the source code of its relevant products, the Court notes that no limit in time is envisaged for the continuing intervention of the monitoring trustee in monitoring Microsoft's activities related to the remedies. Furthermore, it is clear from recital 1002 to the contested decision that the Commission considers that the obligation to disclose interoperability information must apply in a prospective manner' to future generations of Microsoft's products.

1271. It follows that the Commission has no authority, in the exercise of its powers under Article 3 of Regulation No 17, to compel Microsoft to grant to an independent monitoring trustee powers which the Commission is not itself authorised to confer on a third party. The second subparagraph of Article 7 of the contested decision is therefore without legal basis, particularly in so far as it entails the delegation to the monitoring trustee of powers of investigation which the Commission alone can exercise pursuant to Regulation No 17.

1272. If, moreover, as the Commission maintains, its intention was to establish a purely consensual mechanism, there was no need to order such a mechanism in Article 7 of the contested decision.

1273. Last, the Commission exceeds its powers in so far as Article 7 of the contested decision, read with recital 1048(v) to that decision, makes Microsoft responsible for all the costs associated with the appointment of the monitoring trustee, including his remuneration and the expenditure incurred in carrying out his functions.

1274. There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies.

1275. It is for the Commission, in its capacity as authority responsible for applying the Community competition rules, to pursue the implementation of infringement decisions in an independent, objective and impartial manner. It would be incompatible with its responsibility in that regard for the effective implementation of Community law to depend on or be influenced by the willingness or the capacity of the addressee of the decision to bear such costs.

1276. The case-law shows, moreover, that the Commission does not have unlimited discretion when formulating remedies to be imposed on undertakings for the purpose of putting an end to an infringement. In the context of the application of Article 3 of Regulation No 17, the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (Magill , paragraph 107 above, paragraph 93).

1277. If the Commission is not competent to adopt a decision pursuant to Article 3 of Regulation No 17 imposing remedies on an undertaking which has infringed Article 82 EC, including the costs associated therewith, which exceed what is appropriate and necessary, then it is even less competent to make that undertaking responsible for the costs which are to be borne by the Commission in fulfilling its own investigation and enforcement responsibilities.

1278. It follows from all of the foregoing considerations that Article 7 of the contested decision has no legal basis in Regulation No 17 and therefore exceeds the Commission's powers of investigation and enforcement under Regulation No 17 in so far as it orders Microsoft to submit a proposal for the establishment of a mechanism which must include the appointment of an independent monitoring trustee empowered to access, independently of the Commission, Microsoft's assistance, information, documents, premises and employees and also the source code of its relevant products and also provides that Microsoft is to bear all the costs of the appointment of the monitoring trustee, including his remuneration. The Commission cannot therefore retain the right to impose such a mechanism by adopting a decision in the event that it considers that the mechanism proposed by Microsoft is not suitable.

1279. It follows that Article 7 of the contested decision must be annulled to the extent described in the preceding paragraph.

II - The claims that the fine should be annulled or that its amount should be reduced

A - Contested decision

1280. For the two types of abuse identified in the contested decision, a single fine of EUR 497 196 304 is imposed (Article 3 of the contested decision).

1281. The question of the fine is examined by the Commission at recitals 1054 to 1080 to the contested decision.

1282. In the first place, the Commission states that it took into account the provisions of Article 15(2) of Regulation No 17 (recital 1054 to the contested decision) and observes that, in fixing the amount of the fine, it must have regard to the gravity and duration of the infringement and also to any aggravating or attenuating circumstances (recital 1055 to the contested decision).

1283. In the second place, the Commission rejects the arguments which Microsoft had put forward during the administrative procedure in support of its argument that no fine ought to be imposed on it in the present case (recitals 1056 to 1058 to the contested decision).

1284. First, the Commission states that the contested decision establishes to the requisite legal standard that Microsoft intentionally, or at least negligently, infringed Article 82 EC and Article 54 of the EEA Agreement (recital 1057 to the contested decision). Second, it denies having introduced a new rule of law' and concludes that Microsoft ought to have been aware that it was infringing those provisions (ibid.). Third, it rejects Microsoft's argument that the abusive tying cannot have begun in 1999, since certain media functionality has been integrated in Windows since 1992 (ibid.).

1285. In the third place, the Commission explains the way in which it calculated the fine (recitals 1059 to 1079 to the contested decision).

1286. First, the Commission determined the basic amount of the fine according to the gravity and duration of the infringement (recitals 1059 to 1078 to the contested decision).

1287. The Commission observes that, in order to assess the gravity of the infringement, it must take into consideration the nature of the infringement, its impact on the market and the size of the relevant geographic market (recital 1060 to the contested decision).

1288. As regards the nature of the infringement, the Commission draws attention, at recitals 1061 to 1068 to the contested decision, to the following factors:

- the Court of Justice has on several occasions declared that refusals to supply by undertakings in a dominant position and tied sales by such undertakings are unlawful;

- Microsoft has a dominant position on the client PC operating systems market, with a market share of over 90%;

- that market, and the other two markets identified in the contested decision, are characterised by the existence of significant direct and indirect network effects;

- in those circumstances, Microsoft adopted a leveraging strategy which constitutes two separate abuses;

- as regards the abusive refusal to supply, Microsoft adopted a general pattern of conduct aimed at the creation and exploitation to its advantage of a range of privileged connections between its client PC operating system and its work group server operating system and which entails a disruption of previous higher levels of supply;

- that abusive practice enables Microsoft to extend its dominant position to the market for work group server operating systems, which is of significant value';

- Microsoft's capture of that market is likely to have other harmful effects on competition;

- as regards the abusive tying, it ensures that the ubiquity of Microsoft's client PC operating system is shared by Windows Media Player, which creates disincentives for OEMs to pre-install third-party media readers on client PCs and harms competition on the streaming media player market;

- that abusive practice also has significant effects on competition for the delivery of content over the Internet and in the multimedia software industry;

- last, domination of the streaming media player market may constitute a strategic gateway to a range of related markets, some of which are very profitable.

1289. In the light of the factors mentioned in the preceding paragraph, the Commission concludes that the infringement must, by its nature, be characterised as very serious' (recital 1068 to the contested decision).

1290. As regards the effects of the infringement on the market, the Commission finds that [t]he pattern of exclusionary leveraging behaviour engaged in by Microsoft has a significant impact on the markets for work group server operating systems and for streaming media players' (recital 1069 to the contested decision).

1291. The Commission bases that finding on the following factors:

- the abusive refusal to supply interoperability information already allowed Microsoft to acquire a dominant position on the work group server operating systems market and created a risk that competition would be eliminated on that market (recital 1070 to the contested decision);

- the abusive tying already enabled Microsoft to achieve a leading position on the streaming media players market and the evidence examined in the contested decision shows that the market may already be tipping in favour of [Windows Media Player]' (recital 1071 to the contested decision).

1292. As regards the size of the relevant geographic market, the Commission states that the three markets identified in the contested decision cover the whole of the EEA (recital 1073 to the contested decision).

1293. At recital 1074 to the contested decision, the Commission concludes from the foregoing analysis that Microsoft committed a very serious infringement of Article 82 EC and Article 54 of the EEA Agreement, for which the likely fine is above EUR 20 million. At the following recital, it fixes an initial amount for gravity at EUR 165 732 101, the starting point of the basic amount of the fine (the starting amount').

1294. At recital 1076 to the contested decision, the Commission states that, in order to ensure a sufficient deterrent effect on Microsoft, and in the light of that undertaking's significant economic capacity, the starting amount should be doubled, which brings the amount of the fine at that stage to EUR 331 464 203.

1295. Furthermore, as regards duration, the Commission states that the abusive refusal to supply began in October 1998 and had not yet finished, while the abuse tying began in May 1999 and has not yet finished (recital 1077 to the contested decision). The Commission concludes that the total duration of the infringement committed by Microsoft is therefore five years and five months, which corresponds to an infringement of long duration (ibid.). The Commission therefore increases the amount stated in the preceding paragraph by 50% and thus fixes the basic amount of the fine at EUR 497 196 304 (recital 1078 to the contested decision).

1296. Second, the Commission considers that there is no aggravating or attenuating circumstance to be taken into account in the present case (recital 1079 to the contested decision). The final amount of the fine is therefore set at EUR 497 196 304 (recital 1080 to the contested decision).

B - Arguments of the parties

1297. Microsoft submits, primarily, that the fine imposed by Article 3 of the contested decision is wholly unfounded in the absence of an infringement of Article 82 EC.

1298. In the alternative, Microsoft claims that the fine is excessive and disproportionate and that it should therefore be annulled or substantially reduced.

1299. In the first place, Microsoft contends that there is no justification for imposing a fine when the infringements result from novel theories of law'. In support of that assertion, Microsoft refers to extracts from press releases issued by the Commission concerning competition cases (Press Releases IP/01/584 of 20 April 2001 and IP/04/705 of 2 June 2004) and to the Commission's practice of not imposing fines in cases which raise novel or complex issues. In some cases, moreover, the Commission has imposed only a symbolic fine on the undertakings concerned because they could not easily have concluded from its previous practice in taking decisions that their conduct infringed the competition rules.

1300. Microsoft contends that the principles applied by the Commission in the present case represent a significant departure from established case-law and are the product of substantial modification of the Commission's theories as the case progressed over the last five years'.

1301. Thus, as regards the abusive conduct consisting in its refusal to supply its competitors with interoperability information and to authorise its use, Microsoft asserts that the Commission has never precisely identified the information concerned. Microsoft reiterates that Sun did not ask it to license its intellectual property rights for use in the development of work group server operating systems in the EEA. Last, the Commission's position is unprecedented in that it imposes an obligation to license valuable intellectual property rights to facilitate the development of products that compete directly against Windows server operating systems. For those various reasons Microsoft had good reason to believe that the present case did not present the exceptional circumstances required by the Court of Justice.

1302. Furthermore, as regards the abusive conduct consisting in the fact that Microsoft made the supply of its Windows client PC operating system conditional upon the simultaneous acquisition of Windows Media Player, Microsoft observes, first of all, that the Commission's tying theory was not even mentioned in the first statement of objections. Next, this is the first time that the Commission has considered that improving a product through the integration of improved' functionality, in this instance media functionality incorporating streaming capacity, without simultaneously offering a version of that product at the same price without that functionality, could constitute an infringement of Article 82 EC.

1303. In the second place, Microsoft claims that the amount of the fine is excessive. In support of that assertion, it puts forward three series of arguments.

1304. First, it submits that the starting amount of the fine is not justified. First of all, the way in which that amount is set at EUR 165 732 101 is arbitrary and lacks proper reasoning. Next, the applicant disputes the Commission's assertion that the infringement was very serious'. It took the Commission more than five years to arrive at the conclusion that the conduct in question was objectionable, and even longer to determine what remedies were appropriate. Last, Microsoft was unable to predict that its conduct might be regarded as constituting an infringement of the competition rules, still less a very serious' infringement.

1305. In the reply, Microsoft challenges the Commission's assertion that the abuses have a significant impact on the relevant markets.

1306. Also in the reply, Microsoft claims that the Commission did not merely take into account the products... concerned by the infringements' when setting the starting amount, but took as its basis Microsoft's turnover on the market for server operating systems in general. In fact, less than one quarter of the applicant's revenues from those systems can be attributed to the work group server operating systems market as defined by the Commission.

1307. Second, Microsoft contends that the Commission was not correct to double the starting amount on account of its significant economic capacity' and the need to ensure a sufficient deterrent effect. The Commission does not claim that Microsoft was unwilling to comply with the law and, on the contrary, Mr Monti, the then Member of the Commission responsible for competition, commended Microsoft's efforts to arrive at an amicable settlement of the case and also the professionalism of the members of its team. Nor can the Commission invoke the need to deter other undertakings from committing similar infringements. Last, the starting amount is based on Microsoft's worldwide turnover and profits and the same figures are used to justify the multiplier for deterrence (footnote 1342 to the contested decision), which amounts to double counting'. The other factors mentioned in footnote 1342 to the contested decision do not justify the doubling of the starting amount.

1308. Third, Microsoft claims tha t the increase of the fine by 50% of double the starting amount, to reflect the duration of the infringement, is excessive. First of all, the Commission has not taken account of the measures Microsoft took to address the issues raised by the Commission during their discussions and in the statements of objections or of the commitments which Microsoft made under the United States settlement. Next, the Commission failed to take account of the duration of the administrative procedure and Microsoft cannot be criticised for having attempted to reach a settlement with the Commission. And Microsoft could not have brought the alleged abuses to an end earlier, since the Commission's theories changed so much over six years'.

1309. The Commission contends that Microsoft's main argument must be rejected, since it has not established that the Commission erred in finding that it had infringed Article 82 EC.

1310. The Commission also disputes Microsoft's alternative argument.

1311. In the first place, the Commission maintains that the fine is justified.

1312. First, it did not apply any new rule of law in the present case.

1313. Thus, as regards the abusive refusal, the Commission took account of the possibility that [intellectual property rights] are involved'. Consequently, in reliance on judgments such as Magill , paragraph 107 above, it devoted a large part of the contested decision to showing that in exceptional circumstances a refusal to license intellectual property rights could be an abuse of a dominant position. Furthermore, as the recitals to Directive 91/250 specifically indicate that withholding interoperability information may constitute an abuse of a dominant position, Microsoft cannot seriously maintain that it was not aware that it was infringing Article 82 EC.

1314. Furthermore, the Commission has already rebutted Microsoft's arguments relating to the scope of Sun's request and has already stated that the possibility that the products of the copyright owner and the future products of the licensee would compete was not precluded by the case-law. In the rejoinder, the Commission further submits that it had identified at the time of the first statement of objections a certain amount of information that was wrongfully withheld by Microsoft' and reiterates that Microsoft had been fully aware that it was refusing to give its competitors access to the interoperability information referred to in the contested decision.

1315. As regards the tying abuse, the Commission acknowledges that the present case may differ from previous tying cases in that in the contested decision it conducted an assessment of the actual effects of that conduct. However, it cannot be inferred that the Commission developed a new theory and its findings are based on well-known legal and economic principles.

1316. Second, the Commission submits that Microsoft's significant financial and legal resources were such that it was capable of predicting that its conduct in using its dominant position on one market to conquer another market would be characterised as abusive. Furthermore, the Community Courts have consistently rejected the argument that no fine should be imposed when the undertaking concerned could not be aware that it was infringing the competition rules. Last, Microsoft cannot rely on the fact that the Commission did not impose a fine on an undertaking in a different case.

1317. In the second place, the Commission contends that the fine is not excessive and points out that it represents only 1.62% of Microsoft's worldwide turnover in the business year ending 30 June 2003.

1318. First, the Commission has a margin of discretion when setting the amount of a fine and is not required to apply specific mathematical formulae. Its obligation to state reasons does not require it to set out in its decision the statements of figures relating to the calculation of the fines. In accordance with the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; the Guidelines'), moreover, it assessed the gravity of the infringement in the light of its nature, its impact on the market and the size of the relevant geographic market.

1319. The Commission set the starting amount of the fine not on the basis of Microsoft's worldwide turnover but on the basis of its turnover in the EEA on the market for client PC and work group server operating systems. In footnote 217 to the defence, the Commission states that the starting point represents 7.5% of that turnover. The Commission concludes that Microsoft's assertion that there is double counting is unfounded. In response to Microsoft's assertion that it took into account its turnover on the market for operating systems for servers in general, the Commission states that it relied on the figures provided by Microsoft in response to a request for information concerning work group server operating systems. The Commission refers, on that point, to a letter which Microsoft sent to it on 9 March 2004 (annex D.16 to the rejoinder).

1320. Second, the Commission claims that it was entitled to apply a weighting of 2 to the starting amount of the fine. That starting amount represented less than 1% of Microsoft's turnover during the last business year, which would not have made the fine sufficiently deterrent. When fixing that multiplier, it took account of the fact that large undertakings generally have resources which make them better able to be aware of the requirements and consequences of competition law than smaller undertakings are.

1321. The Commission also submits that it is clear from the case-law that the objective of deterrence which it is entitled to pursue when setting the amount of fines is intended to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the EEA (Case T224/00 Archer Daniels Midland and Archer Daniels Midlands Ingredients v Commission [2003] ECR II2597, paragraphs 110 and 111). It follows that the deterrent nature of a fine imposed for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of the undertaking sanctioned. It is necessary not only to deter that undertaking from repeating the same infringement or from committing infringements of the competition rules but also to deter other undertakings of similar size and resources' from committing similar infringements.

1322. The Commission also emphasises that it did not claim that Microsoft had obstructed its investigation and that it did not find any aggravating circumstance on Microsoft's part.

1323. Third, the Commission denies that the increase of 50% which it applied to the amount determined for gravity, in order to reflect the duration of the infringement, is excessive. It followed the normal practice of applying, for long duration, an increase of 10% for each year of participation in the infringement.

1324. The Commission submits that Microsoft cannot rely on the measures which it took to remedy the issues raised by the Commission or under the United States settlement, which have no relevance to the calculation of the duration of the infringement. The Commission refers to recitals 241, 242 and 270 to 279 to the contested decision and submits that those measures did not bring the infringement to an end.

1325. Last, the Commission disputes Microsoft's argument relating to the duration of the administrative procedure and observes, in particular, that that duration was objectively justified by the complexity of the case and the need to ensure Microsoft's rights of defence.

C - Findings of the Court

1326. The present submissions call upon the Court to examine the legality of Article 3 of the contested decision and, if appropriate, to exercise its unlimited jurisdiction and annul or reduce the fine imposed on Microsoft by that article.

1327. The Commission imposed a single fine on Microsoft for the two abuses found in Article 2 of the contested decision. It is apparent from recitals 1061 to 1068 to that decision that the Commission, while recognising the existence of two separate abuses, none the less considered that Microsoft committed a single infringement, namely the application of a strategy consisting in leveraging its dominant position on the client PC operating systems market (see, in particular, recital 1063 to the contested decision).

1328. It follows from recitals 1054 to 1080 to the contested decision that, even though the decision does not expressly say so, the Commission calculated the amount of the fines according to the method set out in the Guidelines.

1329. Microsoft claims, primarily, that Article 3 of the contested decision should be annulled in that, as there has been no infringement of Article 82 EC, the fine has no legal basis.

1330. That argument must be rejected. It follows from the assessment of the refusal to supply and authorise the use of the interoperability information, and also of the bundling of the Windows client PC operating system and Windows Media Player, that the Commission was correct to find that Microsoft had infringed Article 82 EC by adopting those two courses of conduct.

1331. In the alternative, Microsoft maintains that the fine is excessive and disproportionate and should therefore be annulled or substantially reduced. In particular, the two types of conduct referred to in Article 2 of the contested decision are wholly new forms of abuse of a dominant position and Microsoft could not have predicted that its conduct, consisting in exercising its intellectual property rights with respect to a valuable technology which it developed and in introducing new technology to an existing product, would be interpreted by the Commission as constituting an infringement of Article 82 EC.

1332. The Court finds that the arguments put forward by Microsoft in the alternative are unfounded and, in particular, that Microsoft has not shown that the Commission erred in assessing the gravity and duration of the infringement or in setting the amount of the fine.

1333. It must be borne in mind that in the examination of the issues arising in the first abuse, the Court confirmed the validity of the Commission's finding that Microsoft's refusal - and the Commission proceeded on the premiss that the refusal might represent a refusal to license Microsoft's intellectual property rights to a third party - was abusive since, first, it took place in exceptional circumstances such as those envisaged in the case-law, which, in the public interest in maintaining effective competition on the market, permitted an interference with the exclusive right of the owner of the intellectual property right and, second, it was not objectively justified.

1334. It must also be borne in mind that, in the examination of the issues of the second abuse, the Court found that the Commission had established to the requisite legal standard that the fact that Microsoft made the supply of the Windows client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software satisfied the conditions for a finding of abusive tying within the meaning of Article 82 EC and was not objectively justified.

1335. In the first place, as regards Microsoft's argument that the two abuses found in Article 2 of the contested decision result from a new interpretation of the law' (see paragraphs 1299 to 1302 above), it is sufficient to state that it has already been established by the Court, in its examination of the two sets of claims of annulment of the contested decision, that Microsoft's argument was unfounded. That examination shows that the Commission did not apply any new rule of law in the present case.

1336. Thus, as regards, first, the abuse found in Article 2(a) of the contested decision, it has already been explained that, at the time when the facts took place, the Court of Justice had already held, in Magill , paragraph 107 above, that while a refusal by the owner of an intellectual property right to grant a licence, even where it is the act of an undertaking in a dominant position, cannot in itself constitute an abuse of a dominant position, the exercise of the exclusive right by the owner might however, in exceptional circumstances, give rise to abusive conduct.

1337. Microsoft's assertion that it could not easily be aware that its conduct infringed the competition rules is also difficult to reconcile with the position which it adopted throughout the administrative procedure. In effect, Microsoft claimed that if the Commission were to find that the refusal at issue constituted abuse, that could upset the careful balance between copyright and competition policies' struck by Directive 91/250 (recital 743 to the contested decision). It should be added that the 26 th recital to that directive states that the provisions of the directive are without prejudice to the application of the competition rules under Articles [81 EC and 82 EC] if a dominant supplier refuses to make information available which is necessary to interoperability as defined in [that] directive'.

1338. It follows that the Commission was correct to conclude that Microsoft ought to have been aware that its refusal might infringe the competition rules.

1339. The same applies as regards, second, the abuse found in Article 2(b) of the contested decision, as the arguments alleging the application of a new theory have already been rejected during the examination of the bundling issue (see, in particular, paragraphs 859 and 863 to 868 above). The Court therefore finds that the Commission was correct to state, at recital 1057 to the contested decision, that its examination of the tying at issue and its conclusion that Microsoft's conduct was abusive were based on a practice that was well established, notably in Hilti and Tetra Pak II.

1340. The fact that the abusive tying was not mentioned in the first statement of objections is of no relevance to the question whether the Commission applied a new legal theory.

1341. Nor can the assertion that the contested decision is the first decision in which the Commission has characterised as abusive the improvement of a product consisting in the integration of an improved' functionality in that product be upheld. As stated at paragraphs 936, 937 and 1221 above, the integration of that product was not dictated by technical grounds. Furthermore, for the reasons stated at paragraph 935 above, that assertion does not invalidate the Commission's finding that there were two separate products, which constitutes one of the criteria on which it is possible to identify abusive tying, according to the case-law cited at paragraph 859 above.

1342. It follows from the foregoing considerations that Microsoft cannot validly claim that the Commission ought not to have imposed a fine on it or that it ought to have imposed a symbolic fine.

1343. In the second place, Microsoft's argument that the amount of the fine is excessive must also be rejected. The Court finds that the Commission made a correct assessment of the gravity and duration of the infringement.

1344. First, as regards the gravity of the infringement, it must be borne in mind at the outset that the two abuses at issue form part of a leveraging infringement, consisting in Microsoft's use of its dominant position on the client PC operating systems market to extend that dominant position to two adjacent markets, namely the market for work group server operating systems and the market for streaming media players.

1345. First of all, as regards the abuse found in Article 2(a) of the contested decision, the Commission evaluated the gravity of that abuse by taking into consideration its nature (recitals 1064 and 1065 to the contested decision), its actual impact on the market (recitals 1069 and 1070 to the contested decision) and the size of the relevant geographic market (recital 1073 to the contested decision). The Commission characterised the infringement of which that abuse formed part as very serious' and therefore likely to incur a fine of over EUR 20 million.

1346. The Court finds that the matters taken into consideration by the Commission in the recitals mentioned in the preceding paragraph justify the description of the infringement as very serious'. That assessment is not called in question by Microsoft's arguments.

1347. The Court would observe that a number of internal Microsoft documents in the file confirm that Microsoft made use, by leveraging, of its dominant position on the client PC operating systems market to strengthen its position on the work group server operating systems market. Thus, at recital 774 to the contested decision, the Commission cites an extract from an email from Mr Bayer, a senior director of Microsoft, to Mr Madigan, another senior director of Microsoft, in which he states that [Microsoft] has a huge advantage in the enterprise computing market by leveraging the dominance of the Windows desktop'.

1348. At the following recital to the contested decision, the Commission refers to a passage from another email between those two senior directors which shows that conquering the work group server operating systems market was regarded as a means of implementing the same leveraging strategy against the Internet. That passage reads as follows:

Dominance on the server infrastructure on the Internet is a tougher nut to crack [but] we just might be able to do it from the enterprise out if we could own the enterprise (which I think we can).'

1349. Furthermore, as the Commission correctly observes at recital 778 to the contested decision, it is clear from an extract from a speech given by Mr Gates in February 1997 that the most senior directors of Microsoft regarded interoperability as a tool in that leveraging strategy. That extract reads as follows:

What we are trying to do is use our server control to do new protocols and lock out Sun and Oracle specifically... Now, I don't know if we'll get to that or not, but that's what we are trying to do.'

1350. The Court notes that Mr Gates' speech was given in February 1997, well before the date on which Microsoft rejected the request contained in the letter of 15 September 1998. The Commission was therefore correct to consider that Microsoft's refusal formed part of an overall strategy consisting in Microsoft's use of its dominant position on the client PC operating systems market to strengthen its dominant position on the adjacent market for work group server operating systems.

1351. Next, as regards the tying of Windows Media Player and Windows referred to in Article 2(b) of the contested decision, the Court finds that the Commission also made a correct assessment of the gravity of the infringement by characterising it as very serious'.

1352. It should be noted first that it follows from the email sent to Mr Gates by Mr Bay in January 1999 (see paragraph 911 above) that the second abuse also formed part of a leveraging strategy.

1353. Second, the Commission was correct to find, at recital 1068 to the contested decision, that the abuse constituted by its nature a very serious infringement of Article 82 EC and Article 54 of the EEA Agreement.

1354. Tying practices had already clearly been declared unlawful by the Community Courts, notably in Hilti and Tetra Pak II , and the impugned conduct satisfied the conditions laid down in that case-law. It must be borne in mind, in particular, that, as stated at paragraphs 859 and 863 to 868 above, the Commission did not apply a new legal theory in this case, especially when it examined whether the foreclosure condition was satisfied.

1355. The Commission was quite correct, moreover, to observe, at recital 1066 to the contested decision, that the tying ensured the worldwide ubiquity of Windows Media Player, which created disincentives for OEMs to pre-install competing media players on their client PCs and harmed competition on the market for streaming media players (see paragraphs 1031 to 1058 above).

1356. Last, as the Commission properly emphasises at recital 1067 to the contested decision, the abusive tying has significant effects on competition for the delivery of content over the Internet and also on the multimedia software industry. As stated at paragraphs 1060 to 1075 above, the ubiquity that tying confers on Windows Media Player gives content providers an incentive to distribute their content in Windows Media formats and gives software developers an incentive to develop their products so that they rely on certain functionalities of Windows Media Player, in spite of the fact that competing media players are of similar or even better quality than Windows Media Player. It has also been shown at paragraphs 1076 above that the Commission was quite correct to find, at recitals 897 to 899 to the contested decision, that the abusive tying had also had effects on some adjacent markets.

1357. Third, the Commission was correct to observe, at recitals 1069 and 1071 to the contested decision, that the abusive tying has a significant effect on the market for streaming media players.

The tying enabled Microsoft to become market leader with Windows Media Player.

1358. Fourth, it is common ground that the market for streaming media players covers the whole of the EEA (recital 1073 to the contested decision).

1359. It follows from the considerations set out at paragraphs 1344 to 1358 above that the Commission was correct to take as a starting point for the fine imposed for the infringement a minimum amount of EUR 20 million.

1360. In the present case, after taking into consideration the nature of the infringement, its effects on the relevant product markets and the geographical size of those markets, the Commission took a single starting point, which it set at EUR 165 732 101 (recital 1075 to the contested decision). The Commission does not explain in the contested decision what that amount represented or how it was apportioned between the two types of abuse. It is apparent, however, upon reading footnote 217 to the defence together with the content of Microsoft's letter of 9 March 2004 (see paragraph 1319 above), that that amount represents 7.5% of Microsoft's overall EEA turnover on the markets for client PC operating systems and work group server operating systems in the business year ending 30 June 2003. Contrary to Microsoft's contention, the starting amount cannot therefore be considered to have been fixed arbitrarily.

1361. As regards Microsoft's assertion that the Commission failed to state the reasons for fixing the starting amount of the fine at EUR 165 732 101, it is sufficient to observe that it is settled case-law that the obligation to state reasons does not require the Commission to indicate in its decision the figures relating to the method of calculating the fines (Case C291/98 P Sarrio v Commission [2000] ECR I9991, paragraphs 76 and 80, and Limburgse Vinyl Maatschappij and Others v Commission , paragraph 95 above, paragraph 464).

1362. Nor can Microsoft's assertion that the Commission took account of its turnover on the market for server operating systems in general, that is to say, a wider market than the second market identified in the contested decision, be upheld. The Commission relied on the figures which had been given to it by Microsoft in its letter of 9 March 2004 (see paragraph 1319 above) in response to a request for information of 2 March 2004 (annex D.16 to the rejoinder) expressly referring to the Windows work group server operating systems which Microsoft was still supplying at the time.

1363. Furthermore, the Court finds that the Commission was correct to apply a weighting of 2 to that amount to ensure that the fine was sufficiently deterrent and to reflect Microsoft's significant economic capacity. Since Microsoft is very likely to maintain its dominant position on the client PC operating systems market, at least over the coming years, it cannot be precluded that it will have other opportunities to use leveraging vis-à-vis other adjacent markets. Furthermore, Microsoft had already faced proceedings in the United States for a practice similar to the abusive tying at issue, namely the tying of its Internet Explorer browser and its Windows client PC operating system, and the possibility cannot be precluded that it might commit the same type of infringement in future with other application software.

1364. Second, as regards the duration of the infringement, Microsoft's argument that the increase of 50% of the basic amount of the fine is excessive must be rejected. As the Court has already held when examining the second part of the refusal to supply interoperability information, the Commission was correct to consider that the letter of 6 October 1998 contained a refusal to communicate to Sun the information which it had requested. It follows that the Commission was correct to find that, from that date, Microsoft was guilty of an infringement of Article 82 EC. It has been established that that infringement continued until the date of adoption of the contested decision and that, from May 1999, a second type of abusive conduct was added to that infringement.

1365. Third, the Court finds that the Commission was correct to take the view that no aggravating or attenuating circumstances were to be taken into account in the present case.

1366. It follows from all of the foregoing considerations that Microsoft's argument that the fine is excessive and disproportionate must be rejected.

1367. The application must therefore be rejected as unfounded in so far as it seeks annulment or a reduction in the amount of the fine.

Costs

1368. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 87(3) provides that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

1369. In the present case, Microsoft has been unsuccessful in its claim that the contested decision should be annulled in its entirety and in its claim that the fine should be annulled or reduced, and the Commission has been unsuccessful in its claim that the entirety of the application should be dismissed.

1370. In the main action, it is appropriate, in those circumstances, to order that the costs be shared. Microsoft shall bear 80% of its own costs and pay 80% of the Commission's costs, with the exception of the costs which the Commission has incurred in connection with the intervention of CompTIA, ACT, TeamSystem, Mamut, DMDsecure and Others and Exor. The Commission shall bear 20% of its own costs and pay 20% of Microsoft's costs, with the exception of the costs which Microsoft has incurred in connection with the intervention of SIIA, FSFE, Audiobanner.com and ECIS.

1371. In the interim measures proceedings, Microsoft shall bear its own costs and pay the costs incurred by the Commission, with the exception of the costs which the Commission incurred in connection with the intervention of CompTIA, ACT, TeamSystem, Mamut, DMDsecure and Others and Exor.

1372. CompTIA, ACT, TeamSystem, Mamut, DMDsecure and Others and Exor shall bear their own costs, including those relating to the interim measures proceedings. As the Commission did not request that those interveners be ordered to pay the costs which it incurred in connection with their intervention, they shall bear only their own costs.

1373. The costs incurred by SIIA, FSFE, Audiobanner.com and ECIS, including those relating to the interim measures proceedings, shall be paid by Microsoft.

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62000J0076 : N 801
62000O0241 : N 87
62000O0459 : N 88
62001A0203 : N 867
62001C0418 : N 646
62001J0091 : N 1258
62001J0418 : N 325 329 330 335 336 646 647 690 693 709
62002A0137 : N 1258
62002J0093 : N 801 802
62003J0012 : N 89 482

SUB Competition ; Rules applying to undertakings ; Dominant position

AUTLANG English

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA X USA

NOTES Lee, Dianna: Microsoft Corp. v Commission of the European Communities - CFI upholds 2004 Commission finding against Microsoft for abuse of dominance, Bulletin of international legal developments 2007 Vol.18 p.205-208 ; Zarka, Jean-Claude: Microsoft et la justice européenne. A propos de l'arrêt du Tribunal de première instance des Communautés européennes du 17 septembre 2007, Gazette du Palais 2007 no 292-293 p.11-12 ; Debroux, Michel: Arrêt Microsoft: articulation entre droits de propriété intellectuelle et abus de dominance, La Semaine Juridique - entreprise et affaires 2007 no 2304 p.23-25 ; Debroux, Michel ; Dufour, Olivia: Microsoft, une victoire éclatante pour la Commission européenne !, Petites affiches. La Loi / Le Quotidien juridique 2007 no 190 p.3-5 ; Prieto, Catherine: Le TPICE rejette le recours formé par Microsoft condamné pour deux abus de position dominante: le refus de fournir des informations en vue d'une interopérabilité des logiciels pour serveurs de groupes de travail avec son logiciel d'exploitation Windows; la vente liée de son lecteur multimédia avec le logiciel Windows, Concurrences : revue des droits de la concurrence 2007 no 4 p.78-82 ; Solda-Kutzmann, Donatella: Abuso di posizione dominante nel mercato dei sistemi operativi, Giurisprudenza italiana 2007 p.2145-2146 ; Prieto, Catherine: La condamnation de Microsoft ou l'alternative européenne à l'antitrust américain, Recueil Le Dalloz 2007 p.2884-2889 ; Arhel, Pierre: L'affaire Microsoft (A propos de la décision du TPICE du 17 septembre 2007), Petites affiches. La Loi / Le Quotidien juridique 2007 no 233 p.3-10 ; Körber, Torsten: Wettbewerb in dynamischen Märkten zwischen Innovationsschutz und Machtmissbrauch - Zum Microsoft-Urteil des EuG vom 17.9.2007, Wirtschaft und Wettbewerb 2007 p.1209-1218 ; Finbak, Christine: A landmark judgment: the Commission`s long awaited victory in the Microsoft case, European Law Reporter 2007 p.443-448 ; Idot, Laurence: L'arrêt Microsoft: simple adaptation ou nouvelle interprétation de l'article 82 CE?, Europe 2007 Décembre Etudes no 22 p.5-11 ; Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (septembre 2007), Petites affiches. La Loi / Le Quotidien juridique 2007 no 256 p.11-12 ; Bartosch, Andreas: Das Urteil des Europäischen Gerichts erster Instanz in der Rechtssache Microsoft, Recht der internationalen Wirtschaft 2007 p.908-919 ; Buryan, J.: Rozsudek ve vci Microsoft: odmítnutí poskytnout licenci k pravm duevního vlastnictví jako zneuití dominantního postavení, Jurisprudence specialista na komentovaní judikatury 2007 p.18-24 ; Peritz, Rudolph J.R.: Microsoft e il flusso di informazioni, Mercato concorrenza regole 2007 p.523-533 ; Anderman, Steven D.: Microsoft e il problema dell'interoperabilità, Mercato concorrenza regole 2007 p.569-574 ; Pardolesi, Roberto ; Renda, Andrea: Kill Bill Vol. 2, Mercato concorrenza regole 2007 p.575-585 ; Gstalter, Jérôme: L'arrêt Microsoft et la mise en oeuvre de l'article 82 CE. Quels enseignements pour l'analyse fondée sur les effets?, Revue trimestrielle de droit européen 2007 p.742-762 ; Pollaud-Dulian, Frédéric: Propriétés incorporelles. Propriété littéraire et artistique, Revue trimestrielle de droit commercial et de droit économique 2007 p.715-727 ; Eklöf, Dan: Microsofts licensvägran i skottlinjen, Juridisk Tidskrift vid Stockholms universitet 2007-08 nr 3 p.681-692 ; Marcellesi, Doris: Gazette du Palais 2008 no 20-22 I Jur. p.27-30 ; Lévêque, François: La décision du TPICE contre Microsoft: où est passée l'économie?, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 14 p.22-26 ; Robin, Catherine: Microsoft, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 14 p.29-30 ; Cheynel, Benjamin: Affaire Microsoft, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 14 p.99-101 ; Gunther, Jacques-Philippe ; Tayar, David: L'arrêt Microsoft marque-t-il la fin de l'externalisation du contrôle des engagements en matière de concentration?, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 14 p.169-175 ; Howarth, David ; McMahon, Kathryn: "Windows has Performed an Illegal Operation": the Court of First Instance's Judgment in Microsoft v Commission, European Competition Law Review 2008 p.117-134 ; Speyart, Herman M.H.: Het Microsoft-arrest: enkele nieuwe inzichten over misbruik bij licentieweigering, Intellectuele eigendom & Reclamerecht 2008 p.1-4 ; Slot, P.J.: De zaak Microsoft, Ars aequi 2008 p.144-147 ; Dreher, Meinrad: Missbrauch einer marktbeherrschenden Stellung, Lizenzverweigerung, Bündelung von Produkten/"Microsoft", Entscheidungen zum Wirtschaftsrecht 2008 p.137-138 ; Pardolesi, Roberto ; Colangelo, Giuseppe: Microsoft, i giudici europei e l'antitrust di una volta, Il Foro italiano 2008 IV

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PROCEDU Action for annulment;Appeal against penalty

DATES of document: 17/09/2007
of application: 07/06/2004

Case T-201/04

Microsoft Corp.

v

Commission of the European Communities

(Intervention – Representative association – Article 116(6) of the Rules of Procedure of the Court of First Instance – Application to participate in the written procedure – Unforeseeable circumstances or force majeure – Exceptional circumstances)

Summary of the Order

1. *Procedure – Intervention – Interested persons – Application to intervene submitted by a representative association in a case raising questions of principle liable to affect its members – Whether permissible*

   (Statute of the Court of Justice, Arts 40, second para., and 53, first para.)

2. *Procedure – Intervention – Scope of the procedural rights of the intervener linked to the date of submission of the application to intervene*

   (Rules of Procedure of the Court of First Instance, Arts 115(1) and 116(2), (4) and (6))

3. *Procedure – Intervention – Limitation of the procedural rights conferred on an intervener who submitted his application more than six weeks after publication in the Official Journal of the notice of initiation of the action – Exceptions – Unforeseeable circumstances or force majeure – Definition – Withdrawal of another intervener – Not included*

   (Statute of the Court of Justice, Art. 45, second para., Rules of Procedure of the Court of First Instance, Arts 99 and 115(1))

ORDER OF THE PRESIDENT OF THE FOURTH CHAMBER OF THE COURT OF FIRST INSTANCE

28 April 2005(*)

(Intervention – Representative association – Article 116(6) of the Rules of Procedure of the Court of First Instance – Application to participate in the written procedure – Unforeseeable circumstances or force majeure – Exceptional circumstances)

In Case T-201/04,

Microsoft Corp., established in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I. Forrester QC,

applicant,

supported by

Association for Competitive Technology, Inc., established in Washington, DC (United States), represented by L. Ruessmann, lawyer,

DMDsecure.com BV, established in Amsterdam (Netherlands), **MPS Broadband AB,** established in Stockholm (Sweden), **Pace Micro Technology plc,** established in Shipley, West Yorkshire (United Kingdom), **Quantel Ltd,** established in Newbury, Berkshire (United Kingdom), **Tandberg Television Ltd,** established in Southampton, Hampshire (United Kingdom), represented by J. Bourgeois, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H. Brokelmann and R. Allendesalazar Corcho, lawyers,

Mamut ASA, established in Oslo (Norway), and **TeamSystem SpA,** established in Pesaro (Italy), represented by G. Berrisch, lawyer,

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace, Illinois (United States), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

interveners,

v

Commission of the European Communities, represented by R. Wainwright, F. Castillo de la Torre, P. Hellström and A. Whelan, acting as Agents,

defendant,

supported by

AudioBanner.com, trading as VideoBanner, established in Los Angeles, California (United States), represented by L. Alvizar, lawyer,

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

RealNetworks, Inc., established in Seattle, Washington (United States), represented by A. Winckler, M. Dolmans and T. Graf, lawyers,

Software & Information Industry Association, established in Washington, DC (United States), represented by C. Simpson, Solicitor,

interveners,

APPLICATION for annulment of Commission Decision C(2004) 900 final of 24 March 2004, relating to a proceeding under Article 82 EC (Case COMP/C-3/37.792 – Microsoft), or for reduction of the amount of the fine imposed on the applicant,

THE PRESIDENT OF THE FOURTH CHAMBER OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Background

1 Microsoft Corp. (‘Microsoft’) develops and markets computer software, including operating systems for client personal computers (‘PCs’), known as Windows, work group server operating systems, known as Windows Server, and streaming media players, known as Windows Media Player.

2 On 10 December 1998, Sun Microsystems, Inc., established in Palo Alto, California (United States), lodged a complaint with the Commission. That complaint related to Microsoft’s refusal to supply Sun Microsystems, Inc. with the information necessary to allow interoperability of its work group server operating systems with Windows. The Commission opened an investigation into the matter.

3 In February 2000 the Commission opened a second investigation into Microsoft. The object of that investigation was the integration of Windows Media Player in Windows.

4 The two investigations were subsequently joined under Case No COMP/C-3/37.792.

5 On 24 March 2004, the Commission adopted Decision C(2004) 900 final relating to a proceeding under Article 82 EC in Case COMP/C-3.37.792 – Microsoft (‘the Decision’).

6 In assessing Microsoft’s conduct, the Commission, first, defined three relevant markets. Those markets were the client PC operating system market (recitals 324 to 342 to the Decision), the work group server operating system market (recitals 343 to 401 to the Decision) and the streaming media player market (recitals 402 to 425 to the Decision).

7 Second, the Commission found that each of those markets was worldwide (recital 427 to the Decision).

8 Third, the Commission found that Microsoft held a dominant position on two of those markets, namely the client PC operating system market (recitals 429 to 472 to the Decision) and the work group server operating system market (recitals 473 to 541 to the Decision).

9 Fourth, the Commission concluded that, by its conduct on those two markets, Microsoft was infringing Article 82 EC. It considered that Microsoft was abusing its dominant position by refusing to supply the interoperability information and to authorise its use for the development and distribution of products competing with its own products on the work group server operating system market during the period October 1998 to the date of notification of the Decision (recitals 546 to 791 to and Article 2(a) of the Decision). The Commission also considered that Microsoft was abusing its dominant position by making the availability of Windows conditional on the simultaneous acquisition of Windows Media Player during the period May 1999 to the date of notification of the Decision (recitals 792 to 989 to and Article 2(b) of the Decision).

10 Fifth, the Commission ordered Microsoft to bring those infringements to an end, to refrain from any conduct having the same or equivalent object or effect and to implement a series of remedies within certain periods (recitals 994 to 1053 to and Articles 4 to 8 of the Decision).

11 Sixth, the Commission imposed a fine of EUR 497 196 304 on Microsoft (recitals 1054 to 1080 to and Article 3 of the Decision).

Procedure

12 By application lodged at the Registry of the Court of First Instance on 7 June 2004, Microsoft brought the present action.

13 By application lodged at the Registry of the Court of First Instance on 17 December 2004, European Committee for Interoperable Systems ('ECIS'), established in Brussels (Belgium), represented by D. Paemen and N. Dodoo, lawyers, applied to intervene in the proceedings in support of the form of order sought by the Commission.

14 The Commission and Microsoft submitted their written observations on that application to intervene by documents lodged at the Registry of the Court of First Instance on 1 and 7 March 2005 respectively.

The application to intervene

Admissibility of the application to intervene

15 Microsoft submits that the application to intervene is inadmissible on the ground that it does not satisfy the procedural conditions laid down in the Rules of Procedure of the Court of First Instance.

16 Under Article 115 of the Rules of Procedure, in order to be admissible, an application to intervene must comply with certain conditions relating to the period within which the application must be made (paragraph 1), its material content (paragraph 2, first subparagraph) and the applicant having proper representation (paragraph 3).

17 In this case the application to intervene satisfies those conditions.

18 Furthermore, under the second subparagraph of Article 115(2) of the Rules of Procedure the admissibility of an application to intervene is conditional upon compliance with the procedural conditions laid down in Articles 43 and 44 of those Rules. Article 44 of the Rules of Procedure provides, in particular, in paragraph 5(b) that where the applicant for leave to intervene is a legal person governed by private law it is to attach to its application proof that the authority granted to its lawyer has been properly conferred on him by someone authorised for the purpose.

19 In the present case, Microsoft submits, essentially, that the decisions to request leave to intervene in the proceedings and to confer authority on D. Paemen and N. Dodoo for that purpose were improperly adopted by the ECIS Executive Committee on 16 December 2004. It acknowledges that the ECIS General Assembly ratified those decisions on 12 January 2005, but submits that ratification took place only after the application to intervene had been submitted and may be invalid in itself.

20 It cannot be precluded that the validity of the decisions adopted by the ECIS Executive Committee on 16 December 2004 should be treated with caution and it cannot therefore be taken as certain that D. Paemen and N. Dodoo held authority properly conferred by someone authorised for that purpose when ECIS lodged its application to intervene on 17 December 2004. However, it must in any event be noted that, by resolution of 12 January 2005, the ECIS General Assembly, 'properly constituted', declared that it 'unreservedly confirmed' that decision and, 'although not strictly required to do so by the statutes of ECIS or Belgian law, ratif[ied]' it. That declaration leads to the conclusion that the application to intervene satisfies the requirements of Article 44(5)(b) of the Rules of Procedure (see Joined Cases 193/87 and 194/87 *Maurissen and Others* v *Court of Auditors* [1989] ECR 1045, paragraph 33).

21 ECIS therefore has locus standi to apply to intervene in the proceedings.

The merits of the application to intervene

Arguments of the applicant for leave to intervene and of the parties

22 ECIS submits that it satisfies the conditions determining the right to intervene recognised to representative associations and that it must therefore be granted leave to intervene in the proceedings in support of the form of order sought by the Commission.

23 Microsoft disputes that claim. It is not convinced that ECIS is a representative association, that it therefore satisfies all the conditions determining the right to intervene recognised to representative associations and that it may therefore be granted leave to intervene.

24 The Commission submits that ECIS may be granted leave to intervene.

Findings of the President

25 The second paragraph of Article 40 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 thereof, is applicable to the procedure before the Court of First Instance, provides that any person establishing an interest in the result of a case other than a case between Member States, between institutions of the Communities or between Member States and institutions of the Communities is entitled to intervene in cases.

26 Such an interest is established by a representative association whose object is to protect its members and which applies to intervene in a case raising questions of principle liable to affect those members. That broad interpretation of the right to intervene is intended to facilitate assessment of the context of cases while avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure (orders of the President of the Court of Justice in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* v *British Coal and Commission* [1997] ECR I-3491, paragraph 66, and in Case C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6; and order of the President of the Fourth Chamber of the Court of First Instance of 9 March 2005 in Case T-201/04 *Microsoft* v *Commission* [2005], not published in the ECR, paragraph 31).

27 In the present case, ECIS presents itself as a representative association of undertakings operating in the information technologies sector. The representative list of its members and the list in the minutes of its General Assembly of 12 January 2005 confirm that, although the members of ECIS are limited in number and although not all of them are active in the information technologies sector, a number of them carry out significant activities in that sector. ECIS can therefore be regarded as a representative association.

28 Next, ECIS states that its object is, inter alia, the promotion and defence of the intangible and tangible interests of its members. Article 4 of its statutes confirms that that is so. ECIS must therefore be regarded as having the object of protecting its members.

29 Last, certain of the questions raised by the case may be regarded as questions of principle concerning the information technologies sector and the judgment determining the merits of the case is therefore liable to affect the members of ECIS who operate in that sector.

30 It follows from the foregoing that ECIS has established an interest in the result of the case.

31 ECIS must therefore be granted leave to intervene in the case in support of the form of order sought by the Commission.

The procedural rights of the intervener

Arguments of the parties

32 ECIS seeks leave to participate in the written procedure. It submits that the provisions on intervention (Articles 115 and 116 of the Rules of Procedure) allow the Court to grant that application. In any event, such a solution is justified by the existence of unforeseeable circumstances or force majeure (second paragraph of Article 45 of the Statute of the Court of Justice), or at the very least of exceptional circumstances. On that point, ECIS relies on the fact that

Computer & Communications Industry Association ('CCIA'), some of whose members are also members of ECIS, withdrew on 10 November 2004 the application to intervene in support of the form of order sought by the Commission which it had submitted on 23 June 2004.

33 Microsoft disputes that application. It contends that Articles 115 and 116 of the Rules of Procedure do not allow the Court to grant the application. Furthermore, ECIS has not established either the existence of unforeseeable circumstances or force majeure, or the existence of exceptional circumstances of such a kind as to justify a derogation from those provisions.

34 The Commission submits that if an intervener such as ECIS may be authorised to participate in the written procedure, it must only be allowed to do so in exceptional circumstances, and that the withdrawal of CCIA in the present case could be an exceptional circumstance.

Findings of the President

35 Article 115(1) of the Rules of Procedure provides that the application to intervene must be made within six weeks of the publication in the *Official Journal of the European Union* of the notice of initiation of the action or, failing that, before the decision to open the oral procedure.

36 Article 116(2) of the Rules of Procedure provides that if an application to intervene made within the six-week period is granted, the intervener is to receive a copy of every document served on the parties.

37 Article 116(4) of the Rules of Procedure provides that, in the cases referred to in Article 116(2) of the Rules of Procedure, the President is to prescribe a period within which the intervener may submit a statement in intervention containing the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, its pleas in law and arguments and also, where appropriate, the nature of any evidence offered.

38 Article 116(6) of the Rules of Procedure provides that, where the application to intervene is made after the expiry of the six-week period referred to above, the intervener may, on the basis of the Report for the Hearing communicated to him, submit his observations during the oral procedure.

39 It is apparent upon reading those provisions together that the procedural rights of the intervener differ according to whether he submitted his application to intervene before the expiry of the six-week period beginning with the publication in the *Official Journal of the European Union* of the notice of initiation of the action, or after the expiry of that period but before the decision to open the oral procedure.

40 Where the intervener submitted his application before the expiry of that period, he is entitled to participate in both the written procedure and the oral procedure. In that capacity, he must receive a copy of the documents and may submit a statement in intervention containing the form of order which he seeks in support of or opposing, in whole or in part, the form of order sought by one of the main parties, his pleas in law and arguments and also, where appropriate, the nature of any evidence offered.

41 On the other hand, where the intervener submitted his application after the expiry of that period, he is only entitled to participate in the oral procedure, provided he submitted his application to the Court of First Instance before the opening of that procedure. In that capacity, he must receive a copy of the Report for the Hearing and may submit his observations on the basis of that report during the oral procedure.

42 As those provisions are mandatory (order of the Court of First Instance of 30 May 2002 in Case T-52/00 *Coe Clerici Logistics* v *Commission* [2002] ECR II-2553, paragraphs 24 and 31), they are not within the discretion of either the parties or even the Court.

43 In the present case, the notice of the initiation of the action was published on 10 July 2004 (OJ 2004 C 179, p. 18). ECIS's application to intervene was lodged at the Registry of the Court of First Instance on 17 December 2004. Clearly, therefore, it was submitted after the expiry of the six-week period provided for in Article 115(1) of the Rules of Procedure, plus the period of 10 days on account of distance provided for in Article 102(2) of the Rules of Procedure.

44 Accordingly, ECIS can claim only the procedural rights provided for in Article 116(6) of the Rules of

Procedure.

45 ECIS maintains, however, that CCIA's withdrawal constitutes unforeseeable circumstances or force majeure.

46 The second paragraph of Article 45 of the Statute of the Court of Justice provides that no right is to be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure.

47 The provisions on procedural time-limits are of strict application, which serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (judgment in Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 14, and order of the Court of Justice of 18 January 2005 in Case C-325/03 P [2005], not yet published in the ECR, paragraph 16).

48 The second paragraph of Article 45 of the Statute of the Court of Justice, which derogates from that principle and must therefore be interpreted strictly, applies to the mandatory procedural time-limits the expiry of which entails the loss of the right previously open to a natural or legal person to initiate an action (judgment in Joined Cases 25/65 and 26/65 *Simet and Feram* v *High Authority* [1967] ECR 33, 43) or to submit an application to intervene (order of the President of the First Chamber of the Court of First Instance of 22 March 1994 in Joined Cases T–244/93 and T–486/93 *TWD Textilwerke Degendorf* v *Commission*, not published in the ECR, paragraphs 18 to 20).

49 In so far as the second paragraph of Article 45 of the Statute of the Court of Justice also applies to the six-week period provided for in Article 115(1) of the Rules of Procedure, the expiry of which entails not the loss of the right to submit an application to intervene but, as in this case, the limitation of the procedural rights conferred on the intervener, it is settled case-law that it is only in wholly exceptional circumstances, of unforeseeable circumstances or of force majeure, that that article permits any derogation from the provisions on procedural time-limits (judgment in *Ferriera Valsabbia* v *Commission*, cited above, paragraph 14, and order in *Zuazaga Meabe* v *OHIM*, cited above, paragraph 16).

50 The concepts of unforeseeable circumstances and force majeure contain an objective element relating to abnormal circumstances unconnected with the person concerned and a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps and, in particular, by paying close attention to the course of the procedure and demonstrating diligence (judgment in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I–5619, paragraph 32, and order in *Zuazaga Meabe* v *OHIM*, cited above, paragraph 25).

51 In the present case, CCIA's withdrawal may perhaps constitute an event unconnected with ECIS, although, as the latter acknowledges, the two representative associations have members in common.

52 However, it is not an abnormal event. Any intervener is always entitled to withdraw his intervention, just as any applicant is always entitled to discontinue his action, in accordance with Article 99 of the Rules of Procedure. The withdrawal of an intervener therefore does not in itself assume an abnormal nature. Nor, in the present case, does any of the factual elements relied on by ECIS permit CCIA's withdrawal to be described as abnormal. In particular, where a person such as CCIA participates, as an interested third party, in any administrative procedure in order to convince the Commission that there has been an infringement of the competition rules, where the Commission adopts a decision to that effect, where the author of the infringement seeks annulment of that decision and where the person in question intervenes in the dispute in order to assert his interest, it cannot be considered abnormal that he should ultimately decide to change his strategy, to settle his dispute with the applicant by extrajudicial means and, should he consider it appropriate, against payment of financial consideration.

53 Last, ECIS does not show, and, moreover, does not seriously seek to show, that it discharged its obligation to forearm itself against the consequences of that event by taking appropriate steps.

54 Accordingly, ECIS has not established the existence of unforeseeable circumstances or of force majeure.

55 ECIS contends, last, that CCIA's withdrawal constitutes an exceptional circumstance.

56 Even on the assumption that certain exceptional circumstances permit an intervener who has submitted his application to intervene after the expiry of the six-week period provided for in Article 115(1) of the Rules of Procedure to benefit from a procedural right other than those conferred on him by Article 116(6) of the Rules of Procedure, it must be recalled that the factual elements invoked by ECIS do not permit CCIA's withdrawal to be considered either abnormal or exceptional.

57 It follows from the foregoing that ECIS's rights will be those provided for in Article 116(6) of the Rules of Procedure.

58 In so far as ECIS's application to participate in the written procedure should be interpreted, not as claiming a right, but as manifesting its availability to respond to a measure of organisation of procedure whereby the Court might wish to invite it to make written submissions pursuant to Article 64(3)(b) of the Rules of Procedure, it must be observed that it will be for the Fourth Chamber of the Court of First Instance, when the time comes, to contemplate the need for such a measure.

Costs

59 Article 87(1) of the Rules of Procedure provides that a decision as to costs is to be given in the final judgment or in the order which closes the proceedings.

60 At this stage of the proceedings, costs must therefore be reserved.

On those grounds,

THE PRESIDENT OF THE FOURTH CHAMBER OF THE COURT OF FIRST INSTANCE

hereby orders:

1. European Committee for Interoperable Systems is granted leave to intervene in Case T-201/04 in support of the form of order sought by the Commission.

2. European Committee for Interoperable Systems will be able to present its observations at the oral procedure, on the basis of the Report for the Hearing, which will be communicated to it.

3. Costs are reserved.

Luxembourg, 28 April 2005.

H. Jung	H. Legal
Registrar	President of the Fourth Chamber

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* Language of the case: English.

Case T-201/04 R

Microsoft Corp.

v

Commission of the European Communities

(Proceedings for interim relief – Article 82 EC)

Summary of the Order

1. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Prima facie case – Urgency – Cumulative nature – Need to weigh up all the interests involved – Discretion of the judge dealing with the application for interim relief*

   (Rules of Procedure of the Court of First Instance, Art. 104(2))

2. *Applications for interim measures – Interim orders – Duty to state reasons – Limits*

   (Rules of Procedure of the Court of First Instance, Art. 107(1))

3. *Applications for interim measures – Formal requirements – Submission of applications – Statement of the essential elements of fact and law in the application for interim relief itself and the documents annexed thereto – General reference to an annexed document, setting out the details of the argument – Not permissible*

   (Parts VII(1) and (2) of the Practice Directions)

4. *Applications for interim measures – Production during the proceedings, in order to respond to the arguments of another party, of documents predating the lodging of the application for interim relief – Lawfulness*

5. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Burden of proof*

6. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Obligation placed on an undertaking to issue licences affecting its intellectual property rights – Assessment on a case-by-case basis*

7. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Serious and irreparable damage – Obligation placed on an undertaking to disclose secret information – Not in itself serious damage – Burden of proof on the undertaking*

8. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Financial loss*

9. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Obligation placed on an undertaking in a dominant position to alter its business policy – Insufficient*

   (Art. 82 EC)

10. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Irreversible developments in market conditions –*

Included

11. *Applications for interim measures – Suspension of operation of a measure – Dismissal of application – Possibility of submitting another application – Condition – New facts*

    (Rules of Procedure of the Court of First Instance, Art. 109)

12. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Financial loss*

13. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage suffered by the applicant*

14. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Serious and irreparable damage – Interference with intellectual property rights – Assessment of actual situation*

1. Under Article 104(2) of the Rules of Procedure of the Court of First Instance, an application for interim relief must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim relief must be dismissed if any one of them is absent. Where appropriate, the judge hearing an application for interim relief must also weigh up the interests involved. In the context of that overall examination, the judge dealing with the application must exercise the broad discretion which he enjoys when determining the manner in which those various conditions are to be examined in the light of the specific circumstances of each case.

(see paras 71-72)

2. The judge dealing with an application for interim relief cannot be required to reply explicitly to all the points of fact and law raised in the course of the proceedings. In particular, it is sufficient that the reasons given by the judge dealing with the application at first instance validly justify his order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review.

(see para. 73)

3. Under Part VII(1) of the Practice Directions adopted by the Court of First Instance, an application for interim relief must be intelligible in itself, without necessitating reference to the application lodged in the main proceedings. It follows that the merits of such an application can be assessed only by reference to the elements of fact and law as they emerge from the application for interim relief itself and from the documents annexed to that application and intended to illustrate its content. While it cannot be concluded that every assertion based on a document that is not annexed to the application for interim relief must necessarily be excluded from the proceedings, evidence to support such an assertion cannot however be regarded as having been adduced if the assertion in question is challenged by the other party to the proceedings or by a party intervening in support of that other party. While an application may be supported and supplemented on specific points by references to particular passages in documents which are annexed to it, a general reference to other documents, even if they are annexed to the application for interim relief, cannot make up for the absence of essential elements in that application. In this regard, Part VII(2) of the Practice Directions, which requires that the pleas of fact and law on which the main action is based (establishing a prima facie case on the merits in that action) be stated with the utmost concision, cannot, without circumventing that rule, be construed as permitting the general reference to an annexed document setting out the details of the argument.

(see paras 86-88, 97)

4. In interim proceedings, a party cannot be criticised for having produced documents only in the course of the proceedings, provided that it did so in order to support its observations in response to the arguments put forward by the opposing party or by the interveners in their pleadings, little significance attaching in this regard to the fact that the document annexed bears a date prior to that on which the application for interim relief was lodged or that it is identical or comparable to a document annexed to the main application.

(see para. 93)

5. The urgency of an application for interim relief must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind. The alleged damage must be certain or at least established with sufficient probability, while the applicant is required to prove the facts forming the basis of the supposed damage.

(see paras 240-241, 427)

6. To take the view that a breach of the exclusive prerogatives of the holder of an intellectual property right constitutes in itself, and irrespective of the circumstances particular to each case, serious and irreparable damage, would mean that the urgency requirement of a suspension of operation is always satisfied when an undertaking is obliged by a Commission decision to issue licences affecting such rights. In such circumstances, the judge hearing an application for interim relief must therefore examine whether, in the light of the elements of the case, the fact that those rights will be affected until a decision has been given on the merits of the case is likely to cause, over and above the simple breach of the exclusive prerogatives of the holder of the rights in question, serious and irreparable damage.

(see paras 248, 250-251)

7. While it is an indisputable fact that, once acquired, knowledge of information previously kept secret – whether because it is the subject of an intellectual property right or because it constitutes a trade secret – may be retained, that annulment of the Commission decision ordering such disclosure would therefore not delete the knowledge of that information from memories and that compensation would be very difficult as the value of the transfer of knowledge would be difficult to quantify, it is none the less for the undertaking seeking a stay of enforcement of such a decision to show what irreparable damage might be caused to it by the simple fact that third parties had knowledge of data disclosed by it, as opposed to the developments resulting from the use of that knowledge. Nor does the disclosure of information previously kept secret necessarily mean that serious damage will occur.

(see paras 253-254)

8. The serious nature of the financial damage on which an undertaking relies in order to justify the urgency of the suspension of operation which it seeks before the judge dealing with the application for interim measures must be assessed by reference to its financial power.

(see para. 257)

9. In principle, any decision taken under Article 82 EC and requiring a dominant undertaking to bring an abuse to an end necessarily entails a change in its business policy. The obligation imposed on an undertaking to alter its conduct cannot therefore be regarded as constituting serious and irreparable damage in itself, short of considering that the urgency requirement is always satisfied when the decision whose suspension is sought orders the addressee to bring abusive conduct to an end. Where an applicant invokes an interference with its business freedom to demonstrate that the interim measure applied for must be ordered as a matter of urgency, it must adduce evidence either that implementation of the contested measure will oblige it to alter certain essential elements of its business policy and that, even after judgment in its favour has been given in the main proceedings, the effects of the implementation of that measure will prevent it from resuming its initial business policy, or that those effects will cause it serious and irreparable damage of another kind, it being borne in mind that it is in the light of the circumstances of each case that the alleged damage must be assessed. Thus the judge dealing with the application for interim measures must assess the consequences of the interference with the undertakings' freedom to define their business policies in the light of the effects of the implementation of the measure.

(see paras 291-293, 409)

10. It cannot be precluded that disclosure of the information relating to the interoperability of a product with competitors' products which an undertaking in a dominant position is ordered by a Commission decision to effect might alter market conditions in such a way that that undertaking would not only lose market share but also, should the decision be annulled, would no longer be able to regain the market share lost and, accordingly, that such an obligation might be considered to be serious and irreparable harm permitting the undertaking concerned to seek, by way of provisional measure,

suspension of operation of the decision. However, it is for the undertaking concerned to adduce any factual evidence to support its argument, in particular by demonstrating that there would be obstacles preventing it from regaining a significant part of the share which it could have lost as a result of the remedy.

(see para. 319)

11. Under Article 109 of the Rules of Procedure of the Court of First Instance, rejection of an application for an interim measure does not bar the party who made it from making a further application on the basis of new facts. In the present case, it cannot be ruled out that a continuing disagreement as to details of the means of implementation of the impugned decision might be regarded as a 'new fact'.

(see para. 325)

12. Damage which would essentially consist of additional development costs for the applicant and which, therefore, in the absence of proof to the contrary, would constitute financial damage, does not, save in exceptional circumstances, constitute irreparable damage.

(see paras 413, 435)

13. The urgency of an application for interim relief must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures. Consequently, in so far as damage may be caused to third parties, it cannot be taken into account under the head of urgency, unless it is shown that the damage would, conversely, cause damage to the party seeking the measure.

(see para. 416)

14. The mere fact that a Commission decision may to a certain extent affect intellectual property rights is, in the absence of explanations to the contrary, insufficient to support the conclusion that there is serious and irreparable damage, at least independently of the actual effects of such interference.

(see para. 473)

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
22 December 2004 (1)

(Proceedings for interim relief – Article 82 EC)

In Case T-201/04 R,

Microsoft Corporation, established in Redmond, Washington (United States of America), represented by J.–F. Bellis, lawyer, and I.S. Forrester QC,

applicant,

supported by

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace, Illinois (United States of America), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

Association for Competitive Technology, Inc., established in Washington, DC (United States of America), represented by L. Ruessmann and P. Hecker, lawyers,

TeamSystem SpA, established in Pesaro (Italy),

Mamut ASA, established in Oslo (Norway),

represented by G. Berrisch, lawyer,

DMDsecure.com BV, established in Amsterdam (Netherlands),

MPS Broadband AB, established in Stockholm (Sweden),

Pace Micro Technology plc, established in Shipley, West Yorkshire (United Kingdom),

Quantel Ltd, established in Newbury, Berkshire (United Kingdom),

Tandberg Television Ltd, established in Southampton, Hampshire (United Kingdom),

represented by J. Bourgeois, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H. Brokelmann and R. Allendesalazar Corcho, lawyers,

interveners,

v

Commission of the European Communities, represented by R. Wainwright, W. Mölls, F. Castillo de la Torre and P. Hellström, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

RealNetworks, Inc., established in Seattle, Washington (United States of America), represented by A. Winckler, M. Dolmans and T. Graf, lawyers,

Software & Information Industry Association, established in Washington, DC, represented by C.A. Simpson, Solicitor,

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

interveners,

APPLICATION for suspension of the operation of Articles 4, 5(a) to (c) and 6(a) of Commission Decision C (2004) 900 final of 24 March 2004 relating to a proceeding under Article 82 EC (Case COMP/C 3/37.792 – Microsoft),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

The background to the dispute

1 Microsoft Corporation ('Microsoft') develops and markets a variety of software products, including, in particular, operating systems for servers and 'client PCs'.

2 On 10 December 1998, Sun Microsystems Inc. ('Sun Microsystems'), a company established in California (United States of America) which supplies inter alia server operating systems, lodged a complaint with the Commission. In its complaint, Sun Microsystems criticised Microsoft's refusal to disclose to it the technology necessary to allow interoperability of its work group server operating system with the Windows Client PC operating system. Sun Microsystems claimed that the technology which it requested was necessary to allow it to compete on the work group server operating system market.

3 On 2 August 2000, the Commission sent Microsoft a statement of objections. That statement of objections related essentially to certain issues concerning interoperability between Windows Client PC operating systems and the server operating systems of other suppliers ('client-to-server interoperability'). Microsoft replied to that first statement of objections on 17 November 2000.

4 On 29 August 2001, the Commission sent Microsoft a second statement of objections, in which it repeated its previous objections concerning client-to-server interoperability. It also raised a number of issues concerning interoperability between work group servers ('server-to-server interoperability'). Finally, the Commission raised certain issues relating to the integration of the Windows Media Player software in the Windows operating system. Notification of this latter objection resulted from an investigation launched in February 2000 at the Commission's initiative. Microsoft replied to the second statement of objections on 16 November 2001.

5 On 6 August 2003, the Commission sent Microsoft a statement of objections designed to supplement the two previous statements of objections. Microsoft replied to this supplementary statement of objections by letters of 17 and 31 October 2003.

6 A hearing was held by the Commission on 12, 13 and 14 November 2003. By letter of 1 December 2003, Microsoft lodged written observations on the issues which had been raised during the hearing by the Commission, the complainant and interested third parties. Following a final exchange of correspondence between the Commission and Microsoft, the Commission adopted, on 24 March

2004, a decision relating to a proceeding under Article 82 EC in Case COMP/C–3/37.792 – Microsoft ('the Decision').

The Decision

7 According to the Decision, Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area ('EEA') by reason of two abuses of a dominant position.

8 The Commission first identified three distinct product markets and found that Microsoft had a dominant position on two of them. The Commission then identified two types of abusive conduct by Microsoft on those markets. Consequently, the Commission imposed a fine and a number of remedies on Microsoft.

I – *The relevant markets identified in the Decision and Microsoft's dominant position on two of those markets*

A – *The relevant markets identified in the Decision*

9 The first product market identified in the Decision is the client PC operating system market (recitals 324 to 342). An operating system is a software product which controls the basic functions of a computer and allows the user to use the computer and to run applications on it. Client PCs are multifunctional computers designed to be used by one person at a time and may be linked to a network.

10 The second product market identified in the Decision is the work group server operating system market (recitals 343 to 401). The Decision defines 'work group services' as the basic network infrastructure services used by office workers in their day-to-day work for three sets of distinct services, namely sharing files stored on servers, sharing printers, and the 'administration' of the manner in which users and groups of users can access network services ('group and user administration') (recital 53). This latter set of services consists in particular in ensuring that users can access and use the network resources securely, by, inter alia, first authenticating users and then checking that they are authorised to perform a given action (recital 54).

11 According to the Decision, the three sets of services identified in the preceding paragraph are closely interrelated within server operating systems (recital 56). The Decision adds in that regard that 'work group server operating systems' are operating systems designed and marketed to deliver those three sets of services collectively to a relatively small number of client PCs linked together in a small to medium-sized network (recitals 53 and 345 to 368). The Decision also states that the absence of demand-side substitutable products is confirmed by Microsoft's pricing strategy (recitals 369 to 382) and by the importance of the interoperability of work group server operating systems with client PCs (recitals 383 to 386). Having, moreover, established that the existence of supply-side substitutable products was limited for work group server operating systems (recitals 388 to 400), the Commission concluded that those operating systems form a distinct product market.

12 The third market identified in the Decision is the streaming media players market (recitals 402 to 425). A media player is a software product capable of reading sound and image content in digital format, i.e. of decoding the corresponding data and translating them into instructions for hardware (loudspeakers, screen). Streaming media players are capable of reading content 'streamed' over the Internet.

13 In the Decision, the Commission found, first, that a streaming media player is a product distinct from an operating system (recitals 404 to 406), second, that such products are under no competitive pressure from non-streaming players (recitals 407 to 410), third, that only media players with similar functionalities exert competitive constraints on Windows Media Player (recitals 411 to 415), and, fourth, essentially, that the presence of supply-side substitutable products is limited (recitals 416 to 424). The Commission concluded from those factors that streaming media players constitute a distinct product market.

14 As regards the geographic dimension of the three product markets previously identified, the Commission found that the relevant geographic market was world-wide (recital 427).

B – *Microsoft's dominant position on the client PC operating system market and on the work group* *server operating system market*

15 First, on the client PC operating system market, the Commission found that Microsoft has, at least since 1996, held a dominant position by virtue, inter alia, of the fact that it holds market shares in excess of 90% (recitals 430 to 435), and of the very significant barriers to entry attributable to indirect network effects (see, in particular, recitals 448 to 452). The Commission states in the Decision that those indirect network effects are attributable to two factors: (i) the fact that end consumers appreciate platforms on which they can use a large number of applications and (ii) the fact that software designers develop applications for the PC operating systems that are most popular with consumers.

16 Second, on the work group server operating system market, the Commission found that, at a conservative estimate, Microsoft's share of that market is at least 60% (recitals 473 to 499).

17 The Commission also evaluated the position of Microsoft's three main competitors on that market. First, it found that Novell, with its NetWare software, held a market share of between 10% and 15%. Second, Linux products accounted for a market share of between 5% and 15%. Linux is a 'free' operating system distributed under a GNU General Public Licence ('GNU GPL'). According to recital 87 to the Decision, Linux provides a limited set of core tasks of an operating system but may be combined with other software to form a 'Linux operating system'. Linux is present on the work group server operating system market in association with Samba software, which is also distributed under a 'GNU GPL' licence (recitals 294, 506 and 598). Third, UNIX products, which comprise several operating systems sharing certain common features (recital 42), account for a market share in the order of 5% to 15%.

18 The Commission then found that the work group server operating system market is characterised by the existence of numerous barriers to entry (recitals 515 to 525) and by particular links to the client PC operating system market (recitals 526 to 540). The Commission concluded that Microsoft holds a dominant position on the work group server operating system market.

II – *Types of abusive conduct identified in the Decision*

A – *Refusal identified in the Decision*

19 The first type of abusive conduct by Microsoft, described at recitals 546 to 791 to the Decision, consists in Microsoft's refusal to provide its competitors with 'interoperability information' and to allow its use for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating system market from October 1998 until the date of the Decision (Article 2(a) of the Decision). For the purpose of the Decision, 'interoperability information' means 'the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and … used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks' (Article 1(1) of the Decision). 'Protocols' are defined as 'a set of rules of interconnection and interaction between various instances of Windows Work Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network' (Article 1(2) of the Decision).

20 For the purpose of identifying such conduct, the Decision emphasises in particular that the refusal in issue does not relate to elements of Microsoft's source code but solely to specifications for the protocols in question, a specification being a description of what is expected from the software in question, in contrast to 'implementations' (also referred to, for purposes of the present order, as 'realisations'), constituted by the running of the code on the computer (recitals 24 and 569). The Commission also found that Microsoft's conduct was part of a general pattern of conduct (recitals 573 to 577), that it involved a disruption from previous levels of supply (recitals 578 to 584), that it created a risk that competition might be eliminated (recitals 585 to 692), and that it had a negative effect on technical development, to the prejudice of consumers (recitals 693 to 708). The Commission also rejected Microsoft's arguments that there was objective justification for its refusal (recitals 709 to 778).

B – *Tying identified in the Decision*

21 The Commission identified a second type of abusive conduct on Microsoft's part, which is described at recitals 792 to 989 to the Decision. According to the Commission, that conduct consisted in the

fact that Microsoft made the availability of the Windows Client PC operating system conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of the Decision (Article 2(b) of the Decision).

22 In that regard, the Commission found that Microsoft's conduct satisfied the conditions for a finding that there had been abusive tying for the purposes of Article 82 EC (recitals 794 to 954). First, according to the Decision, Microsoft has a dominant position on the market for client PC operating systems (recital 799). Second, streaming media players and client PC operating systems are regarded in the Decision as being two separate products (recitals 800 to 825). Third, Microsoft does not make it possible for consumers to buy Windows without Windows Media Player (recitals 826 to 834). Fourth, the tying which the Commission had identified affects competition in the market for media players (recitals 835 to 954).

23 In ascertaining whether that fourth condition was satisfied, the Commission pointed out that in classical tying cases the Commission and the Community judicature 'considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product' (recital 841). The Commission, however, considered in the Decision that, as users to a certain extent obtained media players in competition with Windows Media Player through the Internet, sometimes free of charge, there were in the present case good reasons not to assume without further analysis that tying Windows Media Player constituted conduct which by its very nature was liable to foreclose competition (recital 841).

24 In the context of that further analysis, the Commission found, first, that the tying in question afforded Windows Media Player ubiquity on client PCs world-wide which could not be affected by alternative distribution channels (recitals 843 to 877), second, that that ubiquity gave content providers an incentive to distribute their content in Windows Media formats and software developers an incentive to develop their products in such a way as to rely on certain functionalities of Windows Media Player (recitals 879 to 896), third, that that ubiquity affected certain related markets (recitals 897 to 899) and, finally, fourth, that the available market studies invariably pointed to a tendency in favour of the use of Windows Media Player and Windows Media formats to the detriment of its main competitors (recitals 900 to 944). From those various considerations, the Commission concluded that there was a reasonable likelihood that the tying in question would lead to a lessening of competition so that the maintenance of an effective competition structure would no longer be ensured in the foreseeable future (recital 984).

25 Finally, the Commission rejected Microsoft's arguments, first, that the tying in question resulted in increased efficiencies such as to offset the anti-competitive effects identified by the Commission (recitals 955 to 970) and, second, that it did not provide incentives to restrict competition (recitals 971 to 977).

III – *The remedies and fine imposed on Microsoft*

26 The two abuses which the Commission identified in the Decision were penalised by the imposition of a fine amounting to EUR 497 196 304 (Article 3 of the Decision).

27 Moreover, Microsoft was required, under Article 4 of the Decision, to bring to an end the abuses established in Article 2 in accordance with Articles 5 and 6 of the Decision. Microsoft is also required to refrain from repeating any act or conduct described in Article 2 and from any act or conduct having the same or equivalent object or effect.

28 By way of remedy for the abusive refusal identified in the Decision, Article 5 of the Decision orders Microsoft to act as follows:

'(a) Microsoft ... shall, within 120 days of the date of notification of this Decision, make the interoperability information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the interoperability information by such undertakings for the purpose of developing and distributing work group server operating system products;

(b) Microsoft ... shall ensure that the interoperability information made available is kept updated on an ongoing basis and in a timely manner;

(c) Microsoft ... shall, within 120 days of the date of notification of this Decision, set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the interoperability information; as regards this evaluation mechanism, Microsoft … may impose reasonable and non-discriminatory conditions to ensure that access to the interoperability information is granted for evaluation purposes only;

…'

29 The 120-day period referred to in Article 5 of the Decision expired on 27 July 2004.

30 By way of remedy for the abusive tying identified in the Decision, Article 6 of the Decision orders as follows:

'(a) Microsoft … shall, within 90 days of the date of notification of this Decision, offer a full-functioning version of the Windows Client PC operating system which does not incorporate Windows Media Player; Microsoft … retains the right to offer a bundle of the Windows Client PC operating system and Windows Media Player;

…'.

31 The 90-day period referred to in Article 6 of the Decision expired on 28 June 2004.

Proceedings for breach of United States antitrust law

32 Concurrently with the investigation conducted by the Commission, Microsoft was the subject of an investigation for breach of United States antitrust legislation.

33 In 1998, the United States of America and 20 Federal States brought proceedings against Microsoft under the Sherman Act. Their complaints related to the measures taken by Microsoft against Netscape's Internet browser 'Netscape Navigator' and Sun Microsystems' Java technologies. The 20 Federal States in question also brought actions against Microsoft for breach of their own antitrust laws.

34 After the United States Court of Appeals for the District of Columbia Circuit ('the Court of Appeals'), to which Microsoft had appealed against the judgment delivered on 3 April 2000 by the United States District Court for the District of Columbia ('the District Court'), delivered its judgment on 28 June 2001, Microsoft reached a settlement in November 2001 with the United States Department of Justice and the Attorneys General of nine States ('the United States Settlement'), under which Microsoft entered into two types of commitment.

35 First, Microsoft agreed to establish document specifications for the communications protocols used by Windows server operating systems in order to 'interoperate', i.e. render those systems compatible, with Windows Client PC operating systems, and to license those specifications to third parties on defined terms.

36 Second, the United States Settlement provided that Microsoft was to allow original equipment manufacturers ('OEMs') and end consumers to enable or remove access to its middleware products. The Windows Media Player software is one of the products belonging to that category, as defined in the United States Settlement. Those provisions are designed to ensure that middleware suppliers will be able to develop and distribute products which function correctly with Windows.

37 Those terms were approved on 1 November 2002 by the District Court, which also rejected the remedy proposals made by the nine States which had not accepted the United States Settlement.

38 Upon appeal by the State of Massachusetts, the Court of Appeals on 30 June 2004 upheld the District Court's decision.

39 In order to give effect to the United States Settlement, the Microsoft Communications Protocol Program ('the MCPP') was put in place in August 2002. According to the documents produced before the Court of First Instance, 17 licensees benefited from the MCPP between August 2002 and July 2004.

Procedure

40 By application lodged at the Registry of the Court of First Instance on 7 June 2004, Microsoft brought an action under the fourth paragraph of Article 230 EC for annulment of the Decision or, in the alternative, annulment of or a substantial reduction in the fine.

41 By separate document lodged at the Court Registry on 25 June 2004, Microsoft also applied under Article 242 EC for suspension of operation of Articles 4, 5(a) to (c) and 6(a) of the Decision. By that document Microsoft also sought, on the basis of Article 105(2) of the Court's Rules of Procedure, suspension of operation of those provisions pending a decision on the application for interim relief.

42 On the same date, the President of the Court of First Instance, in his capacity as judge dealing with the application for interim relief, requested the Commission to state whether it intended to enforce the Decision before an order had been made on the application for interim relief.

43 By letter received at the Court Registry on 25 June 2004, the Commission informed the President of its decision not to enforce Articles 5(a) to (c) and 6(a) of the Decision while the application for interim relief was pending.

44 By application lodged at the Court Registry on 25 June 2004, Novell Inc. ('Novell'), established in Waltham, Massachusetts (United States of America), represented by C. Thomas, M. Levitt and V. Harris, Solicitors, and A. Müller-Rappard, lawyer, requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.

45 By application lodged at the Court Registry on 30 June 2004, RealNetworks Inc. ('RealNetworks') requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.

46 By application lodged at the Court Registry on 30 June 2004, Computer & Communications Industry Association ('CCIA'), established in Washington, DC (United States of America), represented by J. Flynn QC, D. Paemen and N. Dodoo, lawyers, requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.

47 By application lodged at the Court Registry on 1 July 2004, Software & Information Industry Association ('SIIA') requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.

48 By application lodged at the Court Registry on 1 July 2004, The Computing Technology Industry Association Inc. ('CompTIA') requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.

49 By application lodged at the Court Registry on 2 July 2004, The Association for Competitive Technology ('ACT') requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.

50 By application lodged at the Court Registry on 5 July 2004, Digimpro Ltd, established in London (United Kingdom), TeamSystem SpA, Mamut ASA and CODA Group Holdings Ltd, established in Chippenham, Wiltshire (United Kingdom), requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.

51 By application lodged at the Court Registry on 5 July 2004, DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd and Tandberg Television Ltd (hereinafter referred to collectively as 'DMDsecure.com and Others') requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.

52 By application lodged at the Court Registry on 8 July 2004, IDE Nätverkskonsulterna AB, established in Stockholm (Sweden), Exor AB, T. Rogerson, residing in Harpenden, Hertfordshire (United Kingdom), P. Setka, residing in Sobeslav (Czech Republic), D. Tomicic, residing in Nuremberg (Germany), M. Valasek, residing in Karlovy Vary (Czech Republic), R. Rialdi, residing in Genoa (Italy), and B. Nati, residing in Paris (France), requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.

53 By application lodged on 13 July 2004, Free Software Foundation Europe ('FSF-Europe') requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.

54 In accordance with Article 116(1) of the Rules of Procedure, those applications for leave to intervene were served on the applicant and the defendant, which, depending on the case, either submitted their observations within the prescribed periods or did not submit any observations. By letters of 6 and 8 July 2004, Microsoft requested confidential treatment vis-à-vis such parties as should be granted leave to intervene for the data contained in the Decision which the Commission had accepted would not be made public in the version available on its Internet site.

55 The Commission submitted its written observations on the application for interim relief on 21 July 2004. Those observations were notified to Microsoft on the same date.

56 By order of 26 July 2004, the President of the Court of First Instance granted leave to intervene to CompTIA, ACT, TeamSystem SpA, Mamut ASA, DMDsecure.com and Others, Exor AB, Novell, RealNetworks, CCIA and SIIA and dismissed the applications for leave to intervene submitted by Digimpro Ltd, CODA Group Holdings Ltd, IDE Nätverkskonsulterna AB, T. Rogerson, P. Setka, D. Tomicic, M. Valasek, R. Rialdi and B. Nati. The President of the Court of First Instance also ordered that the non-confidential version of the procedural documents be forwarded to the interveners and reserved his decision on the merits of the request for confidential treatment.

57 On 27 July 2004, the President of the Court of First Instance, in his capacity as judge dealing with the application for interim relief, organised an informal meeting which, in addition to Microsoft and the Commission, the parties granted leave to intervene by the order of the President of the Court of First Instance of 26 July 2004 and also FSF-Europe were invited to attend. At that meeting the President provisionally granted leave to FSF-Europe to intervene in the interim relief proceedings in support of the form of order sought by the Commission and set out for the parties the timetable for the various procedural stages in the present interim relief proceedings.

58 By order of 6 September 2004, FSF-Europe was granted leave to intervene in support of the form of order sought by the Commission.

59 Each of the parties granted leave to intervene lodged its observations within the periods prescribed.

60 In accordance with what had been decided at the informal meeting on 27 July 2004, Microsoft replied on 19 August 2004 to the Commission's observations of 21 July 2004.

61 By application lodged on 31 August 2004, Audiobanner.com, trading as VideoBanner ('Videobanner'), established in Los Angeles, California (United States of America), represented by L. Alvisar Ceballos, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission. As neither of the two main parties objected to that application for leave to intervene, VideoBanner was provisionally granted leave to intervene and was requested to submit its observations directly at the hearing.

62 In reply to Microsoft's observations of 19 August 2004, the Commission lodged fresh observations on 13 September 2004.

63 The applicant and the defendant also lodged their written observations on the statements in intervention on 13 September 2004.

64 By way of measures of organisation of procedure, the President of the Court of First Instance, in his capacity as judge dealing with the application for interim relief, put written questions to Microsoft, the Commission and a number of the interveners. The replies given to those questions within the periods prescribed were notified to all of the parties.

65 All of the parties, including VideoBanner, presented oral argument at a hearing held on 30 September 2004 and 1 October 2004.

66 By letter of 8 October 2004, RealNetworks lodged at the Registry a number of additional details which the President had requested it to produce at the hearing. The other parties received notification of that letter and were invited to submit their observations on it.

67 By letter of 27 October 2004, Microsoft submitted observations on RealNetwork's letter of 8 October 2004. None of the other parties submitted observations.

68 By letters of 10 November and 19 November 2004 respectively, CCIA and Novell informed the Court that they were withdrawing their intervention in the present case. The Commission, Microsoft and the interveners submitted their observations on those withdrawals within the period prescribed.

69 Following the withdrawals of CCIA and Novell, an informal meeting was held on 25 November 2004 in the presence of all the parties in order to address certain procedural consequences of those withdrawals. The minutes of that meeting were forwarded to all the parties on 26 November 2004.

Law

70 Under the combined provisions of Articles 242 EC and 225(1) EC, the Court of First Instance may, if it considers that the circumstances so require, order that application of a contested act be suspended.

71 Article 104(2) of the Rules of Procedure provides that an application for interim relief must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim relief must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C‑268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I‑4971, paragraph 30). Where appropriate, the judge hearing an application for interim relief must also weigh up the interests involved (order of the President of the Court of Justice in Case C‑445/00 R *Austria* v *Council* [2001] ECR I‑1461, paragraph 73).

72 In the context of that overall examination, the judge dealing with the application must exercise the broad discretion which he enjoys when determining the manner in which those various conditions are to be examined in the light of the specific circumstances of each case (order of the President of the Court of Justice in Case C‑393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I‑441, paragraph 28).

73 Article 107(1) of the Rules of Procedure states that '[t]he decision on the application shall take the form of a reasoned order'. It has, however, been held that a judge dealing with an application for interim relief cannot be required to reply explicitly to all the points of fact and law raised in the course of the interim proceedings. In particular, it is sufficient that the reasons given by the judge dealing with the application at first instance validly justify his order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review (order in *SCK and FNK* v *Commission,* cited at paragraph 71 above, paragraph 52, and order of the President of the Court of Justice in Case C‑159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I‑4147, paragraph 70).

74 Because the abuses of a dominant position which Microsoft is alleged to have committed are mutually distinct, as may be seen, moreover, from both the structure of the Decision and the way in which Microsoft has marshalled its arguments, the President considers it appropriate to examine separately the arguments developed in support of the application for suspension of operation of Article 5(a) to (c) of the Decision, read with Article 4 of the Decision (the section dealing with the interoperability information issue), and the arguments developed in support of the application for suspension of operation of Article 6(a) of the Decision, also read with Article 4 (the section dealing with the issue of the tying of the Windows operating system and the Windows Media Player software). Before doing so, however, the President will consider the request for confidential treatment, VideoBanner's application for leave to intervene, the effects of the withdrawal of CCIA and Novell, and also whether the applicant complied with certain procedural requirements relating to the written submissions.

I – The request for confidential treatment

75 At the stage of the interim relief proceedings, it is appropriate to grant confidential treatment, vis-à-vis the parties granted leave to intervene, for the data contained in the Decision which the Commission has accepted should not be made public in the version available on its Internet site, since such information is prima facie liable to be regarded as being secret or confidential within the terms of Article 116(2) of the Rules of Procedure.

II – *VideoBanner's application for leave to intervene*

76 As noted at paragraph 61 above, VideoBanner lodged an application for leave to intervene in the interim-relief proceedings in support of the form of order sought by the Commission.

77 As that application was made in accordance with Article 115(2) of the Rules of Procedure and the main parties have not raised any objections, it must be granted, pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of the first paragraph of Article 53 thereof.

III – *The effects of the withdrawal of certain interveners*

78 As CCIA and Novell informed the Court that they were withdrawing their intervention in support of the form of order sought by the Commission in the interim relief proceedings, the President of the Court, in his capacity as judge dealing with the application, organised an informal meeting in the presence of all the parties to examine some procedural consequences of their withdrawal.

79 As is clear from the minutes of that meeting, the parties agreed, first, that the documents lodged by CCIA and Novell in the interim relief proceedings, including all annexes to their written submissions, and the arguments presented at the hearing should remain part of the file for purposes of the present interim relief proceedings; second, that all the parties should be able to rely on those matters for the purposes of their arguments and the President should be able to rely on them for his appraisal; and, third, that all the parties had had an opportunity to present argument in respect of all material placed on the file in the present case.

80 RealNetworks, moreover, submitted in its observations on CCIA's withdrawal that CCIA did not have the power to withdraw in the present case.

81 The President takes the view in this regard that it is not for him to examine RealNetworks' objection in so far as, first, he has no jurisdiction to adjudicate on whether the decisions of the Board of CCIA were taken in accordance with the provisions of its articles and, second, the application to withdraw was submitted by CCIA in accordance with the requirements laid down in the Rules of Procedure of the Court of First Instance.

IV – *Compliance with the procedural requirements governing the written documentation*

82 The Commission and a number of the parties intervening in support of the form of order which it is seeking have claimed, first, that certain references to documents annexed to Microsoft's main application are inadmissible; second, that certain documents produced by Microsoft in the course of the present proceedings are inadmissible; third, that there is no evidence to support a number of assertions; and, fourth, that the applicant has failed to comply with other procedural requirements.

A – *The references to the main application*

83 In its observations of 21 July 2004, the Commission listed the paragraphs of the application for interim relief which contain references to the main application and to the documents annexed to that application but not annexed to the application for interim relief (Annexes A.9, A.9.1, A.9.2., A.11, A.12.1, A.17, A.18, A.19, A.20, A.21, A.22 and A.24). The Commission concludes that Microsoft cannot effectively rely on those documents.

84 In its observations of 13 September 2004, the Commission added that the new references to the main application which Microsoft made in its observations of 19 August 2004, in particular with regard to the agreement of the World Trade Organisation (WTO) on the trade-related aspects of intellectual property rights ('the TRIPS Agreement') must, like the preceding ones, be excluded. To attach the corresponding sections of the main application as an annex (Annex T.9) to the observations does not allow the conclusion to be drawn that the application for interim relief is self-sufficient.

85 It must be borne in mind in this regard that, at the informal meeting held on 27 July 2004 (see paragraph 57 above), the President drew Microsoft's attention to the large number of references to the main application contained in the application for interim relief and questioned the applicant on that point. As recorded in the minutes of that meeting: '[Microsoft] confirmed that its application for interim measures should be seen as self-sufficient and that the multiple references made in its

application for interim measures to annexes to the application in the main case could be ignored for the purposes of the interim measures proceedings'.

86 That position is in accordance with Part VII(1) of the Practice Directions (OJ 2002 L 87, p. 48), which provides that an application for interim relief 'must be intelligible in itself, without necessitating reference to the application lodged in the main proceedings'.

87 It follows that the merits of Microsoft's application for interim relief can be assessed only by reference to the elements of fact and law as they emerge from the application for interim relief itself and from the documents annexed to that application and intended to illustrate its content (see, to that effect, the order of the President of the Court of First Instance in Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387, paragraph 52). While it cannot be concluded that every assertion based on a document that is not annexed to the application for interim relief must necessarily be excluded from the proceedings, the fact remains that evidence to support such an assertion cannot be regarded as having been adduced if the assertion in question is challenged by the other party to the proceedings or by a party intervening in support of that other party.

88 So far as the reference to Annex T.9 is concerned, it must be borne in mind that, while an application may be supported and supplemented on specific points by references to particular passages in documents which are annexed to it, a general reference to other documents, even if they are annexed to the application for interim relief, cannot make up for the absence of essential elements in that application (order in *Aden and Others* v *Council and Commission,* paragraph 87 above, paragraph 52). It is necessary to point out in this regard that Part VII(2) of the Practice Directions, which requires that 'the pleas of fact and law on which the main action is based (establishing a prima facie case on the merits in that action)' be stated 'with the utmost concision', cannot, without circumventing that rule, be construed as permitting the general reference to an annexed document setting out the details of the argument.

89 Without prejudice to the documents placed subsequently on the case-file and the oral submissions at the hearing before the President, the decision in the present proceedings will be taken without reference to either the annexes to the main application or Annex T.9.

B – *The production of documents in the course of the proceedings*

90 In its observations of 13 September 2004, the Commission maintains, first, that the arguments which Microsoft had put forward in its observations of 19 August 2004, in particular those relating to intellectual property rights set out in detail in two separate annexes (Annex T.3, entitled 'Prescott, Opinion', and Annex T.6, entitled 'Galloux, Opinion'), went beyond those set out in the main application. Nor was any explanation provided as to why Annex T.3, a document dated 3 June 2004, was not produced as an annex when the application for interim relief was made.

91 The Commission then states that Microsoft annexed to its observations of 19 August 2004 a document which it had annexed to the main application (Annex A.21, which became Annex T.5, Knauer, 'Aspects of Patent Law of the [Decision]', and a document the content of which appears to be similar to that of an annex to the main application (Annex T.8, Evans, Nichols and Padilla 'Economic Evidence on the Foreclosure Issues Raised by the Commission's Refusal to Supply and Tying Claims', similar to Annex A.19).

92 In their replies to the written questions put by the Court before their withdrawal, Novell and CCIA stated that certain documents are inadmissible inasmuch as they ought to have been produced along with the application for interim relief, whereas they were produced only subsequently (Annexes T.3, T.5, T.8 and U.2, Campbell-Kelly, 'Commentary on Innovation in Active Directory').

93 The President finds that documents T.3, T.5, T.6 and T.8 were annexed to Microsoft's observations of 19 August 2004 and that they are intended to support the content of those observations. Microsoft cannot therefore, in those circumstances, be criticised for having replied in detail to the arguments which the Commission had put forward in its observations of 21 July 2004; little significance attaches in this regard to the fact that the document annexed bears a date prior to that on which the application for interim relief was lodged or that it is identical or comparable to a document annexed to the main application. Likewise, for the same reasons, Microsoft could validly use Annex U.2 as a basis for its observations on the statements in intervention.

C – *The lack of evidence*

94 The Commission points out that Annex T.5 and Annex T.8 are based on information to which it has not had access (paragraph 4 of Annex T.5 refers to information received from Microsoft, without further specification; in the case of Annex T.8, the reports referred to in paragraph 6 thereof (prepared by Merrill Lynch and Forrester and dealing with server market data) are not attached, as is the case with regard to those referred to in footnote 35 (surveys conducted by Microsoft), footnotes 42 and 43 ('Digital Media Tracker Survey'), footnote 48 ('Analysis of Media Players Installed on PCs') and footnote 50 ('NERA submission')).

95 It is sufficient in this regard to point out that it is for the judge dealing with the application for interim relief to determine, as appropriate, whether the assertions based on the above reports and information are lacking in probative value.

D – *The failure to comply with certain other procedural requirements*

96 The Commission and CCIA, prior to its withdrawal, submit that Microsoft refers in its application for interim relief to Annex R.6 (Carboni, 'Trade Marks Opinion'), without explaining the relevance of the document in question, and that no account should therefore be taken of that annex.

97 As already pointed out at paragraph 88 above, the general reference to other documents, even if they are annexed to the application for interim relief, cannot make up for the absence of the essential elements in that application. In the present case, Annex R.6, to which the application for interim relief refers, is used to support an argument concerning the risk of harm to Microsoft's trade marks, which reads as follows: '[t]he immediate implementation of Article 6(a) of the Decision would also cause serious injury to the valuable Microsoft and Windows trademarks because Microsoft would be required to sell a downgraded product inconsistent with its basic design concept.' In so far as it is sufficiently clear from this phrase that Annex R.6 is intended to illustrate the risk identified, the President considers that that annex should not be excluded from the proceedings.

V – *Substance*

A – *The interoperability information issue*

1. Arguments of the parties

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

A prima facie case

98 Microsoft states that there is a serious dispute between it and the Commission regarding the compulsory licensing of its communications protocols, with the consequence that the requirement that it demonstrate a prima facie case as to the illegality of Article 5(a) to (c) of the Decision is satisfied.

99 Microsoft maintains that the four criteria which must be satisfied before an undertaking can be required to license its products, as defined by the Court of Justice in Case 238/87 *Volvo* [1988] ECR 6211, Joined Cases C-241/91 P and C–242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743 ('*Magill*'), C-7/97 *Bronner* [1998] ECR I-7791 and judgment of 29 April 2004 in Case C-418/01 *IMS Health*, not yet reported, are not satisfied in the present case.

100 First, the intellectual property that the Decision would require Microsoft to deliver to its competitors is not indispensable for the purposes of carrying on a business as a supplier of work group server operating systems.

101 First of all, Microsoft claims that there are five ways of achieving interoperability between operating systems supplied by different vendors, namely: (i) by using standard communications protocols such as TCP/IP (Transmission Control Protocol/Internet Protocol) and HTTP (HyperText Transfer Protocol); (ii) by adding software code to a Windows Client PC or server operating system to permit it to communicate with a non-Microsoft server operating system by using communications protocols specific to that server operating system; (iii) by adding a software code to a non-Microsoft server operating system to permit it to communicate with a Windows Client PC or server operating system

using communications protocols specific to Windows operating systems; (iv) by adding a block of software code to all of the client PC and server operating systems in a network in order to achieve interoperability by means of communications between those blocks of software code; and (v) by using a Windows server operating system as a 'bridge' between the Windows Client PC operating system and the non-Windows server operating system.

102 Next, Microsoft refers to the absence of customer complaints about the existing degree of interoperability.

103 Last, Microsoft refers to the continued presence of several competitors carrying on that business.

104 Second, Microsoft's refusal to make its intellectual property available to its competitors has not prevented the emergence of any new product for which there is unsatisfied consumer demand. No evidence of lack of satisfaction has been adduced. Nor has it been established that Microsoft's intellectual property will be used by its competitors to develop new products and not simply to replicate the functionality of existing Microsoft products.

105 Third, the fact that Microsoft has retained its technology for its own use has not had the effect of eliminating competition on a secondary market, since, as shown by the steady growth of Linux, there is substantial competition among vendors of work group server operating systems. Six years after Microsoft's alleged refusal to supply its technology, the market is therefore competitive.

106 Fourth, the refusal to license its technology to vendors of non-Microsoft server operating systems is objectively justified. Unlike the information protected by the national legislation then at issue which the companies involved had refused to disclose in *Magill* and *IMSHealth*, paragraph 99 above, the information protected in the present case relates to secret and valuable technology. In the present case, in order to arrive at the conclusion that the refusal to communicate information protected by intellectual property rights was not objectively justified and therefore constituted an infringement of Article 82 EC, the Commission applied an imprecise test which represented a marked departure from those recognised in previous case-law. Thus, the Commission itself considered that such a refusal constitutes an infringement of Article 82 EC if, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (recital 783). In addition to the fluid nature of that new test, it is not demonstrated, on the basis of evidence or analysis, that innovation in the sector would be spurred should Microsoft's technology be delivered to its competitors. Microsoft maintains, on the contrary, that a compulsory licence would reduce competition between server operating system vendors.

107 Microsoft further claims that Sun Microsystems did not request it to provide the technology which the Commission now orders it to disclose. Moreover, as no licence for the purpose of developing software in the EEA was ever requested by Sun Microsystems, Microsoft maintains that it was under no duty to regard Sun Microsystems' request as susceptible of leading it to adopt a course of conduct that might fall within the scope of Article 82 EC.

108 Last, by requiring Microsoft to license protected information, the Commission fails to take proper account of the obligations imposed on the Communities by the TRIPS Agreement (see paragraph 84 above).

109 In its observations of 19 August 2004, Microsoft submits that the Commission cannot validly maintain that the Decision does not impose new conduct on it but only has the effect of requiring it to revert to a business policy that it had initially pursued. Microsoft observes, first of all, that the Commission does not suggest that the information referred to in Article 5 of the Decision was supplied in the past. If the Commission was thus referring to the networking technology information licensed to AT&T in 1994 to permit the creation of a product called 'Advanced Server for UNIX' ('AS/U'), then the supply of that information has not been discontinued. The product called 'PC Net Link' developed by Sun Microsystems, to which AT&T licensed AS/U, is still available on the market today. Sun Microsystems still advertises PC Net Link as providing 'native Windows NT network services' – including file and print services and user and group administration services – on the Solaris server operating system. Sun Microsystems also claims that PC Net Link works well with Microsoft's latest Windows Client PC operating systems, including Windows 2000 Professional and Windows XP.

110 Nor can Microsoft be required to license its communications protocols in the future because it decided to license networking technology to AT&T in 1994. It was a term of the contract between

Microsoft and AT&T, moreover, that their business relationship would not be extended to new technologies.

111 Last, Microsoft states that competing vendors of server operating systems are not dependent on the interoperability information whose supply Microsoft is alleged to have interrupted. Novell has never used AS/U and has never expressed the slightest interest in doing so. Novell's NetWare supplies file and print services and user and group administration services to Windows operating systems using Novell's own suite of communications protocols. Linux vendors have no use for AS/U either. Their server operating systems supply file and print services and user and group administration services to Windows operating systems using the Samba open-source software product, which was developed by reverse engineering Microsoft's communications protocols.

Urgency

112 Microsoft contends that the immediate enforcement of Article 5(a) to (c) of the Decision would give rise to three types of serious and irreparable harm.

– Infringement of intellectual property rights

113 The Decision has the effect of requiring Microsoft to license valuable information protected by intellectual property rights. The resulting infringement of intellectual property rights constitutes serious and irreparable harm.

(i) Valuable information

114 Microsoft states that the communications protocols constitute a technology owned by Microsoft and used by Windows Client PC and server operating systems to exchange information with other copies of those operating systems, and that they have significant commercial value (report by S. Madnick and B. Meyer, 'Harm caused by forcing Microsoft to disclose all communications protocols used to provide "work group" services', in annex R.2 ('the Madnick & Meyer report')). Its communications protocols are the fruit of many years of very expensive research and development. Significant efforts were expended in designing communications protocols that provide useful functionality and enhance the speed, reliability, security and efficiency of interactions between Windows operating systems.

115 The specifications for the communications protocols, which are detailed descriptions of the design and operation of the communications protocols, would allow a competitor in possession of them to use Microsoft's communications protocols in its own server operating system.

116 In its observations of 19 August 2004, Microsoft claims that the compulsory licensing of specifications for communications protocols that enable multiple Windows server operating systems to function jointly in providing work group services would have the effect of disclosing a great deal of information about the internal design of Windows operating systems. As the Madnick & Meyer report shows, licensing the communications protocols that enable interaction between a number of Windows server operating systems would reveal extensive information about how the directory in those operating systems, called Active Directory, works.

(ii) Information protected by intellectual property rights

117 Microsoft's communications protocols and the specifications describing them are protected by intellectual property rights. In answer to an argument put forward by the Commission in its observations of 21 July 2004, Microsoft states, first, that a distinction must be drawn between protocol design, protocol specifications and protocol implementation and, second, that intellectual property protection is not limited to any one of those three categories.

Copyright protection

118 Communications protocols are protected by copyright under the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as last amended on 28 September 1979, and by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), by virtue of the preamble and Article 1(1). The specifications for those protocols are preparatory design material, which is also protected by copyright (opinion of Mr Prescott, annex T.3, referred to at paragraph 90 above).

119 Consequently, Microsoft, like any copyright owner, has the exclusive right to authorise publication of its protected works or to make them available to the public in any other form. The copyright laws of various Member States expressly authorise owners of protected works to determine whether those works will be published or disclosed in any form. The Decision deprives Microsoft of the right to decide in what form, to whom, when and on what conditions it wishes to make the specifications for its communications protocols available, if at all. The Commission cannot therefore recognise that the specifications for Microsoft's communications protocols are protected by copyright and at the same time maintain that the requirement imposed on Microsoft by the Decision to license those specifications does not infringe the very substance of that right.

120 The copyright owner also has the exclusive right to authorise the creation of derivative works, under both Article 12 of the Berne Convention and Article 4 of Directive 91/250. That exclusive right to authorise the creation of derivative works is infringed, since the implementation of the specifications for Microsoft's communications protocols by its competitors would almost certainly be an adaptation, or a translation, of those specifications which would fall within the ambit of copyright and could therefore not be regarded as a work developed independently. Furthermore, even on the assumption that the licensees were capable of implementing certain specifications without infringing Microsoft's copyright, the Decision does not require them to do so, since it requires Microsoft to 'allow the use' of the specifications for its communications protocols without setting a limit to the way in which the licensees will develop their creations. There is therefore no reason to believe that the licensees will confine themselves to developing applications that would not be unlawful, even on the assumption that it were possible to do so.

121 Last, Microsoft claims that, in the context of the United States Settlement, all the parties agreed that the specifications for its client-to-server communications protocols were protected by copyright.

Patent protection

122 In its application for interim measures, Microsoft states that certain of the communications protocols that the Commission requires it to provide are covered by patents or patent applications and that it intends to file, before June 2005, a large number of patent applications covering various aspects of the Windows Client PC and server operating systems covering the communications protocols referred to in the Decision. The fact that the effects of the Decision are not limited as to time means that future patents would be covered by the compulsory licensing requirement contained in the Decision.

123 In its observations of 19 August 2004, Microsoft identifies three existing European patents and two pending European patent applications covering the communications protocols subject to compulsory licensing. According to the opinion of Mr Knauer, annex T.5, referred to at paragraph 91 above, a number of communications protocols used by Windows server operating systems to provide file and print services and user and group administration services are covered by patents, namely (i) the DFS (Distributed File System) protocol, covered by Patent EP 0 661 652 B1; (ii) the SMB Protocol, covered by Patent EP 0 438 571 B1; and (iii) the Distributed Component Object Model Remote protocol, covered by Patent EP 0 669 020 B1. The patent applications relate to the Constraint Delegation and Active Directory Sites protocols.

124 In that context, Microsoft states that the Commission does not exclude patented technology from the remedy and requires that Microsoft license all its intellectual property rights relating to communications protocols, including every patent. Its competitors would thus have no reason to attempt to develop applications which did not use the patented methods.

Protection of trade secrets

125 Microsoft maintains that the communications protocols are trade secrets which have not been disclosed to third parties, unless they have undertaken to be bound by a contractual confidentiality obligation.

126 In answer to the Commission's observations of 21 July 2004 that, first, the legitimacy under competition law of a refusal to reveal a 'secret' whose existence is purely the consequence of a unilateral business decision should be dependent upon the interests at stake and, second, the damage caused to Microsoft by the requirement to reveal its trade secrets is less serious than the damage caused by the requirement that Microsoft allow reproduction of its copyrighted works or infringement of its patents, Microsoft contends that at the moment it can transfer its

communications protocols to third parties in exchange for financial consideration and can bring proceedings against those who unlawfully use those protocols (opinions of Mr Prescott and Mr Galloux, annexes T.3 and T.6, referred to at paragraph 90 above) and that, consequently, compulsory licensing will undermine the value of those assets. Nor can it be inferred from the judgment in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 84 and 139, that the Court of First Instance accepted that secret information in the form of specifications is not protected in the same way as other intellectual property, since the Court was not called upon to determine whether the specifications for cartons were protected trade secrets.

The necessity for the information

127 In its observations of 21 July 2004, the Commission asserts that the specifications for Microsoft's communications protocols constitute 'information necessary to achieve interoperability' within the meaning of Directive 91/250 and that, consequently, the compulsory licensing ordered by the Decision does not provide Microsoft's competitors with anything which they could not obtain by decompiling Windows server operating systems in accordance with the derogation in Article 6 of that directive.

128 However, Microsoft contends that that assertion is incorrect, for a number of reasons.

129 First, Article 6(2) of Directive 91/250 offers only a limited exception to the exclusive rights of the owner of a protected software program as set out in Article 4 of that directive. In certain well-defined circumstances, a 'legitimate user' is permitted to 'discover' interfaces in a protected software program by 'decompiling' the machine-readable code that exposes those interfaces. Such 'decompilation' is permitted only if the interfaces are indispensable to support functionality in an independently-created software program and have not been made available by the owner of the program. In the present case, apart from the fact that Microsoft states that it has already disclosed the interfaces that third-party software programs need in order to call upon the functionality of Windows server operating systems, the specifications for its communications protocols are not necessary to support functionality in an independently-created work group server operating system. On the contrary, the Decision requires Microsoft to allow competitors to create products providing the same file and print services and user and group administration services as Windows server operating systems provide by developing their own implementations of Microsoft's communications protocols. Thus, Microsoft is required to provide its competitors with valuable commercial information in circumstances in which they would have no right to decompile under Article 6(2) of Directive 91/250.

130 Second, Article 6 of Directive 91/250 allows information to be obtained by decompilation, but in paragraph 2 it places three strict limits on the use of that information, including a prohibition on using the information to create a program reproducing the decompiled program. However, the Decision contains no limit in that sense; on the contrary, it authorises licensees to develop applications which infringe Microsoft's copyright in its specifications for its communications protocols.

131 Third, the specifications are more valuable than the information that Microsoft's competitors could obtain through legitimate decompilation.

Serious and irreparable damage

132 Microsoft maintains, in the second place, that the disclosure of information protected by intellectual property rights would cause serious and irreparable harm.

133 By allowing Microsoft's competitors to use the communications protocols in order to provide server operating systems capable of replacing those supplied by Microsoft, Article 5(a) of the Decision deprives Microsoft of the competitive advantages which it has acquired through research and development. Intellectual property rights imply the right to choose whether or not to use the protected property and the way in which to use it. It has already been held that compulsory licensing undermines the 'fundamental rationale' of intellectual property, which 'affords the creator of inventive and original works the exclusive right to exploit such works' (order of the President of the Court of First Instance of 26 October 2001 in Case T-184/01 R *IMSHealth* v *Commission* [2001] ECR II-3193, paragraph 125). For that reason, the Court of First Instance has recognised that to require an undertaking to license its intellectual property, even on a 'purely temporary' basis, risks causing 'serious and irreparable damage' even when the information concerned is already in the public domain (ibid., paragraph 127).

134 The irreversible nature of the delivery of intellectual property is particularly obvious in the case of trade secrets. In the present case, the intellectual property relates to Microsoft's insights into the ways of accomplishing certain tasks that server operating systems need to perform, whether by themselves or in collaboration with client PC and server operating systems. Disclosure of those insights reveals knowledge that can never be erased from the memory of the recipients.

135 The compulsory licensing of copyrighted information also has irreversible effects on competition. By studying the specifications for copyrighted communications protocols, Microsoft's competitors will be able to obtain detailed knowledge of the inner workings of its operating systems and to use that knowledge in their own products. It will be impossible to determine subsequently that that knowledge is not being used by Microsoft's competitors.

136 The compulsory licensing of patents also causes irreparable harm. Admittedly, following annulment of the Decision, Microsoft would be able to bring proceedings against third parties in order to prevent them from using the patented technology, but it would be a particularly complicated and inefficient exercise to attempt to ascertain whether or not Microsoft's technology was still being used, and products created in the meantime and incorporating Microsoft's inventions would probably remain in distribution channels and in the hands of customers.

137 Although the Decision allows Microsoft to license its intellectual property on 'reasonable and non-discriminatory terms', which presumably implies payment of a royalty, the damage to its intellectual property rights would not be cured by the receipt of such a royalty (see, to that effect, the order in *IMS Health* v *Commission*, paragraph 133 above, paragraph 125).

– Interference with Microsoft's business freedom

138 Microsoft refers to the orders of the President of the Court of First Instance in Case T-41/96 R *Bayer* v *Commission* [1996] ECR II-381, paragraph 54, and *IMS Health* v *Commission*, paragraph 133 above (paragraph 130) and maintains that, as in the cases in which those orders were made, its ability to determine freely the crucial elements of its business policy would be compromised by the implementation of the Decision.

(iii) Freedom to communicate information

139 In the present case, it is not Microsoft's business policy to offer a general licence for its communications protocols. The licensing of its client-to-server protocols was agreed in the United States Settlement, but that settlement does not cover the licensing of its server-to-server communications protocols. By requiring Microsoft to deliver the specifications for its server-to-server communications protocols, most of which have never been drawn up, the Decision forces Microsoft to become a purveyor of technology to its competitors in the server operating system sector.

140 Microsoft then explains the differences between, on the one hand, the United States Settlement and the agreement with Sun Microsystems and, on the other hand, the Decision.

141 The United States Settlement provides for the licensing of client-to-server communications protocols for the sole purpose of ensuring interoperability with Windows client PC operating systems, unlike the Decision, which requires the licensing of the same protocols for use in work group server operating systems which provide file and print services and user and group administration services to any Windows Client PC or server operating system.

142 The settlement concluded with Sun Microsystems – the only complainant before the Commission – in April 2004 comprises a series of reciprocal agreements whereby the parties agreed to collaborate in product development and to conclude cross-licences, including licences covering the types of communications protocols concerned by the Decision. Microsoft emphasises that the cross-licences make provision for consideration in the form of access to Sun Microsystems' intellectual property and provide Sun Microsystems with an incentive to respect Microsoft's intellectual property in its licensed technology. The reciprocal nature of those agreements provides Microsoft with the consideration specifically lacking in the compulsory licensing ordered by the Decision.

(iv) Freedom to develop products

143 Microsoft maintains that implementation of the Decision would deprive it of its capacity to develop

its products. The compulsory licensing of its communications protocols would definitively compromise its freedom to decide how to develop its products. The future improvement of those protocols and, ultimately, Microsoft's capacity to innovate would be affected, as the Madnick & Meyer report shows. Once third-party products begin to depend on the design features of a Windows server operating system rather than calling upon its functionality through published interfaces, Microsoft's capacity to change those design features with the aim of improving the product will be reduced. The Commission's assertions to the contrary in its observations of 21 July 2004 ignore commercial reality. It is already an engineering challenge for Microsoft, in the context of successive releases of new Windows server operating systems, to maintain backward compatibility with the thousands of published interfaces used by third-party software programs. The task of adding new functionalities and improving the performance, security and reliability of existing functionality would be made considerably more difficult if third-party software programs were calling upon Windows functionality using what were formerly confidential protocols (Madnick & Meyer reports, annexes R.2 and T.7).

(v) The need to 'harden' the protocols

144 Private protocols are not designed to be used in unknown third-party software products. Consequently, the disclosure of a large number of private communications protocols might lead to malfunctions, crashes and security risks. Microsoft would then have to devote part of its resources to 'hardening' the protocols against inadvertent and malicious use, which often requires the addition of protective code or substantial additional testing before products using the communications protocols can be released. In that regard, the Decision irreversibly affects Microsoft's freedom to develop its products in whatever way it deems appropriate.

145 In its observations of 19 August 2004, Microsoft further states that providing competitors with specifications for communications protocols that were never intended for any purpose other than communicating between Windows server operating systems would expose customers to technical vulnerabilities. It refers on that point to the Madnick & Meyer reports, annexes R.2 and T.7. Such protocols make numerous assumptions about the internal workings of the server operating systems that jointly provide work group services. Consequently, they do not have the protective mechanisms which they would have if they had been designed to communicate with third-party software products. While it would be possible for Microsoft to 'harden' the implementations of its communications protocols in the future, there are millions of Windows server operating systems in customer networks using the protocols in their current state. It is not feasible to retrofit those products to protect them against improper use of the communications protocols, because adding the necessary protective mechanisms would require extensive changes to products already in use. Although the Commission derides what it refers to as 'security through obscurity' (annex S.2), customers would be unhappy to learn that disclosures ordered by the Commission made existing Windows server operating systems vulnerable to malfunction (Madnick & Meyer report, annex T.7). The protocols are complicated and the chances of a mistake in implementing them in another work group server operating system are high. Such a mistake could lead to significant data loss and data corruption, with concomitant harm to Microsoft and its customers. Needless to say, customers take data loss and corruption seriously and Microsoft would suffer serious harm, in particular to its reputation, if the existing base of Windows server operating systems were placed at risk by the incorrect use of Microsoft's communications protocols. The Commission suggests that 'any harm would be reversible … once the Decision is annulled'. However, annulment could not restore lost or corrupted data, nor would it restore Microsoft's good name.

– Irreversible change in market conditions

146 Microsoft maintains that compulsory licensing would irremediably change prevailing market conditions to its disadvantage. It is apparent that the Commission sought to bring about that change: recital 695 to the Decision states that '[i]f Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture'.

147 In order to demonstrate the irreversible change that will occur on the market, Microsoft claims that examination of the detailed specifications for communications protocols which it owns, made possible by compulsory licensing, will reveal to competitors important aspects of the design of Windows server operating systems. As explained in the Madnick & Meyer report, the specifications for formerly private communications protocols would be particularly likely to reveal information about the internal design of operating systems because those protocols are often dependent on their specific implementation in software code. The use of such communications protocols by third

parties would therefore entail specifying many details, although those details remain implicit when the protocols are used privately by different copies of the same operating system running on different servers.

148 The large-scale disclosure of such information would enable Microsoft's competitors to reproduce in their server operating systems a range of functionality that Microsoft has developed through its own research and development efforts. The resulting damage to Microsoft would extend beyond the scope of the compulsory disclosure, beyond the work group server operating system market and indeed beyond the geographic scope of a compulsory licence.

The balance of interests

149 Microsoft maintains, first, that the Communities' interest in imposing an effective remedy does not require the immediate implementation of Article 5(a) to (c) of the Decision.

150 First of all, as the purpose of Article 82 EC is 'to safeguard the interests of consumers, rather than to protect the position of particular competitors' (order in *IMS Health* v *Commission*, paragraph 133 above, paragraph 145), significant weight should be given to the absence of harm to consumers. In the present case, customers benefit from various interoperability solutions. Thus, in five years of proceedings before the Commission, not a single undertaking stated that it wanted to choose a non-Windows server operating system but was forced by interoperability concerns to choose a Windows server operating system.

151 Next, the implementation of the remedy provided for in Article 5 of the Decision is unnecessary, since Microsoft's competitors have no urgent need for access to its communications protocols. Furthermore, in Microsoft's submission, the Commission itself does not claim that competition between vendors of work group server operating systems would disappear in the short term should Article 5 of the Decision be suspended.

152 On that point, Microsoft claims that its competitors' products are competitive at present and provides various studies and projections concerning Linux, UNIX and Novell in support of that contention.

153 Microsoft further submits that the Commission has not established a link between the remedy provided for in Article 5 of the Decision and any request formulated by suppliers of work group server operating systems. Neither Sun Microsystems, Novell nor Free Software Foundation/Samba have asked Microsoft to licence its communications protocols.

154 The advantage which those competitors may derive from being able to discover how Microsoft has addressed certain issues in the design of server operating systems cannot prevail over Microsoft's legitimate interest in protecting its own technology. When the interests are weighed up, the public interest in maintaining effective competition must clearly take precedence over the interests of Microsoft's competitors alone.

155 The risk that competing server operating systems suppliers might exit the market should the effects of Article 5 of the Decision be suspended does not exist. Microsoft's competitors have been licensing their server operating systems to enterprise customers for many years without providing access to the specifications for the communications protocols that the Decision would require Microsoft to deliver to them. In support of its analysis, Microsoft provides various data relating to certain of its competitors on the market in question.

156 Last, Microsoft contends that it cannot be maintained that the implementation of the Decision is urgent, since the administrative procedure, during which the Commission's assessment of the situation constantly changed, lasted five years.

157 Second, in the exercise consisting in balancing the interests, account should be taken of the Communities' obligations under international treaties, including the TRIPS Agreement, and also of the merits of the main action. On that last aspect, Microsoft submits, in reliance on the order of the President of the Court of Justice of 11 April 2002 in Case C-481/01 P(R) *NDC Health* v *IMS Health and Commission* [2002] ECR I-3401, that the merits of its main action must be taken into account in the balancing of interests. In the present case, it is particularly clear that the Commission has not established that the criteria laid down in the case-law (judgment in *IMS Health*, paragraph 99 above) which permit an undertaking in a dominant position to be compelled to grant licences to its

competitors were satisfied.

158 Third, and last, Microsoft states that since the adoption of the Decision Sun Microsystems has reached an agreement with Microsoft which addresses all the concerns underlying its complaint to the Commission. There is therefore no immediate need to implement the Decision while the main action is pending.

159 ACT claims that unless the remedy is suspended it will produce serious and irreparable effects owing to the damage to the strength and value of its members' intellectual property rights in the EEA.

160 More specifically, ACT maintains, first, that the immediate applicability of the remedy would constitute a groundbreaking precedent in the compulsory licensing of intellectual property rights which would quickly and substantially reduce the value of the intellectual property rights owned by its members. In that regard, ACT claims that the Commission has interpreted and applied Article 82 EC in a way that is inconsistent with the Community's obligations under Articles 13, 31 and 39 of the TRIPS Agreement.

161 ACT maintains, second, that disclosure of the communications protocols which have thus far been the exclusive property of Microsoft would result in the instability of Windows Client PC and server operating systems, which would immediately cause significant harm for its members.

162 CompTIA submits that, in so far as it requires Microsoft to supply its intellectual property to any undertaking present on the servers market, the remedy provided for in Article 5 of the Decision will reduce the level of protection for the entire information technology and communications industry, give rise to legal uncertainty and have the immediate effect of reducing investment in the technology sector and therefore the general level of economic activity.

163 CompTIA further contends that the serious and irreparable damage which that remedy will cause to the entire sector, and also to the members of CompTIA, exceeds any possible adverse effect which the lack of immediate disclosure could have on the public interest or the interest of third parties. In that context, CompTIA states that no evidence has been brought to its attention of an interoperability problem on the servers market, even though it plays a greater role than any other trade association in certifying the qualifications of technology industry workers in the servers sector.

b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

164 The Commission contends, by way of preliminary submission, that the application for suspension of implementation of Article 5(a) to (c) of the Decision relies to a large extent on the assessment of the impact which the Decision is supposed to have on the exercise of Microsoft's 'intellectual property rights'; it makes a number of introductory observations in that regard. In its observations of 13 September 2004, the Commission states that even on the assumption that Microsoft has expressly shown that the Decision would force it to license its intellectual property rights, the Commission's argument would remain just as valid. FSF-Europe supports the Commission's argument.

Preliminary observations

165 First of all, the Commission states that Article 5(a) to (c) of the Decision requires Microsoft to provide technical documentation, called 'specifications', which describes in detail the 'protocols' referred to in Article 1(1) of the Decision. However, it is important to distinguish that technical documentation from the source code of Microsoft's products. A competitor wishing to write a server operating system that understands Microsoft's protocols will have to write code in its product that implements the specifications. Two programmers implementing the same protocol specifications will not write the same source code and the performances of their programmes will be different (recitals 24, 25, 698 and 719 to 722). From that aspect, the protocols may be compared with a language whose syntax and vocabulary are the specifications, since the mere fact that two persons learn the syntax and the vocabulary of the same language does not mean that they will use it in the same way.

166 Next, against that background, the Commission examines the various intellectual property rights on which Microsoft relies.

– Copyright

167 As regards, first, copyright, the Commission maintains that Microsoft's contentions are inaccurate, if not misleading. Microsoft wrongly gives the impression that the use of interoperability information in order to make interoperability effective normally constitutes breach of copyright. Microsoft is also wrong to state that copyright protection extends to the communications protocols and to rely on copyright in the 'specifications' to support its contention that the use of the knowledge contained in those specifications constitutes breach of copyright.

168 Although the Commission does not rule out the possibility that those specifications may, as such, be covered by copyright, it maintains that that does not mean that the use of the information contained in that document, in the form of implementation in an operating system, constitutes a breach of copyright, since, as the Decision states, implementation of a specification does not constitute copying, but leads to a clearly distinct work (recitals 25, 570 et seq. and 719 et seq.)

169 In its observations of 13 September 2004, the Commission maintains, essentially, that implementation of the communications protocols does not constitute a form of exploitation prohibited by copyright.

170 From the many comments made by the Commission on Microsoft's observations of 19 August 2004, it is appropriate to mention the answers made more specifically to five categories of arguments.

171 First, the Commission states that Microsoft relied for the first time in its observations of 19 August 2004 on a right of 'disclosure' (paragraph 119 above). The Commission observes that Article 6bis of the Berne Convention, which sets out the 'moral rights' of the copyright owner, does not mention that right and that, accordingly, an obstacle to the exercise of that alleged right cannot be contrary to the 'normal exploitation of the computer program' as defined in Article 6(3) of Directive 91/250, since that provision provides that that exploitation must be interpreted 'in accordance with the provisions of the Berne Convention'. At most, the right of disclosure is a 'moral right' which cannot be licensed. Furthermore, reliance on a right of disclosure is difficult to reconcile with the fact that Microsoft's products are on the market, that persons are able to observe, study or test them and, under certain circumstances, to decompile them. Last, Microsoft's reasons for refusing disclosure of the information concerned are purely economic and therefore have nothing to do with the rationale of the right in question.

172 Second, the Commission disputes that the technical documentation which will have to be disclosed can be regarded as a 'computer program' protected by Directive 91/250, on the ground that it constitutes 'preparatory design material' for a computer program (paragraph 118 above). The information in question is not composed ex ante as an internal aid to the creation of Microsoft's programs but written ex post for the sole purpose of disclosing only limited information to Microsoft's competitors.

173 In response to Microsoft's assertion, based on Article 4 of Directive 91/250, that implementation of the protocols in question would 'almost certainly' be an adaptation or translation of the specifications covered by Microsoft's copyright (paragraph 120 above), the Commission states that the applicant fails to substantiate that assertion. The text of Directive 91/250 and its legislative history lead to the conclusion that writing interfacing software on the basis of interface specifications is not normally covered by Article 4 of that directive. Article 6 of Directive 91/250 is based on the premiss that the use of interoperability information, extracted by decompilation – which is 'exempted' – in order to 'achieve the interoperability of an independently created computer program with other programs' is not an act in breach of copyright, unless the information is 'used for the development, production or marketing of a computer program substantially similar in its expression' to the decompiled program. If Microsoft were correct, Article 6 of Directive 91/250 could never be invoked to build compatible products, since the creation of those products would be an 'act which infringes copyright' and therefore prohibited by Article 6(2)(c).

174 Third, the Commission refutes the restrictive interpretation by Mr Prescott (Annex T.3) of Article 1 (2) of Directive 91/250, which provides that '[i]deas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright'. Mr Prescott's argument that the whole, or the structure, of the 'ideas' in question is protected by copyright where they form a 'substantial part of the protected work' is flawed because, first, it is not consistent with Article 1(2) and Article 6 of Directive 91/250 and, second, the judgments of the English courts on which he bases his analysis have nothing to do with the present case.

175 Fourth, as regards Microsoft's arguments, referred to at paragraph 120 above, which suggest, first of all, that the remedy would lead to a particular 'temptation', as it were, for Microsoft's competitors to develop implementations which infringed its copyright and, next, that the Decision makes no provision for any safeguard against such 'temptation', the Commission states that the remedy does not require disclosure of the source code and that, consequently, the prohibition in Article 6(2) of Directive 91/250 on using the information obtained by decompilation 'for the development, production or marketing of a computer program substantially similar in its expression' is not applicable.

176 Fifth, the Commission maintains that, contrary to Microsoft's contention (paragraph 129 above), Microsoft has not disclosed the interfaces that third-party software programs need to call upon the functionality of Windows server operating systems. The interfaces to which Microsoft refers are 'application programming interfaces' ('APIs') which allow applications running on a Windows server operating system to use the services of that server operating system, whereas the interfaces at issue in the present case are those through which a Windows work group server delivers its services to Windows work group networks (recital 210).

– Patents

177 As regards patents, the Commission notes at the outset that during the administrative procedure Microsoft mentioned only one patent application, whereas during the judicial procedure it refers to three European patents and two pending patent applications. Microsoft has not produced the documentation from which it might be determined whether a licence in respect of one or more of those patents would be indispensable for a person implementing the relevant protocols.

178 In its observations of 13 September 2004, the Commission states that before the adoption of the Decision Microsoft mentioned the existence of only one patent, on 20 January 2004, whereas the three European patents referred to in the document setting out Mr Knauer's opinion (Annex T.5; paragraph 91 above) were granted before the end of 2001 and the two European patent applications were, according to that document, filed before the end of 2002. As regards the content of Mr Knauer's opinion, the Commission observes that Mr Knauer had to 'rely on information received from Microsoft in regard to the selection of protocols that fall under Article 5 of the Decision'. Neither is it obvious to the Commission that a competitor of Microsoft taking advantage of the implementation of the Decision will be infringing some of the claims in those patents. The doubts expressed as to whether a developer of server software using the relevant protocols in order to communicate with Windows clients would infringe the claims in question are confirmed by Microsoft's behaviour towards Samba, an 'open source' product which implements certain Microsoft communications protocols that the Samba group developers have identified using reverse-engineering techniques. Samba appears to have incorporated SMB's 'opportunistic locking' as early as January 1998 (version 1.9.18) and Dfs as early as April 2001 (version 2.2.0). So far as the Commission is aware, the Samba group has never licensed the patents in question from Microsoft and Microsoft has never claimed that its patents were being infringed by the Samba group. The Commission observes that the three patents in question were all granted before the end of 2001 and that, in view of the technical description which they propose, they appear to relate to the NT 4.0 generation of Microsoft's products, which predates Windows 2000.

179 The relationship between Microsoft's patent claims and the Decision therefore remains unclear.

180 The Commission concludes on that point that Microsoft has not proved that any of its patents would be infringed should Article 5(a) to (c) of the Decision be implemented.

– Trade secrets

181 The Commission maintains that the parallel which Microsoft draws between trade secrets and intellectual property rights is not self-evident. It refers to the Tetra Pak II case (Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 – Tetra Pak) (OJ 1992 L 72, p. 1)), which culminated in the judgment in *TetraPak* v *Commission*, paragraph 126 above (paragraphs 84 and 139).

182 While there may be a presumption of legitimacy in respect of a refusal to license an intellectual property right created by law, the legitimacy in competition law of a refusal to disclose a secret the existence of which depends purely on a unilateral business decision should depend on the facts of the case and, in particular, on the interests at stake. In the present case, Directive 91/250 shows that the interest in the protection of the inventive effort underlying the software does not entitle the

inventor to hinder the use of interoperability information inherent in that software for the purpose of achieving interoperability.

183 The Commission acknowledges that Directive 91/250 does not require the inventor to disclose the information on his own initiative. However, from the aspect of any trade secret that Microsoft may have, disclosing interoperability information for the purpose of achieving interoperability is not comparable to licensing a competitor to copy a work protected by intellectual property rights legislation. That assertion is supported by the technical relevance of such disclosure, by the practices existing in the software industry and by Microsoft's own behaviour when it entered the market.

184 In its observations of 13 September 2004, the Commission rejects the idea that the protocols reflect important innovation, since the truth of that assertion has not been established by Microsoft either in its application, or in its subsequent observations, or in annex T.3. The Commission also regards as unfounded the argument that the remedy would have the effect of 'transferring' the innovation in question to Microsoft's competitors, since, first, disclosure of the information would not entail a transfer of the essential value of the Windows operating system and, second, under Article 82 EC an undertaking in a dominant position may be ordered to license an essential element of one of its products, as demonstrated by *Magill* and *IMSHealth*, paragraph 99 above.

185 FSF-Europe submits, in essence, that the information which the Decision requires Microsoft to disclose has little value in terms of innovation and contains a number of incompatibilities deliberately introduced in pre-existing written protocols. Microsoft's approach consists in adopting pre-existing protocols and then altering them with the aim of preventing or prohibiting interoperability. It has acted in that way in regard to several work group server protocols, disclosure of which the Samba group sought in order to create a compatible product, namely the CIFS, DCE/RPC (Distributed Computing Environment/Remote Procedure Call), DCE/RCP IDL ('Interface Definition Language'), Kerberos 5 et LDAP (Active Directory) protocols.

A prima facie case

186 The Commission rejects at the outset Microsoft's assertions that the present case is merely about its relationship with Sun Microsystems and that Sun Microsystems did not request the information which the Decision orders Microsoft to disclose.

187 Next, the Commission recalls that it stated in its preliminary observations that no copyright owned by Microsoft would prevent the interoperability information from being used for the purpose of achieving interoperability (paragraphs 167 and 168 above). None the less, it comments on the four criteria laid down in the case-law in respect of compulsory licences and assumes, for the sake of argument, first, that some intellectual property right issues may be at stake and, second, that no other criterion is relevant to a finding of exceptional circumstances, although in the Commission's view the second assumption is contradicted by the wording of the *IMSHealth* judgment, paragraph 99 above (paragraph 38).

188 As regards, first, the indispensability of the information alleged to be covered by intellectual property rights, the Commission contends that Microsoft's claims that there are 'many other ways of achieving interoperability' have already been refuted in the Decision (recitals 666 to 687).

189 Second, the Commission rejects Microsoft's claim that it has not prevented the emergence of any new product for which there was unsatisfied consumer demand.

190 It follows from paragraph 49 of the judgment in *IMSHealth*, paragraph 99 above, that a 'new product' is a product which is not limited 'essentially to duplicating' the products already offered on the market by the owner of the copyright. It is sufficient, therefore, that the product in question contains substantial elements contributed by the licensee's own efforts. Accordingly, it is not precluded that the products of the owner of the copyright should compete with the future products of the licensee, as shown by the facts of the cases determined by the Community judicature (Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraph 73; *Magill*, paragraph 53; and *IMSHealth*, paragraph 99 above). Furthermore, the 'new product' criterion does not imply an obligation to provide concrete proof that the licensee's product would attract customers who would not buy the products offered by the existing supplier. Any other interpretation would render the case-law largely meaningless, since owners of intellectual property rights normally have excellent reasons for granting licences to operators who intend to manufacture goods which do not compete with their own goods. A situation of that type therefore does not normally lead to a refusal to supply. In

IMSHealth, paragraph 99 above, the Court of Justice concentrated on product differentiation which could affect consumer choices, or, in other words, on whether there is 'potential demand' for the new product. The precise consequences which that differentiation will have for the choices made and, in the longer term, for the emergence of products attracting new customer categories, will be determined by the market.

191 In the present case, the implementation of the protocols can take very different forms (recitals 24, 25 and 698), which provides sufficient scope for product differentiation, and there are significant possibilities for product differentiation which could enhance competition but which at present are neutralised by Microsoft's conduct.

192 Third, as regards the elimination of competition on a secondary market, the Commission states that it thoroughly analysed in the Decision the developments on the relevant market and the importance of interoperability for those developments (recitals 590 to 692) and, in particular, the alleged 'steady growth of Linux' (recitals 598 to 610). In the application for interim relief, Microsoft does not claim that there has been any error in that regard. Microsoft incorrectly assumes that, where competition is eliminated gradually, a 'cease and desist order' on the basis of Article 82 EC could be made only when there would no longer be any point in making such an order, because the market had irreversibly turned into a monopoly, whereas in reality it is sufficient that the refusal to license be 'likely' to exclude competition (*Bronner*, paragraph 99 above, paragraph 40, and *IMSHealth*, paragraph 99 above, paragraphs 37 and 38).

193 Fourth, Microsoft does not mention any specific objective justification for its conduct, apart from making a general reference to 'its intellectual property rights', which has already been refuted in the Decision (recitals 709 to 763).

194 The Decision therefore shows, and Microsoft has not seriously disputed, that Microsoft's conduct satisfied the requirements laid down in the case-law.

195 Last, as regards the incompatibility of the Decision with the TRIPS Agreement, the Commission refers to the findings set out at recitals 1052 and 1053 to the Decision.

Urgency

196 The Commission submits that Microsoft has not shown that it would suffer serious and irreparable damage should implementation of the Decision not be suspended. The interveners SIIA and FSF-Europe support the Commission's argument.

The balance of interests

197 The Commission contends that the balance of interests tilts in favour of immediate implementation of Article 5(a) to (c) of the Decision and therefore claims that the application should be dismissed. The interveners SIIA and FSF-Europe support the Commission's arguments.

2. Findings of the President

a) A prima facie case

198 In support of its claim that the prima facie case requirement is satisfied, Microsoft essentially maintains, first, that the conditions on which a refusal to supply information protected by intellectual property rights constitutes an abuse of a dominant position prohibited by Article 82 EC are not satisfied in the present case; second, that Sun Microsystems has not requested the information which the Decision orders the applicant to supply and that its request did not relate to the development of software in the EEA; and, third, that the Commission has failed to fulfil the obligations imposed on the Community by the TRIPS Agreement.

199 In the light of the arguments developed by Microsoft in the context of the interim relief proceedings, the second and third sets of arguments cannot be regarded as sufficiently serious to constitute a prima facie case.

200 The arguments relating to Sun Microsystems' request were refuted in detail in the Decision (recitals 199 to 207, 564 and 565) and Microsoft has not shown prima facie that the Commission erred in

defining the scope of Sun Microsystems' request. Likewise, the argument that Sun Microsystems' request did not relate to software development 'in the EEA' cannot succeed, since that request was couched in general terms and since the EEA is necessarily a part of the relevant worldwide market, as clearly demonstrated at recitals 185 et seq. and 427 to the Decision.

201 The plea alleging failure to take account of the TRIPS Agreement has not been expanded in such a way that the President can make a proper ruling on it. Microsoft has merely claimed in its application for interim relief that, 'in imposing a mandatory licence on Microsoft, the Commission [did] not properly take into account the obligations imposed on the European Communities by [the TRIPS Agreement]'. Furthermore, the reference to the arguments expounded in annex T.9 has not been found to be consistent with the applicable procedural rules (see paragraph 88 above).

202 The President will therefore confine himself to examining the single plea alleging infringement of Article 82 EC, it being noted that in the context of the present application Microsoft does not deny that it holds a dominant position on the client PC operating system market and on the work group server operating system market. It is therefore contesting only the allegedly abusive nature of its refusal to disclose the interoperability information and to authorise its use by its competitors.

203 It should be recalled at the outset that recitals 546 to 791 to the Decision are devoted to an examination of the abusive nature of the refusal to supply the interoperability information. The Commission states there that it must analyse the whole of the circumstances particular to each case before being able to conclude that there are exceptional circumstances characterising an abusive refusal (recitals 546 to 559). In the present case, the Commission considered that the exceptional circumstances consisted in the fact that the refusal to supply the interoperability information was directed against Sun Microsystems, formed part of a general pattern of conduct and entailed a reduction in the level of disclosure of information (recitals 560 to 584), that it risked eliminating competition (recitals 585 to 692) and that it had a negative effect on technical development, to the prejudice of consumers (recitals 693 to 708). In the light of those 'exceptional circumstances', the Commission found that Microsoft's arguments did not amount to sufficient objective justification for the refusal to disclose the interoperability information, whether in terms of incentives for Microsoft to innovate (recitals 709 to 763) or of its having no interest in restricting competition (recitals 764 to 778).

204 In the present case, the prima facie case requirement must be considered to be satisfied, regard being had to the questions of principle raised by the case and to the fact that certain pleas and arguments require a thorough examination. In substance, it must be ascertained whether the circumstances taken into account by the Commission are correct in fact and capable in law of founding the conclusion that there are exceptional circumstances which justify ordering the applicant to disclose valuable information protected by intellectual property rights.

205 The questions of principle relate to the conditions on which the Commission is justified in concluding that a refusal to disclose information constitutes an abuse of a dominant position prohibited by Article 82 EC.

206 First, this case raises the question whether the conditions laid down by the Court in *IMSHealth*, paragraph 99 above, are necessary or merely sufficient. The Commission contends in the Decision that the existence of exceptional circumstances must be assessed on a case-by-case basis and that it cannot therefore be excluded, without a thorough examination of each case, that a refusal may be abusive, even though the conditions hitherto laid down by the Community judicature are not satisfied. Microsoft, on the contrary, maintains in its application that a refusal to supply can be found to be abusive only where the conditions laid down by the Community judicature are satisfied. Clearly, that question cannot be resolved at the interim relief stage. It should be pointed out, however, that the Court of Justice has held, in the words of paragraph 38 of the judgment in *IMSHealth*, that 'it is sufficient', in order for 'the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive', 'that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and [that it is] likely to exclude all competition on a secondary market'.

207 Second, this case raises the question whether, where the exercise of an intellectual property right is in issue, the nature of the protected information must be taken into account. Microsoft contends that the Decision compels it to supply competitors with technology that is secret and valuable and which, consequently, is intrinsically different from the information at issue in *Magill* and *IMSHealth*, paragraph 99 above. Thus, the requirements to be satisfied in order for a refusal to disclose

information to constitute an abuse of a dominant position are all the stricter because the information is valuable. The Commission, on the other hand, maintains that the Community judicature has never taken the 'value' of an intellectual property right into consideration. On that point, the President finds that the hitherto secret specifications for the communications protocols which the Decision requires Microsoft to draw up and disclose are clearly fundamentally different from the information at issue in *Magill* and *IMSHealth*, paragraph 99 above. In those cases the information at issue was widely known in the sector: the television programme listings were sent free of charge to newspapers every week and the map of Germany was in reality an industry standard for the presentation of sales figures. However, the question whether, and if so to what extent, a distinction must be drawn according to whether the information is known or secret is even less amenable to determination at this stage because account must be taken more generally of parameters such as the value of the underlying investment, the value of the information concerned for the organisation of the dominant undertaking and the value transferred to competitors in the event of disclosure.

208 This case also raises the question whether the requirements laid down by the Court of Justice in its judgment in *IMSHealth*, paragraph 99 above, are satisfied in the present case. The Commission does not dispute the relevance of that judgment, which, essentially, consolidates the position thus far expressed by the Community judicature as regards the circumstances in which a refusal to license intellectual property rights constitutes an abuse.

209 The dispute between the parties relates to the indispensability of the information in issue, the barrier to the emergence of a new product for which there is claimed to be an unsatisfied demand, the risk of eliminating competition on the secondary market and the objectively justified nature of the refusal. While it is for the Court dealing with the substance of the case to resolve the disputes in respect of each of those requirements, the President none the less considers it necessary to identify the sources of the dispute between the parties which he deems sufficiently serious to constitute a prima facie case. In that regard, the accent will be placed on two specific aspects.

210 As regards, first, the indispensability of the interoperability information, it should be observed that that question is dealt with at recitals 666 to 687 to the Decision.

211 On that point, Microsoft refers to a number of methods allowing sufficient interoperability between the operating systems of different suppliers.

212 That argument emphasises the disagreement between the parties as regards the level of interoperability required. As stated at recitals 743 to 763 to the Decision, the information which must be provided in accordance with the remedy is the 'information necessary to achieve … interoperability' within the meaning of Article 6 of Directive 91/250, on decompilation. Microsoft maintains that the decompilation provided for in Article 6 of Directive 91/250 is permitted only where the interfaces are indispensable to ensure the functionality of an independently-created software program and that in the present case the specifications for its communications protocols are not necessary to ensure the functionality of an independently-created work group server operating system. Microsoft concludes that the information which it has refused to communicate cannot be regarded as interoperability information.

213 The preamble to Directive 91/250 defines interoperability as 'the ability to exchange information and mutually to use the information which has been exchanged'. At the 27th recital, that directive states that its provisions are without prejudice to the application of the competition rules under Article 82 EC 'if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive'. However, the question whether, in the present case, the information requested from Microsoft is actually necessary for interoperability, as defined in Directive 91/250, requires a thorough examination of the elements of fact in the light of the applicable legislation, which only the Court dealing with the substance of the case can undertake.

214 As regards, second, the objectively justified nature of the refusal, Microsoft contends that it was permissible for it to rely on its intellectual property rights and to refuse to license its technology to third-party operating systems providers. In answer to a written question put by the President, Microsoft also claimed that the information requested by Sun Microsystems related to technology under development.

215 In order to understand the scope of Microsoft's argument, the President questioned Microsoft at the hearing. It emerged that it cannot be excluded, in Microsoft's submission, that the refusal may be objectively justified by the intellectual property rights which Microsoft holds in the information

requested by Sun Microsystems or, in other words, that the justification for the refusal lies in the need not to disclose information because it is legally protected and is valuable.

216 That argument may be understood as meaning that Microsoft was entitled to refuse to disclose legally-protected information irrespective of whether or not there were exceptional circumstances.

217 Thus, on the one hand, Microsoft's argument means that, in the absence of duly-established exceptional circumstances, the exercise of the prerogatives recognised to the holder of intellectual property rights cannot give rise to abusive conduct within the meaning of Article 82 EC. As that argument is very closely linked to the question whether the Commission has demonstrated that 'exceptional circumstances' existed in the present case, it cannot be examined separately from that question (see paragraph 206 above).

218 On the other hand, Microsoft's argument also means that, even if exceptional circumstances had been established by the Commission, its refusal to communicate the information in question was justified by the need to protect the valuable information covered by the intellectual property rights.

219 That argument, which was developed by Microsoft during the administrative procedure, as shown at recital 709 to the Decision, was rejected by the Commission in the Decision (recitals 710 to 712), which concluded on that point that, in regard to the exceptional circumstances, 'Microsoft's refusal cannot be objectively justified merely by the fact that it constitutes a refusal to license intellectual property' (recital 712). The Commission then examined the other arguments which Microsoft put forward in order to demonstrate that the refusal to disclose the information in issue could be justified by the need to protect its incentive to innovate. The Commission, after rejecting Microsoft's arguments relating to its concerns about the 'cloning' of its products (recitals 713 to 729), concluded that it could not, explaining that disclosure of interoperability information is a widespread practice in the industry concerned (recitals 730 to 735) and pointing out that the undertaking given to the Commission by IBM in 1984 was not substantially different from what Microsoft was ordered to do in the Decision (recitals 736 to 742), and that its approach is consistent with Directive 91/250.

220 The fact none the less remains that Microsoft's argument, understood as seeking to challenge the legality of the Commission's assessment in relation to the absence of objective justification for the refusal, cannot be rejected outright as unfounded, in the light of the specific circumstances of the case.

221 On that point, the intellectual property rights on which Microsoft relies have not been declared valid by a national court and for that reason the present situation may be distinguished from those in *Magill* and *IMSHealth*, paragraph 99 above. However, the Commission did not exclude the existence of intellectual property rights and in any event took them into account when considering whether the refusal was justified.

222 The central issue is therefore whether the Commission was entitled to conclude that the need to protect the purported value of the information alleged to be covered by intellectual property rights was not sufficient to support the conclusion that the refusal to communicate that information was objectively justified.

223 The Commission's approach consisted in ascertaining whether, in spite of the exceptional circumstances identified, the considerations put forward by Microsoft precluded the adoption of a remedy. That is apparent, in particular, from recital 783 to the Decision, which states:

'The major objective justification put forward by Microsoft relates to Microsoft's intellectual property [in] Windows. However, a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified …'.

224 However, it is for the Court dealing with the substance of the case to ascertain whether a manifest error was made in the evaluation of the interests involved, in particular in connection with the protection of the intellectual property rights relied on and the requirements of free competition enshrined in the EC Treaty.

225 Accordingly, the President considers that the arguments which Microsoft puts forward concerning the issues raised in the present case cannot, in the interim-relief proceedings, be regarded as prima facie unfounded. The prima facie case requirement is therefore satisfied.

b) Urgency

226 For the purposes of determining whether the implementation of Article 5(a) to (c) must be suspended as a matter of urgency, it is necessary to make a number of preliminary observations.

Preliminary observations

227 The preliminary observations concern, first, the subject-matter of the remedy and, second, the extent of the alleged damage.

228 As regards the subject-matter of the remedy, it should be recalled that, in the words of Article 5(a) of the Decision, Microsoft is to disclose the 'interoperability information' 'to any undertaking having an interest in developing and distributing work group server operating system products' and, on 'reasonable and non-discriminatory terms', allow it to be used by those undertakings for the purpose of 'developing and distributing work group server operating system products'. As thus formulated, the remedy seeks to require Microsoft to disclose what the Commission criticises it for having wrongfully refused to supply (see also Article 2(a) of the Decision and recital 998 thereto).

229 Furthermore, as is apparent from recitals 999 and 1004 to the Decision, Microsoft is not required by the remedy in question to disclose source codes, nor does Microsoft dispute that point in the present interim-relief proceedings.

230 According to Article 1(1) of the Decision, the information which Microsoft is ordered to disclose is 'the complete and accurate specifications for all the protocols implemented in Windows Work Group Server Operating Systems and … used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks'. Recital 999 to the Decision states that '[t]his includes both direct interconnection and interaction between a Windows work group server and a Windows Client PC, as well as interconnection and interaction between a Windows work group server and a Windows Client PC that is indirect and passes through another Windows work group server'.

231 The objective pursued by the Commission is, according to the Decision, 'to ensure that Microsoft's competitors can develop products [compatible] with the Windows domain architecture [originally] supported in the dominant Windows Client PC operating system and hence viably compete with Microsoft's work group server operating system' (recital 1003; see also recitals 181 to 184).

232 Last, the parties agree that the authorisation to use the specifications, provided for in Article 5(a) of the Decision, means that the specifications, which describe in detail what is expected of a software product, can be implemented by Microsoft's competitors. However, the parties are not agreed as to the time necessary to implement the specifications, i.e. to write them in code.

233 As regards the extent of the alleged damage, it should be recalled that the Decision requires Microsoft to disclose the specifications for its client-to-server and server-to-server protocols.

234 In its application for interim relief, Microsoft emphasised the difference between the Decision and the United States Settlement, stating that the United States Settlement authorised a licensee to use Microsoft client-to-server communications protocols only in order to ensure interoperability with the Windows Client PC operating systems, whereas the Decision requires Microsoft to license those protocols for use in work group server operating systems which provide file and print services and user and group administration services to any Windows Client PC or server operating system. The difference between the United States Settlement and the Decision was described by the Commission at recitals 688 to 691.

235 In answer to a written question put by the President, Microsoft explained that, as regards client-to-server protocols, the United States Settlement and the Decision are similar in that both compel Microsoft to develop specifications describing certain of its protocols, to provide those specifications to competitors and to allow competitors to use the specifications in order to implement, in their products, protocols that Microsoft has created to be used in its Windows operating systems.

236 At the hearing, Microsoft claimed that the United States licence programme will last until November 2009 and that the licences granted cover the whole world. It concluded that the immediate implementation of the obligation to disclose the specifications for the client-to-server protocols is unnecessary, since the United States Settlement makes it possible to achieve the same result by the date on which the Court of First Instance adjudicates on the merits of the case.

237 In that regard, the President observes that a decision is immediately enforceable and that suspension of its operation can be ordered only in the circumstances prescribed in the EC Treaty, in the Statute of the Court of Justice and in the Rules of Procedure of the Court of First Instance. Accordingly, the immediately enforceable nature of a decision is not in any way dependent on the necessity for its implementation.

238 None the less, account will be taken of the foregoing elements in the context of the examination of the urgency in ordering suspension of the obligation to disclose the specifications for the client-to-server protocols.

239 That argument developed by Microsoft at the hearing makes it necessary to undertake a separate examination of the condition relating to urgency according to whether the Decision requires Microsoft to disclose the specifications for the server-to-server communications protocols and the specifications for the client-to-server communications protocols.

The serious and irreparable damage caused by the obligation to disclose the specifications for the server-to-server protocols

240 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures (order of the President of the Court of Justice in Case 310/85 R *Deufil* v *Commission* [1986] ECR 537, paragraph 15; order of the President of the Court of First Instance in Case T-13/99 R *PfizerAnimalHealth* v *Council* [1999] ECR II-1961, paragraph 134). It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (order of the President of the Court of Justice in Case C-356/90 R *Belgium* v *Commission* [1991] ECR I-2423, paragraph 23; and orders of the President of the Court of First Instance in Case T–44/98 R II *EmesaSugar* v *Commission* [1999] ECR II-1427, paragraph 128, and Case T-151/01 R *DualesSystemDeutschland* v *Commission* [2001] ECR II-3295, paragraph 187).

241 The alleged damage must be certain or at least established with sufficient probability, while the applicant is required to prove the facts forming the basis of the supposed damage (order of the Court of Justice in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667; and order of the President of the Court of Justice in Case C-335/99 P(R) *HFBandOthers* v *Commission* [1999] ECR I-8705, paragraph 67).

242 In the present case, Microsoft claims that implementation of the Decision would harm its intellectual property rights and also its commercial freedom and capacity to develop its products. It also maintains that implementation of the Decision will irreversibly alter market conditions.

243 Each of those three heads of damage will be examined separately.

– The alleged infringement of intellectual property rights

244 Microsoft maintains that implementation of the Decision will require it to license to its competitors valuable information protected by intellectual property rights.

245 It is therefore necessary to examine whether Microsoft has established specifically how the effects of the Decision are serious and irreparable. To that end, it is appropriate to separate the question whether disclosure of the interoperability information constitutes in itself serious and irreparable damage for Microsoft and the question whether the use of that information by Microsoft's competitors will give rise to serious and irreparable consequences.

(vi) Disclosure of the interoperability information

246 The information that Microsoft is ordered to disclose is alleged to be protected by intellectual property rights and to be valuable. In the light of Microsoft's arguments, it is appropriate to assess

in turn whether, first, the infringement of the exclusive prerogatives of the holder of an intellectual property right and, second, the obligation to disclose information constitute serious and irreparable damage.

247 First, Microsoft claims that, by requiring it to grant licences to its competitors, the Decision breaches its intellectual property rights in the information that it is required to disclose.

248 Without its being necessary in the present case to adopt a position on the existence of intellectual property rights or, consequently, on the question whether implementation of the Decision would effectively compel Microsoft to grant licences affecting its copyright or its patents, it is clear that should such rights be at stake the fact of requiring an undertaking to issue licences affecting its intellectual property rights would constitute in itself a substantial breach of the exclusive prerogatives which the undertaking derives from those rights.

249 The fact remains that that breach is the necessary consequence of the principle established in *IMSHealth*, paragraph 99 above, since the examination carried out by the Community judicature consists specifically in weighing up, on the one hand, the protection conferred by an intellectual property right on its holder and, on the other, the requirements of free competition laid down in the EC Treaty. Thus, where the Commission considers, when faced with exceptional circumstances, that the requirements of free competition require it to order an undertaking in a dominant position to grant a licence affecting its intellectual property rights, there is necessarily a breach of the prerogatives of the owner of those rights. In the present case, on the assumption that the specifications for the communications protocols, once drawn up, are protected by copyright, the very fact of ordering Microsoft to make its specifications available to competing undertakings constitutes a breach of the exclusive rights conferred on the author. Likewise, on the assumption that some of the protocols are protected by patents and that their use proves to be indispensable for the undertakings referred to in Article 5 of the Decision, the very fact that Microsoft is unable to use its patents as it intends constitutes a breach of the prerogatives conferred on the inventor.

250 None the less, to take the view that a breach of the exclusive prerogatives of the holder of the right constitutes in itself, and irrespective of the circumstances particular to each case, serious and irreparable damage, would mean that the urgency requirement is always satisfied when the measure which the Court is requested to suspend is of the type envisaged in *IMSHealth*, paragraph 99 above.

251 It is therefore necessary, in such circumstances, to examine whether, in the light of the elements of the case, the fact that intellectual property rights will be affected until a decision has been given on the merits of the case is likely to cause, over and above the simple breach of the exclusive prerogatives of the holder of the rights in question, serious and irreparable damage (see, to that effect, order of the President of the Court of Justice in Joined Cases 76, 77 and 91/89 R *RTEandOthers* v *Commission* [1989] ECR 1141, paragraph 18; and order in *IMSHealth* v *Commission*, paragraph 133 above, paragraphs 126 to 131).

252 Second, Microsoft maintains that the cause of the damage lies in the fact that the subject-matter of the disclosure is secret and valuable information.

253 In that regard, it is an indisputable fact that, once acquired, knowledge of information previously kept secret – whether because it is the subject of an intellectual property right or because it constitutes a trade secret – may be retained. Should the Decision be annulled, its annulment would not delete the knowledge of that information from memories and compensation would be very difficult as the value of the transfer of knowledge would be difficult to quantify. However, Microsoft does not explain what irreparable damage might be caused to it by the simple fact that third parties had knowledge of data disclosed by it, as opposed to the developments resulting from the use of that knowledge.

254 Next, the disclosure of information previously kept secret does not necessarily mean that serious damage will occur.

255 In the present case, however, Microsoft claims essentially that the interoperability information has a specific value. That value relates, first of all, to the fact that the communications protocols are the fruit of substantial and costly efforts and also to the fact that their commercial applications are significant. Microsoft further claims that drawing up the specifications is also onerous.

256 The President considers that, in the light of the material in the case-file, proof of the serious nature

of that damage has not been adduced. In particular, the vague allegation that Microsoft's communications protocols have 'cost tens of millions of [United States] dollars', even if it were well founded, is not supported by any evidence. Account must also be taken of the fact that such costs will be offset in part by the royalties that Microsoft will be able to demand for the use of its protocols under the licences granted in implementation of the Decision.

257 In any event, the financial damage alleged in the preceding paragraph cannot be regarded as serious, owing to the financial power of Microsoft, whose turnover for the United States fiscal year July 2002 to July 2003 was, according to recital 1 to the Decision, EUR 30 701 million (see, to that effect, order of the President of the Court of Justice in Cases C-51/90 R and C-59/90 R *Comos-TankandOthers* v *Commission* [1990] ECR I-2167, paragraph 26).

258 Microsoft further maintains that the value of the information in issue consists in the fact that the specifications for the server-to-server communications protocols contain a significant amount of information on the functioning of the 'Active Directory' in the Windows operating systems. Its server-to-server communications protocols are not simple interfaces unconnected to the underlying implementation of the functionalities accessible via those interfaces. Consequently, communication of the protocols to competitors would amount to transferring to them a significant quantity of information on the way in which those functionalities are supplied (annex R.2; annex T.7; annex U.1, Madnick & Meyer, 'Response to CCIA annex by Ronald Alepin and to the submission by [FSF-Europe]'; and annex U.2).

259 The President notes, first, that Microsoft maintains in its written submissions that it would be required to disclose information on the internal structure or the innovative aspects of its products but notes further that the specific examples relate exclusively to the replication protocols in Active Directory and, second, that that assertion is based on the analyses by Dr Madnick and Dr Meyer, on the one hand, and by Mr Campbell Kelly, on the other.

260 In that regard, the President considers that Microsoft's allegations cannot be regarded as proven to the requisite legal standard.

261 Microsoft's assertion that the information that it would be required to disclose will reveal the mode of functioning of its products is illustrated by the sole example of Active Directory, defined in the Decision as the directory service included in Windows 2000 Server (recital 149). In its observations on the statements in intervention, Microsoft again emphasised that 'the specifications will teach competitors a great deal about how important components of Windows server operating systems, such as Active Directory, work'. At the hearing, the question put by the President as to whether the specifications would reveal elements relating to components of Windows server operating systems other than Active Directory did not meet with a clear and convincing answer either. On that point, one of Microsoft's expert witnesses stated that he 'believed' that the rules governing the management of the directory would also be revealed.

262 The claims made by Microsoft's experts and the examples relating to Active Directory on which they relied are based on analyses (see paragraph 116 above) which were strongly criticised by the Commission and the parties intervening in its support. Those parties challenged the assumptions made in those analyses and, in particular, the assumption that the protocols used to deliver communications between two copies of the same operating system and also the replication method are 'tightly coupled'. The objections raised by the Commission – based on documents submitted by experts (annex S.2 and annex U.1, 'Report by OTR', dated 10 September 2004) –, by FSF-Europe and, before they withdrew from the proceedings, by CCIA and Novell, relate essentially to the vague and conjectural nature of the demonstration in the Madnick & Meyer report and to the fact that that report contains theories which are contrary to Microsoft's practices. In annex 3 to CCIA's statement in intervention, Mr Alepin maintains that correctly-written protocol specifications reveal little or nothing about the internal structure, algorithms and other innovative aspects of the operating systems.

263 Faced with such objections and in the absence of other more precise material produced by Microsoft, it is not possible to take as established the allegations that the specifications will reveal more than is necessary to ensure the interoperability sought by the Commission.

264 Likewise, as the Commission stated in an answer to a written question, Microsoft's assertion that the single compression algorithm used by Active Directory would have to be disclosed under the remedy imposed by the Decision cannot be verified in the absence of sufficient objective evidence for that purpose.

265 In that regard, the President considers that Microsoft had the possibility and the right to submit a technical file to the Commission, and to the Commission alone, in which it would have been able to comment on the degree of precision of the specifications and the risks of revealing information necessarily covering more than just the interoperability sought by the Commission. However, Microsoft refrained from doing so during the administrative procedure. Likewise, after the adoption of the Decision, Microsoft could have explained the reasons why efficient security measures to overcome that difficulty could not be envisaged. In particular, the Commission stated at the hearing that it had requested Microsoft on 30 July 2004 to communicate its specifications for examination, but that they were never sent; and Microsoft does not dispute that assertion.

(vii) The use of the interoperability information

266 Microsoft claims that, once the interoperability information is disclosed, the use to which it will be put will be the cause of a number of types of serious and irreparable damage.

The alleged dilution of the information

267 Microsoft contends that the information disclosed will be able to be used by its competitors, that it may be placed in the public domain and that there will be no means of checking whether it is being used following annulment of the Decision.

268 That argument ignores the possibility of providing for contractual safeguards concerning the confidentiality and use of the information pending the decision of the Court in the main action, such clauses being standard practice in the sector. Confidentiality clauses, together where necessary with penalty clauses, can be inserted in the licence agreements concluded with the undertakings having an interest in developing and distributing products competing with Microsoft's products, within the meaning of Article 5(a) of the Decision.

269 On that point, the Commission has indicated that Microsoft could require reasonable contractual safeguards for the disclosure, so that the information disclosed to competitors will no longer be able to be used should the Decision be annulled. The licence agreements concluded within the framework of the MCPP and technology transfer agreements constitute reference elements.

270 In that context, it should be noted that Microsoft itself stated in its application for interim measures that the disclosure of trade secrets to its contractual partners was subject to compliance by them with an obligation to maintain confidentiality (see paragraph 125 above).

271 Furthermore, Microsoft undertook, under the agreement with Sun Microsystems, to communicate the specifications for its server-to-server communications protocols. However, it has offered no explanation of why contractual safeguards identical to the ones in that agreement would not ensure that the information disclosed in implementation of the Decision was not made public. As stated at recital 211 to the Decision, moreover, '[i]n the course of the 1990s, Microsoft entered into a licence with AT&T relating to the disclosure of portions of the Windows source code'. Microsoft has not explained why it would not be able to use the same contractual safeguards as those that must have been included in that agreement with AT&T when disclosing the specifications referred to in Article 5 of the Decision.

272 The possibility of appropriate safeguards also provides an answer to Microsoft's fear that the knowledge disclosed will spread to the point of entering the public domain. Apart from the fact that the conclusion of licences does not in any way mean that the data in question will, from a legal point of view, be in the public domain, at least as regards intellectual property rights, the damage alleged by Microsoft assumes that the other parties will fail to honour their contractual undertakings, which cannot be presumed (see, to that effect, order of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II–2769, paragraph 41).

273 As regards the allegation that it will be impossible to ascertain whether the information is being used after the Decision has been annulled, Microsoft asserts that it is simplistic to believe that the use of its specifications for the communications protocols will be immediately detectable should the Decision be annulled, owing to the maintenance of interoperability of third-party work group server operating systems and Windows server operating systems. However, in its observations on the statements in intervention, Microsoft stated that 'without having access to the source code of third-party products' it could not know to what extent those third parties were using the knowledge which they obtained through their access to the specifications for Microsoft's communications protocols. It

follows from that argument that Microsoft considers it possible to determine to what extent competitors are using the knowledge which they have obtained from the specifications for the communications protocols by having access, should the Decision be annulled, to the source code of their products. The possibility that an independent expert – appointed by common agreement between the contracting parties or, failing that, by the Commission – should access the source code of the products of Microsoft's competitors in order to check whether that knowledge was being used can perfectly well be provided for in the licensing agreements to be concluded with the undertakings referred to in Article 5 of the Decision. It is also open to Microsoft, moreover, to include in those licensing agreements penalty clauses which, in the event that the Decision is annulled, would prevent its competitors from marketing products containing the interoperability information. Such contractual stipulations in relation to the procedures for checking the products and the penalties incurred for breach of the undertaking given not to use the information following the annulment of the Decision must be considered to be sufficient to avoid irreparable damage.

274 For the sake of completeness, it should be observed that the appraisal in the preceding paragraph is supported by the fact that at the hearing Novell stated that it was prepared to allow access to the source code of its products, should the Decision be annulled, for the purpose of verifying that it was not using the interoperability information. Microsoft did not answer that point.

The argument that the products will remain in the distribution channels

275 Microsoft maintains that the Decision will cause permanent damage to its intellectual property rights – more specifically to its right to exploit its patents – since, if the Decision is annulled, products incorporating its technology will remain in the distribution channels and in the hands of its customers.

276 The President considers that Microsoft has not established that those circumstances constituted serious and irreparable damage.

277 First, it is not known when competing products implementing the specifications will be placed on the market. In that regard, it is common ground that the undertakings which receive the information will first have to implement the specifications and then have to place their products on the market. At the hearing, Microsoft's representative stated that the specifications for the communications protocols would be ready within three to four weeks.

278 The total period between the date of receiving the specifications and the date of placing the products on the market was put at several years by the Commission in the Decision (recitals 719 to 721 to the Decision). In its observations, the Commission referred to a 'letter from Sun [Microsystems] to the Commission dated 20 July 2004', paragraph 3 of which states, with reference to the specifications for server-to-server protocols:

'Employing a team of up to [a substantial number of] engineers it took [longer than one] years for Sun [Microsystems] to complete the development effort to deliver a market-ready version of AS/U based upon materials received from AT&T. For the reasons explained below, Sun [Microsystems] would expect that more time would be required to introduce a similarly complex from technical specifications supplied pursuant to the "Technical Collaboration Agreement" with Microsoft dated April 2004.'

279 Furthermore, in the pleadings which it submitted before withdrawing from the proceedings, CCIA maintains that 'even if the information were disclosed tomorrow (and assuming that it was complete and correct), it is clear that it would take several years (at least two) before one of Microsoft's competitors could place a product using that information on the market', that assertion being based on annex CCIA.R.3, in which Mr Alepin considers that it is entirely unrealistic to expect that any fully interoperable product would be commercially available in two years' time (paragraph 84). SIIA and, before withdrawing, Novell developed the same argument in their written submissions.

280 When invited to comment in writing on that information relating to the estimate of the time necessary to implement its own specifications, Microsoft stated essentially that the time necessary to implement a specification depends largely on the resources allocated to that effort. At the hearing, Microsoft stated that a product could be placed on the market in less than three months, but without providing sufficient detail or evidence to support that claim or making it possible to ascertain whether it is well founded. That claim cannot therefore be upheld.

281 It follows from the foregoing, without prejudice to the fact that it will take some time for Microsoft's

competitors to sell the versions of their products compatible with Windows work group server operating systems, that there is no reason to believe that those compatible products will be marketed in the short term. Consequently, the effect of which Microsoft complains would in any event take concrete form only for a limited period between the date on which the products concerned are placed on the market and the date on which judgment is delivered in the main proceedings.

282 Second, any damage arising from the fact that products implementing the specifications for Microsoft's protocols will remain in the distribution channels cannot be regarded as irreversible, since an effect of that nature is inevitably limited in time, either because the products will eventually be sold and installed within the undertakings which have acquired them (see paragraph 283 below) or because the unsold products will become technologically obsolete.

283 Third, Microsoft correctly maintains that, even if the Decision should be annulled, the competing products will remain installed within the undertakings which have acquired them. None the less, that fact cannot be regarded as the cause of serious and irreparable damage, since, first, Microsoft has not shown how the presence of those products in customers' networks would appreciably harm its future activities and, second, it is likely that the commercial value of those products, which will have satisfied customer demand before judgment is given on the merits of the case, will fall rapidly if the Decision is annulled by the Court of First Instance.

284 On that last point, should the Decision be annulled, Microsoft would be able to prevent competing operating systems from being compatible with the new versions of the Windows operating systems by altering its server-to-server communications protocols and thereby significantly and rapidly reducing the value of the competing products. The fact that it is technically possible to affect interoperability between the Windows environment and the competing work group server operating systems installed in undertakings – which is likely to enable Microsoft to derive an exclusive benefit from subsequent improvements – was confirmed at the hearing and Microsoft raised no objection on that point.

285 Even on the assumption that Microsoft were to decide not to alter its communications protocols should the Decision be annulled, the fact that competing work group server operating systems remain within networks will not be likely to cause it irreparable damage either. At the hearing, Microsoft stated that, should the Decision be annulled, it would be technically possible to sever interoperability with competing work group server operating systems, but that it would be inconceivable from a commercial point of view not to ensure backward compatibility between old and new systems. However, although the maintenance of that compatibility allows competing operating systems to interoperate in a network with the new version of the Windows operating systems, that does not alter the fact that the former systems are less technologically advanced than the latter systems and that, from a commercial viewpoint, they would rapidly become obsolete. In that regard, it must be borne in mind that, should the Decision be annulled by the Court of First Instance, Microsoft's competitors would no longer be able to use the interoperability information referred to in Article 5 of the Decision (see paragraph 273 above) and that, consequently, backward compatibility would be ensured only for the work group server operating systems marketed by those competitors before the date of annulment.

The alleged 'cloning' of the products

286 Microsoft maintains that the information in question will be able to be used to clone its products. Once its competitors have acquired detailed knowledge of the internal operating modes of its operating systems by studying the copyrighted specifications for its communications protocols, they will be able to use them for their own products. It would be difficult, indeed impossible, for Microsoft and for the judicial authorities to determine whether Microsoft's competitors were using that knowledge when designing their own server operating systems.

287 In that regard, it should be borne in mind that the premiss of that reasoning, namely that it will be possible to obtain information going far beyond just the interoperability information, has not been held to be established (see paragraphs 260 to 265 above).

288 Furthermore, Microsoft's allegation is based on a reading of Article 5 of the Decision that does not take account of the grounds on which it is based. The direction in Article 5 that Microsoft must allow the use of its specifications for its protocols 'for the purpose of developing and distributing work group server operating system products' must be read in the light of recitals 1003 and 1004 to the Decision. Recital 1003 states that '[t]he objective of this Decision is to ensure that Microsoft's

competitors can develop products that interoperate with the Windows domain architecture natively supported in the dominant Windows Client PC operating system and hence viably compete with Microsoft's work group server operating system'. Recital 1004 states that 'as regards the subsequent use of the specifications, the specifications should also not be reproduced, adapted, arranged or altered, but should be used by third parties to write their own specification-compliant interfaces'.

289 It follows that Article 5 of the Decision must be understood as meaning that the use of the protocols is permitted only for the purposes of interoperability and that, consequently, their use for other purposes is not allowed. The Commission expressly confirmed that interpretation at the hearing and emphasised that compliance with that limitation will be capable of being verified by Microsoft's 'monitoring trustee who shall be independent from [it]' referred to in Article 7 of the Decision.

– The alleged interference with commercial freedom

290 Microsoft maintains that its freedom to determine the essential elements of its business policy will be compromised owing to the implementation of the Decision: the Decision would require it to disclose information to its competitors, deprive it of its capacity to develop its products and force it to 'harden' its protocols.

291 In that regard, it should be pointed out that, in principle, any decision taken under Article 82 EC and requiring a dominant undertaking to bring an abuse to an end necessarily entails a change in its business policy. The obligation imposed on an undertaking to alter its conduct cannot therefore be regarded as constituting serious and irreparable damage in itself, short of considering that the urgency requirement is always satisfied when the decision whose suspension is sought orders the addressee to bring abusive conduct to an end.

292 Where an applicant invokes an interference with its business freedom to demonstrate that the interim measure applied for must be ordered as a matter of urgency, it must adduce evidence either that implementation of the contested measure will oblige it to alter certain essential elements of its business policy and that, even after judgment in its favour has been given in the main proceedings, the effects of the implementation of that measure will prevent it from resuming its initial business policy, or that those effects will cause it serious and irreparable damage of another kind, it being borne in mind that it is in the light of the circumstances of each case that the alleged damage must be assessed.

293 Thus, in the orders in *Bayer* v *Commission*, paragraph 138 above, and *IMSHealth* v *Commission*, paragraph 133 above, on which Microsoft relies, the judge dealing with the application assessed the consequences of the interference with the undertakings' freedom to define their business policies in the light of the effects of the implementation of the measure.

294 In the order in *Bayer* v *Commission*, paragraph 138 above, the judge dealing with the application actually emphasised that '[i]n this case, if the applicant's argument were to be accepted by the Court as well founded, immediate implementation of the provision in question would risk depriving the applicant of its independence in defining certain crucial elements in its business policy' (paragraph 54). He further held that '[a] situation of that kind is particularly likely to cause serious damage to the applicant in the context of the pharmaceutical industry, which is distinctive in that prices and methods of reimbursement are fixed or controlled by national health services, thereby giving rise to large disparities in the prices for a single medicine in the various Member States' (paragraph 55). As the sectoral regulation of prices had been regarded as a factor limiting the undertakings' scope for business freedom, the judge concluded that a further interference with an already-restricted business freedom constituted serious damage. The change in Bayer's business policy was therefore regarded as sufficient to characterise the urgency only in the light of the specific features of that case.

295 In the order in *IMSHealth* v *Commission*, paragraph 133 above, the judge dealing with the application for interim measures considered that the urgency requirement was satisfied because there were serious grounds for believing that many of the 'market developments' to which immediate execution of the decision was likely to give rise would be very difficult, if not impossible, to reverse should the application in the main action be upheld (paragraph 129). The 'real risk of serious and irreparable damage to the applicant's interests' (paragraph 127) identified in that case therefore relates to the serious and irreversible nature of the market developments. The considerations relating to the interference with the freedom which undertakings enjoy when defining their business policy (paragraphs 130 and 131) were taken into account solely for the purposes of

supporting the conclusion at which the judge dealing with the matter had already arrived in relation to urgency, as may be seen from the fact that there is no analysis of the serious and irreparable nature of the interference.

296 It is appropriate therefore to examine whether Microsoft has demonstrated that, regard being had to the circumstances of the case, the interference with its business freedom is the cause of serious and irreparable damage.

(viii) The alleged fundamental change in business policy

297 The fundamental change in business policy which the Decision would impose on Microsoft is contradicted by certain material in the file.

298 First of all, both the United States Settlement and the Decision require Microsoft to disclose the specifications for its communications protocols. Admittedly, the United States Settlement does not require Microsoft to disclose the specifications for its server-to-server communications protocols, but it does require it to license all the protocols implemented in a Windows Client PC operating system for the purposes of interoperability with a Windows server operating system. The President finds, in the light of the evidence before him and having regard to the fact that the Decision is in keeping with the disclosure policy already implemented by Microsoft under the United States Settlement, that the differences existing in terms of business policy between that settlement and the Decision cannot be regarded as being fundamental. It must be noted, in that context, that it is not disputed that one of the protocols licensed under the MCPP is a communications protocol used not only for client-to-server communications but also for server-to-server communications. On that last point, it follows, in particular, from recital 179 to the Decision that '[s]ervers in a network can sometimes use the same protocols as client PCs in order to communicate with other servers. For instance, in a Windows domain, Microsoft Kerberos is used for authentication both between a Windows client PC and a Windows group server and among Windows work group servers'. Furthermore, the alleged interference with Microsoft's business policy is not irremediable, since annulment of the Decision, like the end of the MCPP due to take place to take place in 2009, would allow Microsoft not to license its communications protocols any more, should that be its choice.

299 Next, it is apparent from the case-file that Microsoft's management declared that they wished to pursue a policy of actively promoting licences in respect of the protocols covered by the United States Settlement and of affirming the intention to offer usage rights on a wider basis than required by that settlement. The following is taken from a Microsoft press release dated 1 August 2003 (annex N.12):

'Microsoft also announced that it is generally willing to provide even broader usage rights for the company's protocol technology than is required by the final judgment in the antitrust case or is reflected in standard MCPP licence agreements. Microsoft has already voluntarily granted usage rights to a number of licensees under the MCPP that exceed the requirements of the final judgment, and Microsoft encourages other developers who may be interested in licensing the company's protocol technology to discuss their technical requirements with Microsoft's protocol licensing team.'

300 Last, the agreement concluded between Microsoft and Sun Microsystems provides for disclosure of the server-to-server communications protocols covered by the Decision. In so far as that agreement provides for communication of the protocols which the Decision specifically requires Microsoft to disclose, Microsoft cannot validly claim that the implementation of the Decision would oblige it fundamentally to modify its business policy.

301 In light of the foregoing considerations, the President cannot take it as established that the Decision will cause a sufficiently significant change to Microsoft's business policy.

302 That conclusion is supported by the fact that the Commission stated at the hearing, in answer to a question put by the President, that in the course of the negotiations with the Commission during the administrative procedure, Microsoft was prepared to disclose more interoperability information than that referred to in the Decision. While insisting on the specific nature of each negotiation, which was the result of mutual concessions, Microsoft did not contradict the Commission's argument on that point.

(ix) The alleged difficulty in improving the protocols

303 Microsoft states that implementation of the Decision will have the effect of restricting the flexibility which it needs to improve the protocols concerned on a regular basis, thus reducing its capacity to innovate (annexes R.2 and T.7).

304 In that regard, it should be recalled that Article 5(a) to (c) of the Decision requires Microsoft to communicate the specifications for its protocols to its competitors, but leaves Microsoft free to design its protocols as it sees fit. The improvement of the protocols therefore remains a decision which it is for Microsoft to take in accordance with the expected consequences of such a decision. Microsoft has failed to establish that a decision to improve the protocols during the interim period – until the Court has delivered judgment in the main action – would have practical consequences of such magnitude as to constitute a real obstacle to innovation.

305 Next, the argument that the flexibility with which it will be able to improve the protocols concerned will be affected by the constraint, imposed by commercial reality, of having to ensure backward compatibility with competitors' products based on its protocols cannot be accepted in view of certain evidence in the case-file.

306 First, it should be recalled that, historically, Microsoft did not consider itself bound by such an obligation when it decided to render Novell's NDS for NT inoperative (recitals 298 to 301 and 686 to the Decision).

307 Second, Microsoft in any event ensures backward compatibility with the previous versions of its own products. There is no evidence in the file on which to believe that, in ensuring such compatibility, it is not also capable of ensuring backward compatibility with all compatible implementations. Microsoft has stated that it ensured backward compatibility with a range of products, emphasising that '[i]t [was] already an engineering challenge for Microsoft, in the context of successive releases of new Windows server operating systems, to maintain backward compatibility with the thousands of published interfaces used by third-party software programs for Microsoft'.

308 Third, the increased complexity represented by the development of compatible work group server operating systems has not been evaluated. In any event, the extra effort must be regarded as limited during the interim period owing to what will probably be the small number of compatible products placed on the market and bought by customers before the merits of the case have been determined by the Court. On that point, it should be noted that a new Microsoft operating system, known as 'Longhorn', will, according to Microsoft, be ready for 2006 and that, as the parties intervening in support of the Commission stated, the effect of the announcement of its launch will be likely to influence customer purchases to the detriment of competing work group server operating systems.

309 Fourth, the United States Settlement, which operates to the advantage of not only manufacturers of work group server operating systems, within the meaning of the Decision, but also virtually all manufacturers of server operating systems, ought to have had a negative impact of the same kind as that on which Microsoft relies in these interim relief proceedings. However, there is nothing in the parties' written submissions to indicate that implementation of the Decision might affect Microsoft's flexibility to change its protocols to a greater extent than that resulting from the undertakings agreed by Microsoft in the context of the United States Settlement. On that point, it follows from one of Microsoft's answers to the written questions that, in certain circumstances, the United States Settlement allows Microsoft to choose to use innovations in client-to-server protocols to increase the appeal of the Windows operating systems, without making that technology available to its competitors. It adds:

'In particular, if Microsoft develops new client-to-server protocols that are not included in its Windows client operating system, but are installed separately, then Microsoft need not make such protocols available to competitors. For example, Microsoft could develop innovative protocols in connection with a new version of its Windows server operating system. When a network using that Windows server operating system was set up, customers would be asked to install the client software implementing these protocols on their personal computers. (This is the method traditionally followed by Novell.)'

310 That statement confirms that Microsoft intends to improve its products and that the constraints leading to a lack of flexibility as regards the possibility of improving them effectively are not such as to prevent that improvement. It matters little whether the improvements are made available by deliberate intention or under a legal constraint.

311 Fifth, the agreement with Sun Microsystems, which covers the protocols concerned by the Decision, tends to show that the impact on Microsoft's capacity to alter its protocols is not irreversible.

(x) The alleged need to 'harden' the protocols

312 Microsoft states that it would have to 'harden' the protocols in order to avoid 'possible malfunctions, crashes and security risks' as a result of 'inadvertent and malicious use'.

313 On the assumption that the 'possible malfunctions, crashes and security risks' were proven, the President finds that Microsoft is merely invoking the damage resulting from the efforts which it claims would be necessary to prevent such a possibility from becoming a reality, without stating how that damage would be serious and irreparable. In particular, it does not show that the 'hardening' of the protocols would have to be maintained should the Decision be annulled or that it would be the cause of another type of damage. Furthermore, as the Commission contends, the recipients of the interoperability information would have strong incentives to render their products secure and stable and to prevent their 'inadvertent use' and would have no interest in 'malicious' use. On the contrary, as the Commission further submits, the undertakings benefiting from the disclosure will have a manifest interest in avoiding random damage, by testing their implementations against Microsoft's and ensuring that their products do not cause data loss or corruption with their customers. Those tests will naturally extend to all Windows products with which the competitor concerned intends to establish interoperability. In all probability, therefore, there will be no need for Microsoft to adapt retroactively products previously installed.

314 Just as in relation to the alleged interference with its ability to design its products freely, Microsoft has not established that the risks referred to in the preceding paragraph materialised as a result of the implementation of the United States Settlement. Last, although Samba or AS/U implement a number of protocols which had initially been designed as 'private' protocols, to use Microsoft's terminology, Microsoft does not put forward any example of 'unexpected' data capable of causing data loss or data corruption being transmitted to Windows.

315 The alleged constraints on Microsoft's capacity to develop its products are already inherent in the settlement concluded with Sun Microsystems, which includes the protocols of relevance in the context of the Decision. Even on the assumption that it exists, the resulting damage therefore has no connection with the remedy and Microsoft has not established that the suspension of implementation which it seeks would appreciably alter its current position.

316 Last, precise technical conditions could also be agreed by contract, as provided for in the context of the United States Settlement. In answer to a question put by the President, Microsoft stated that the United States Settlement allows it to make disclosure of security-related protocols conditional upon certain terms designed to minimise the risk that those protocols would be used maliciously to compromise computer security. Thus, the fear connected with malicious use of the information in issue or inadequate implementation testing could be dispelled by the possibility of requesting the Commission to authorise Microsoft to refuse to supply the information in such a situation.

– The alleged irreversible development of market conditions

317 Microsoft maintains that mandatory licensing will irremediably alter to its detriment the conditions prevailing on the market, because examination of the detailed specifications for the communications protocols in issue will reveal to its competitors important aspects of the design of the Windows server operating systems. The large-scale disclosure of such information would allow competitors to reproduce in their server operating systems a series of functionalities that Microsoft has developed through its own research and development efforts.

318 The factual premiss on which Microsoft bases its analysis has not been regarded by the President as proven to the requisite legal standard (see paragraphs 260 to 265 above). Nor has Microsoft adduced evidence of the development of the market which it maintains would follow from the alleged problem, even though the Commission challenged that point in its observations in defence. Microsoft's argument cannot therefore be accepted.

319 In any event, even on the assumption that Microsoft's argument may be understood as meaning that disclosure of the interoperability information will alter market conditions in such a way that it would lose market share and, should the Decision be annulled, would no longer be able to regain the market share lost, the President finds that Microsoft has adduced no factual evidence to support that argument. In particular, it has not demonstrated that there would be obstacles preventing it

from regaining a significant part of the share which it could have lost as a result of the remedy (see, to that effect, order of the President of the Court of Justice in Case C-471/00 P(R) *Commission* v *CambridgeHealthcareSupplies* [2001] ECR I-2865, paragraph 111; and order of the President of the Court of First Instance of 16 January 2004 in Case T-369/03 R *ArizonaChemicalandOthers* v *Commission*, not yet reported, paragraphs 82 to 84).

The serious and irreparable damage caused by the obligation to disclose the specifications for the client-to-server protocols

320 It follows from all of the foregoing considerations that, as regards the obligation to disclose the specifications for the server-to-server communications protocols, the various heads of damage alleged by Microsoft were not held to satisfy the urgency requirement.

321 As Microsoft has put forward no additional argument on which a different conclusion might be reached as regards the effects of the disclosure of the client-to-server communications protocols, the President is necessarily led to conclude that Microsoft has not shown that the urgency requirement was satisfied in relation to the second part of the obligation to disclose. In that regard, is should be borne in mind that, as the Commission correctly explained in the Decision, client-server interoperability and server-server interoperability are two indissociable components of interoperability within a computer system consisting of a number of client PCs running Windows and a number of work group servers running Windows, all linked together in a network (recitals 144 to 184 and 689).

322 In any event, it must be taken into account that Microsoft insisted at the hearing that there was no need to require it to disclose the specifications for the client-to-server protocols, since those protocols can be obtained until 2009 under the MCPP. That argument can only be taken to mean that the disclosure of those specifications ordered by the Decision cannot be the cause of serious and irreparable damage to Microsoft.

323 The application for interim measures must therefore also be dismissed for lack of urgency in so far as it seeks suspension of implementation of the obligation to disclose the specifications for the client-to-server protocols and to authorise their use by Microsoft's competitors.

324 In the light of all of the foregoing, as the urgency requirement is not satisfied, the application for suspension of implementation of Article 5(a) to (c) must be dismissed without there being any need to balance the various interests involved.

325 It is important to make clear that, under Article 109 of the Rules of Procedure, rejection of an application for an interim measure does not bar the party who made it from making a further application on the basis of new facts. In the present case, it cannot be ruled out that a continuing disagreement as to details of the means of implementation of the Decision may be regarded as a 'new fact'. More specifically, in view of the references in the foregoing assessment to the contractual conditions that justify the conclusion that the urgency requirement is not satisfied (see paragraphs 268, 273, 285 and 316 above), the refusal to include such safeguard clauses in the licence agreements to be concluded with the undertakings referred to in Article 5 of the Decision might be regarded as a change in circumstances susceptible of calling in question certain of the grounds on which the present order is based.

B – *The tying issue*

1. Arguments of the parties

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it is seeking

A prima facie case

326 Microsoft maintains that it presented arguments in its application for annulment which prima facie provide grounds for annulment of the provisions of the Decision as concerns the alleged tying abuse.

327 In the Decision, the Commission claims that the incorporation by Microsoft of an improved multimedia functionality in Windows constitutes an abuse within the meaning of Article 82 EC, 'in

particular' within the meaning of subparagraph (d) of the second paragraph of that article, and also in application of a new criterion in respect of tied sales derived from Article 82 EC. As stated at recital 841 to the Decision, in classical tying cases, the Commission and the Courts consider the foreclosure effects for competing vendors to be demonstrated by the bundling of a separate product. In Microsoft's submission, it follows from the same recital to the Decision, first, that the present case is not a 'classical tying case' and, second, that 'users can … obtain third party media players through the Internet, sometimes free [of charge]'. The Commission therefore accepts that '[t]here are … good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition' (recital 841).

328 The Commission none the less concludes that there is a foreclosure effect in this case and bases that conclusion on a highly speculative theory, according to which the ubiquitous distribution of media functionality in Windows will compel content providers to encode their content almost exclusively in Windows Media formats, which will, in turn, eventually drive all competing media players out of the market and then, indirectly, oblige consumers to use only Windows multimedia functionality (recitals 836 and 842 to the Decision). Microsoft claims that there is, for the purposes of the case-law, 'a serious dispute regarding the correctness of the fundamental legal conclusion underpinning' the Commission's allegations concerning the design and integration of Windows Media Player (order in *IMS Health* v *Commission*, paragraph 133 above, paragraph 106). Microsoft also submits that it has satisfied the requirement that the finding of infringement on which Article 6(a) of the Decision is based be shown to be prima facie unlawful.

329 First, the Commission's speculative theory concerning foreclosure from the market has no basis. The Decision does not reflect market realities, particularly in so far as, first, users of Windows-based client PCs find it easy to use different media players with different formats and, second, content providers use multiple formats on a daily basis. The Commission's finding is also contrary to the very different theory applied in the AOL/Time Warner decision (Commission Decision 2001/718/EC of 11 October 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1845 – AOL/Time Warner) OJ 2001 L 268, p. 28). Furthermore, the Commission concludes in the Decision that the foreclosure theory applies only where the media functionality of Windows is developed by Microsoft, although that theory was not found to apply between 1995 and 1998, when RealNetworks' media player was 'bundled' with Windows.

330 In its observations of 19 August 2004, Microsoft further states that the Commission wholly ignores the fact that the main Web sites continue to present media content in two or more formats, the fact that the number of formats on popular Web sites with media content has increased and is now approximately three and, last, the fact that in the spring of 2004 almost 80% of Web sites presented content in RealNetworks format.

331 The Commission also fails to take account of recent market developments, in particular the exponential growth in devices other than client PCs, such as Apple's iPod, which reads media content in formats different from Windows, or the future generation of mobile telephones, which will include media players. Microsoft maintains that content suppliers who wish to reach the widest possible audience will continue to use multiple formats, in order to reach, on the one hand, users of devices other than client PCs which are not capable of reading contents in Windows Media format and, on the other, consumers who use third-party media players on their client PCs rather than the Windows Media functionality.

332 Second, the benefits flowing from Microsoft's operating system 'design concept', which entails the creation of new versions of Windows with added functionality, are substantial and should have been given more weight by the Commission.

333 Third, the Commission fails to establish the existence of an infringement of Article 82 EC, in particular of subparagraph (d) of the second paragraph of that article. In particular, the Decision does not establish that Windows and its media functionality belong to two distinct product markets. The Commission incorrectly considers only whether the alleged tied product is available separately from the alleged 'dominant' product, whereas the appropriate question is whether the latter product is regularly offered without the alleged tied product. Nor does the question of a supplementary obligation arise in the present case, since consumers (i) are not required to pay extra for the media functionality in Windows, (ii) are not required to use the media functionality in Windows and (iii) are not prevented by Microsoft from using third-party media players instead of or in addition to the media functionality in Windows. Nor has the Commission demonstrated that the media functionality is not connected naturally or by commercial usage with client PC operating systems. Indeed, other operating systems include media functionality and Microsoft has been integrating constantly-

improving media functionality into Windows since 1992.

334 Fourth, the Commission failed in the present case to take sufficiently into account the obligations imposed on the European Community by the TRIPS Agreement.

335 Fifth, the remedy is disproportionate.

336 CompTIA and Exor support Microsoft's position as regards a prima facie case. They contend that Microsoft has demonstrated that Articles 4 and 6(a) of the Decision are prima facie unlawful.

Urgency

337 Microsoft maintains that the immediate implementation of Article 6(a) of the Decision will cause two types of serious and irreparable harm, resulting, first, from the abandonment of the fundamental design concept underlying its Windows operating system and, second, from injury effect to its reputation.

– The harm which Microsoft alleges will follow from the abandonment of the fundamental design concept underlying the Windows operating system

338 Microsoft maintains that the fundamental design concept underlying its Windows operating system constitutes the basis of the Windows business model. Microsoft's business model has the goal of designing a common platform for the development and running of applications, no matter what hardware is used by the consumer.

339 The immediate enforcement of Article 6(a) of the Decision would compel Microsoft to abandon that concept and thus cause it serious and irreparable harm. By requiring it to offer a version of Windows from which the software code corresponding to what the Commission identifies as 'Windows Media Player' has been removed, Article 6(a) of the Decision prohibits Microsoft from designing its operating system in such a way as to include new or improved media functionality on a uniform basis. It also deprives software developers, content providers, OEMs and consumers of the benefits they currently derive from the Windows platform.

340 Microsoft recalls that, according to the case-law, serious and irreparable damage is caused when a party is required to implement immediately a Commission decision which would entail structural changes or prevent it from determining essential aspects of its commercial policy (order in *RTE and Others* v *Commission*, paragraph 251 above; order of the President of the Court of Justice of 13 June 1989 in Case C-56/89 R *Publishers Association* v *Commission* [1989] ECR 1693; orders of the President of the Court of First Instance of 16 July 1992 in Case T–29/92 R *SPO and Others* v *Commission* [1992] ECR II-2161; in Joined Cases T-7/93 R and T-9/93 R *Langnese-Iglo and Schöller Lebensmittel* v *Commission* [1993] ECR II-131; of 10 March 1995 in Case T–395/94 R *Atlantic Container Line and Others* v *Commission* [1995] ECR II-595; in *Bayer* v *Commission*, paragraph 138 above; of 7 July 1998 in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641; and in *IMS Health* v *Commission*, paragraph 133 above). Should the Decision be implemented immediately, the benefits flowing from uniformity of the Windows platform would be irreversibly lost, resulting in serious and irreparable harm to Microsoft.

341 Nor, in Microsoft's submission, would that harm be repaired by the annulment of the Decision. Microsoft's engineers would have to assume that at least some copies of Windows distributed in the EEA will not have the media functionality. Since those downgraded versions of Windows could not be taken back from users should the Decision subsequently be annulled, Microsoft's engineers would have to take into account the fact that two versions would be in existence for many years, as would third parties who depend on the stability and consistency of the Windows platform, which would increase their costs and continuously reduce the appeal of Windows. Those planning difficulties would be compounded by the conditions laid down in Article 4 of the Decision.

– Harm to Microsoft's reputation

342 Microsoft contends that the distribution of the version of Windows required by Article 6(a) of the Decision ('the Article 6 version') would cause serious and irreparable harm to its reputation as a developer of quality software products.

343 First, the Article 6 version would not contain the media functionality normally made available to applications running on Windows. Consequently, many applications would not work with that version of the operating system, even though it would be called ‘Windows’. That malfunction would undermine the central value of Windows and would also have the effect that Microsoft and the OEMs and software developers would be required to resolve problems created by the Decision and to provide the necessary support to dissatisfied customers in the interim. Resolving the many foreseeable and potentially unforeseeable problems would be extremely difficult, costly and harmful to Microsoft’s reputation.

344 In its observations of 19 August 2004, Microsoft disputes the Commission’s assertion that Microsoft could maintain ‘basic media functionality’ in the Article 6 version. The Commission fails to explain what it means by ‘basic media functionality’ and its assertion could be correct only if it were referring to the ability to generate certain sounds or display static pictures on the screen. In any event, the Article 6 version would remove all ability to play audio or video files, in particular from compact discs or digital versatile discs (DVDs) or from documents in standard formats such as MP3 downloaded from the Internet on to the hard disk of a client PC. In Microsoft’s submission, a consumer will regard a client PC operating system which is incapable, in 2004, of performing such common tasks as seriously downgraded.

345 Nor does the Commission dispute the non-exhaustive list of all the Windows functionalities that would no longer work properly in the Article 6 version.

346 Second, the problems caused by the Article 6 version would not be resolved by the installation of third-party media players. Microsoft claims that such products are not substitutes for the media functionality in Windows, since they do not provide the same APIs, which leads to certain failures in third-party applications and Web sites that rely on Windows media functionality.

347 Third, Microsoft would suffer equivalent, or even greater, harm since other parts of Windows that rely on its media functionality would no longer work correctly in the Article 6 version, in particular as regards the ‘My Music’ folder and the transfer of MP3 files to a large range of portable digital music players.

348 It follows from the non-exhaustive list of defects caused by the Article 6 version, first, that only some of those defects could be remedied by installing a third-party media player and, second, that the defects resolved would vary depending on which media reader was installed.

349 In its observations of 19 August 2004, Microsoft disputes the Commission’s argument that third-party media players installed on new client PCs by OEMs can replace the Windows media functionalities. That assertion, which is apparently based on the supposition that the software code which supplies media functionality is perfectly substitutable, is technically incorrect. The Commission does not mention any third-party media player offering full media functionality which is not in the Article 6 version. Microsoft does not dispute that a part of Windows media functionality could be restored by installing certain media players. None the less, a part of the media functionality of the operating system would still be corrupted. Media player manufacturers are not in the business of curing Windows media functionality defects. Where appropriate, the extent to which the installation of a third-party media player will be capable of restoring a part of media functionality in the Article 6 version will in any event vary greatly depending on the media player installed.

350 Microsoft explains that, in so far as third-party media players make their functionality available by means of published interfaces, those interfaces are different from the interfaces used by the applications to call upon media functionality in Windows. Consequently, the different variations of platform software use different interfaces to present similar types of functionality. The other parts of Windows and the applications designed to call up media functionality in Windows cannot suddenly obtain that functionality of a media player of a third-party undertaking. At the very least, it would be necessary to alter Windows or a Windows application to enable third-party media players to use alternative interfaces. Those changes would probably be substantial and would have to be made for each of the media players. The advantages of a uniform platform would therefore be lost, even if third-party media players were capable of providing all the media functionality not in the Article 6 version.

351 Fourth, the immediate implementation of Article 6(a) of the Decision would cause serious and irreparable harm to the Microsoft and Windows trade marks, because Microsoft would be required to sell a downgraded product inconsistent with its basic design concept. Microsoft’s reputation as a

supplier of quality software would be damaged if it were forced to place its name on a downgraded product that did not provide the media functionality that consumers expect from a modern operating system.

352 Fifth, Microsoft states that it could not prevent damage to its reputation by issuing notices informing consumers about the nature of the Article 6 version, since it would be unable to carry out all the tests necessary to draw up a complete list of the applications which would not work properly with the Article 6 version. In practice, it is likely that many consumers will be unable to understand the consequences of the absence of media technology in the Article 6 version.

353 Sixth, the immediate implementation of Article 6(a) of the Decision would cause serious harm to Microsoft's copyright in Windows. Microsoft would be required to adapt its work by removing the parts of the software code which provide the media functionality that in Microsoft's judgment should be included in a modern operating system and the absence of which renders the product defective. That damage to Microsoft's copyright would be irreparable, since, once the adaptation was marketed, there would be no way of taking the downgraded versions of Windows out of circulation.

354 In its observations of 19 August 2004, Microsoft disputes a number of the Commission's arguments relating to its trade marks and its reputation. In particular, it disputes the Commission's claim that the 'impression' that Windows operating systems 'always guarantee the presence of [Microsoft's] basic design concept' is 'factually incorrect', the Commission noting in that regard that Microsoft already produces a number of different versions of Windows. Microsoft submits that the existence of the products mentioned by the Commission has no impact on the serious and irreparable damage which it has demonstrated. Windows CE and Windows XP Embedded are not client PC operating systems. The other versions of Windows XP identified by the Commission, namely Professional, Home, Media Center Edition and Tablet PC Edition, all expose the same common core of interfaces, the 'Win32 APIs'. These are the interfaces that software developers have used to write Windows applications since the release of Windows NT 3.5 and Windows 95, and thus all versions of Windows XP will run the existing stock of Windows applications. In its observations on the statements in intervention, Microsoft also uses the same argument to counter RealNetwork's assertion that the Windows platform is already fragmented.

355 The important thing for Microsoft and end users is that the latest version of Windows designed for use as a general-purpose operating system, Windows XP, in all its versions, will run any Windows application designed over the last 10 years. That would not be possible in the case of the Article 6 version, even though that version will be seen by consumers as a general-purpose client PC operating system.

356 Last, also in its observations of 19 August 2004, Microsoft further claims that the Commission appears to share its view that the harm invoked is irreparable, since, in the Commission's words, the 'unbundled versions of Windows cannot be taken back from users'. The Commission none the less contends that the residual damage would not be irreversible, because 'Microsoft would be able to use the Internet in order to distribute [Windows Media Player] to any customer that has acquired an [Article 6 version]'. That hypothetical possibility is factually incorrect. It ignores users of the Article 6 version who are not connected to the Internet. Furthermore, Microsoft does not download and install software code on users' client PCs without their prior consent. The Article 6 versions would remain in the hands of consumers for a long time, and perhaps even indefinitely. Microsoft adds that even if the Commission is correct to consider that some users would prefer the Article 6 version, it must also conclude that there are users who would not give permission for Microsoft to restore media functionality in their operating systems.

357 Microsoft's position on the existence of serious and irreparable damage is supported by Exor. Exor contends that the damage sustained would not depend on either the decisions of third parties, i.e. decisions by consumers to buy the Article 6 version, or a 'lack of diligence' on the part of Microsoft. The Article 6 version would inevitably be a downgraded product, since the removal of one of the components of the Windows operating system would cause malfunctions in other components which rely on the missing code in order to provide media functionalities. Even if it were technically possible to redesign Windows completely in order to eliminate those interdependencies, the efficiencies stemming from such interdependencies would be completely lost. The Decision requires Microsoft to develop a completely different version of Windows. Consequently, the mere ex post installation of media functionality would not be sufficient, since the components which had been modified in order not to call upon the media functionality would no longer be capable of doing so afterwards.

The balance of interests

358 Microsoft contends that the balance of the interests at stake tilts heavily in favour of suspending implementation of Article 6(a) of the Decision. It submits (i) that the immediate implementation of Article 6(a) of the Decision is unnecessary, (ii) that that implementation would cause serious harm to it and to others and (iii) that the balance of interests ought to take the Commission's obligations under international treaties into account.

– The lack of necessity for the immediate implementation of Article 6(a) of the Decision

359 First of all, Microsoft contends that the Commission's interest in imposing an effective remedy does not require immediate implementation of Article 6(a) of the Decision. The remedy imposed is expressly designed to deprive Microsoft of what the Commission alleges to be a decisive competitive advantage of the media functionality in Windows, namely the fact that it enjoys widespread distribution because it is integrated into the leading operating system for client PCs. In Microsoft's submission, a number of facts show that the Commission's concern about the widespread distribution of media functionality in Windows is unjustified.

360 First, the integration of media functionality in Windows does not prevent consumers from running one or more third-party media players on Windows, but actually facilitates the development of those media players since many of them rely to a certain extent on that functionality.

361 Second, vendors of third-party media players are free to distribute their products widely, in particular by means of agreements with OEMs or by downloading over the Internet.

362 Third, under the United States Settlement, vendors of third-party media players are free to reach exclusive agreements with OEMs whereby the media functionality in their product is the only one offered to the end user.

363 Fourth, third-party media players can design their products in such a way that they can read files in Windows Media formats.

364 Fifth, the Commission itself has emphasised the ease with which consumers can download media players on their PCs. Furthermore, the Commission attributed no significance to the widespread distribution of media functionality in Windows when assessing the probability that, as a result of the AOL/Time Warner concentration, AOL's media player would shortly become the most popular player in the world (see paragraph 329 above)

365 Next, Microsoft contends that the Commission's position and the remedy imposed are based on excessively speculative reasoning, according to which the widespread distribution of media functionality in Windows will in future compel content providers to use Windows formats exclusively, which will drive all third-party media players out of the market. There is no evidence to support the Commission's speculation that any delay in implementing Article 6(a) of the Decision would 'tip' the scales in favour of Windows Media Player, which would drive out all competition.

366 Thus, first, the integration of media functionality into Windows has not prevented the emergence of third-party media players, as demonstrated by the example of iTunes. Microsoft also produces data which show that, between April 2003 and April 2004, although the use of Windows Media Player increased, both RealPlayer and QuickTime maintained the numbers of users.

367 Nor, second, is there the slightest evidence that content providers are 'inclining' towards Windows Media formats.

368 Third, the facts contradict the theory that removal of the Windows Media Player code is necessary because OEMs are not prepared to pre-install third-party media players if they are not allowed to distribute Windows without media functionality (recital 851 to the Decision).

369 Fourth, in its observations of 21 July 2004, the Commission maintains for the first time that 'even a 5% exclusive share of PCs with a third-party media player will provide incentives to software developers to also write applications for this media player'. That theory is incorrect, it confirms that the Commission's objective is to fragment Windows and it is at odds with the Commission's objective of increasing consumer choice.

370 Fifth, in its observations of 19 August 2004, Microsoft disputes the Commission's assertion that immediate implementation of the remedy is necessary to 'make consumer choice possible'.

371 Sixth, also in its observations of 19 August 2004, Microsoft states that third-party media players continue to be distributed in huge numbers and that large amounts of content continue to be encoded in non-Microsoft formats.

372 Seventh, in its observations on the statements in intervention, Microsoft further states that the implementation of the remedy provided for in Article 6(a) of the Decision in the 'end user' segment and the 'OEM' channel will not resolve any of the concerns underlying the Decision. In the first place, it is difficult to see what benefits an 'end user' could derive from an Article 6 version rather then a complete version of Windows, since both would be offered at the same price. In the second place, the Commission has not investigated the extent to which OEMs would be prepared to enter into exclusivity agreements for the client PCs which they distribute in the EEA.

– The damage resulting from the immediate implementation of Article 6(a) of the Decision

373 Microsoft maintains that the damage that would result from the immediate implementation of Article 6(a) of the Decision is real and significant, since implementation would not allow Microsoft to continue its long-standing and successful business model, as it has shown, it submits, in its arguments in respect of urgency. Furthermore, Microsoft, supported more broadly on that point by CompTIA, ACT, Mamut and TeamSystem, DMDSecure.com and Others and Exor, claims that account should be taken of the interests of software developers and website creators whose activities depend on a uniform Windows platform.

374 First, applications conceived on the premiss of Windows media functionality would not function properly on the Article 6 version.

375 Second, immediate implementation of Article 6(a) of the Decision would affect applications and websites currently under development and those which will be developed in the future, and that serious and irreparable damage could not be avoided by the installation of third-party media players.

376 Third, in its observations of 19 August 2004, Microsoft disputes the Commission's arguments, first, that software developers who develop applications that rely on Windows functionality may 'avail themselves' of the 'possibility "to redistribute the player as part of their application and from their [Internet] site"' and, second, that '[i]t is commonplace in the software industry for software developers to write their applications to accommodate the eventuality of dealing in an intelligent way with the possible absence of a media player (update)', so that 'any costs related to such adaptations of applications … are likely to be insignificant, or at least not exceed those normally incurred whenever Microsoft provides a new version (or update) of Windows'. In practice, in Microsoft's submission, the process of restoring media functionality in the Article 6 version would be just as complicated and onerous for others as for Microsoft.

377 Fourth, Microsoft states that in considering the various interests at stake in the present case, it is important to bear in mind the significance attributed in the proceedings before the District Court which upheld the United States Settlement to the interests of software developers and to the disadvantages resulting from the fragmentation of Windows.

– The Community's obligations under the TRIPS Agreement

378 Last, Microsoft requests the Court to consider the obligations imposed on the Community by the TRIPS Agreement.

b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order sought by it

A prima facie case

379 The Commission, supported on this point by CCIA before it withdrew from the proceedings, contends that Microsoft's case is prima facie unfounded and must be rejected.

380 The Commission maintains that its findings with regard to tying are based on well-established legal and economic theories and that the tying abuse is consistent with the case-law on tying (recital 794 et seq. to the Decision). Microsoft does not put forward any increase in technical efficiencies for which the ‘integration’ of Windows media player in Windows would be a precondition (recitals 962 to 969 to the Decision).

381 Thus, first, as regards the existence of a foreclosure effect, the Commission fails to see at the outset how a difference from certain earlier cases to which Microsoft refers supports its claim that a new theory was applied in the present case. The fact that foreclosure is demonstrated where it is normally presumed does not mean that a new legal theory is being applied. The Commission accepts that the Decision, unlike those adopted in certain earlier cases (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, upheld by the Court of Justice in Case C–53/92 P *Hilti* v *Commission* [1994] ECR I-667, and *Tetra Pak* v *Commission*, paragraph 126 above, upheld by the Court of Justice in Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951), does not conclude that there was foreclosure from the market per se (recital 841 et seq.), but takes into account the specific circumstances of the case, i.e. the fact that media players may be downloaded, sometimes free of charge, over the Internet.

382 However, the evidence in the present case shows, first of all, that no other media player manufacturer can equal the ubiquity of Windows Media Player which results from its being tied with Windows and, moreover, that that situation is liable to have a significant effect on developers of complementary software and content. The reduction, by tying, of the applications and content available for other manufacturers’ media players is ultimately harmful to consumers as it reduces innovation in those products, irrespective of their intrinsic merits. Microsoft has put forward no objective justification for that practice.

383 Furthermore, Microsoft’s claim that the Commission’s findings of foreclosure are based on speculation is wrong in fact and in law. Recitals 879 to 896 to the Decision provide a clear description of the impact of tying on content providers and independent software developers. It follows from the Decision that Windows Media Player usage is increasing while, according to Microsoft itself, other media players are rated higher in terms of quality by users (recitals 948 to 951). Nor does the case-law require that the Commission demonstrate that all third-party media players have been eliminated from the market (judgments of 30 September 2003 in Case T-203/01 *Michelin* v *Commission*, not yet reported, paragraph 239; of 23 October 2003 in Case T-65/95 *Van den Bergh Foods* v *Commission*, not yet reported, paragraphs 149 and 160; and of 17 December 2003 in Case T–219/99 *British Airways* v *Commission*, not yet reported, paragraph 293).

384 Second, as regards the existence of distinct products, the Commission claims that the Court of Justice and the Court of First Instance have held that the existence of independent manufacturers specialising in the manufacture of the tied product already indicates a separate consumer demand and therefore a separate market for the tied product. That approach is also consistent with United States case-law.

385 Third, the arguments whereby Microsoft seeks to demonstrate that no coercion was exercised on consumers have already been rejected in the Decision.

386 Last, the Commission rejects the arguments put forward by Microsoft in respect of its two other pleas. First, as regards Microsoft’s reference to the Community’s obligations under the TRIPS Agreement, the Commission refers to its arguments relating to the remedy provided for in Article 5 (a) of the Decision (see paragraph 195 above). Second, the Commission submits that the remedy provided for in Article 6(a) of the Decision is proportionate, since Microsoft retains the right to offer a bundled version of Windows with Windows Media Player and since, even if some customers should choose the Article 6 version, they would still have the opportunity to complement that product with Windows Media Player, should they so desire.

Urgency

387 The Commission, supported on this point by RealNetworks and SIIA, and also by CCIA before it withdrew from the proceedings, maintains that Microsoft has not demonstrated the existence of serious and irreparable damage that would be caused to it by the immediate implementation of the Decision.

The balance of interests

388 The Commission maintains that the balance of interests tilts towards rejecting Microsoft's request, in particular as regards the public interest in maintaining, at least, effective competition. The media player market is approaching the stage at which it may be starting to tip. The Commission is supported on this point by RealNetworks and SIIA. The Commission adds in that regard that immediate implementation of the remedy would be unlikely to make a drastic change to Microsoft's position on the media player market but would simply allow a levelling of competition on that market and thus enable the status quo to be maintained as regards the structure of that market. Only immediate implementation of the remedy could preserve consumer choice and allow consumers to reap the benefits of innovation in digital media services.

389 As regards the risk of damage to third parties, the Commission disputes the arguments based on possible claims from certain software developers, certain web site developers and certain content providers. The Commission also plays down the risk that damage might be caused indirectly to the computer sector in general.

2. Findings of the President

a) A prima facie case

390 In the words of Article 2(b) of the Decision, Microsoft is stated to have infringed Article 82 EC by 'making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of [the] Decision'. In order to provide a remedy for that situation, Article 4 of the Decision requires Microsoft to bring that infringement to an end in accordance with Article 6 of the Decision. Article 6(a) of the Decision orders Microsoft to market 'a full-functioning version of the Windows Client PC Operating System which does not incorporate Windows Media Player'. The Decision states, however, that 'Microsoft … retains the right to offer a bundle of the Windows Client PC Operating System and Windows Media Player'.

391 In support of its claim that the prima facie case requirement is satisfied, Microsoft relies on a series of arguments made up essentially of five parts. It maintains, first, that the Commission applied in the Decision a speculative theory without any basis; second, that the Commission should have given greater weight to the advantages flowing from the Windows operating system design concept; third, that the decision fails to establish an infringement of Article 82 EC; fourth, that the Decision does not take sufficiently into account the obligations imposed on the Community by the TRIPS Agreement; and, fifth, that the remedy imposed by the Decision is disproportionate.

392 In the light of the arguments submitted by Microsoft in the interim measures proceedings, the fourth and fifth parts of its arguments cannot be considered sufficiently serious to constitute a prima facie case.

393 The part relating to the disproportionate nature of the remedy was presented in an excessively succinct manner by Microsoft in its application. Microsoft merely stated in that regard that 'the remedy imposed by the Decision [was] disproportionate'. It fails to explain, in particular, how the allegedly disproportionate character of the measure imposed by Article 6(a) of the Decision should be established by the Court. As regards the part relating to failure to observe the TRIPS Agreement, it was not developed sufficiently to enable the President to arrive at an informed decision. First, Microsoft merely stated in its application for interim measures that 'the Decision [did] not take sufficiently into account the obligations imposed on the European Communities by [the TRIPS Agreement]'. Second, the reference to the argument developed in annex T.9 was not held to be consistent with the applicable procedural rules (see paragraph 88 above).

394 The President considers, however, that Microsoft's other arguments raise complex issues which it is for the Court of First Instance to resolve in the main action and that those arguments cannot be regarded in the interim measures proceedings as prima facie unfounded.

395 First, this case raises a complex issue concerning the first part of Microsoft's argument, whereby Microsoft alleges in substance that the Commission unlawfully applied a new theory on tying.

396 By that argument, Microsoft essentially criticises the Commission for having concluded that the media player market would 'tip' in Microsoft's favour without making any attempt to reconcile that theory with the realities of the market. Microsoft relies in particular, first, on the fact that it is easy for users of Windows-based client PCs to access different media players using different formats and, second, on the fact that content providers make use of different formats. In that regard, Microsoft

claims that the Decision relies on pure supposition.

397 In the Decision, in order to arrive at the conclusion that the bundling of Windows Media Player with Windows constituted tying prohibited by Article 82 EC, first, the Commission considered that Microsoft held a dominant position on the client PC operating systems market (recital 799), which Microsoft does not dispute. Second, the Commission considered that streaming media players and client PC operating systems were distinct products (recitals 800 to 825). Third, the Commission considered that Microsoft did not allow its customers to obtain Windows without Windows Media Player (recitals 826 to 834). Fourth, the Commission examined the existence of foreclosure effects on the market. In that regard, it follows from recital 841 to the Decision that the Commission gave the following answer to Microsoft's arguments that the practice condemned by the Commission had no such effects: '[t]here are indeed circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case. While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the Internet, sometimes ... free [of charge]. There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition'. Consequently, in the light of the characteristics of the market in question, the Commission recognised that the present case presented specific features from the viewpoint of its previous practice and of what it considered to reflect the principles established in the Community case-law on tying.

398 For that reason, Microsoft's argument is likely to raise one or more important questions of principle which may affect the legality of the Commission's analysis. In that regard, it has consistently been held that 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 *Hoffmann-La Roche* v *Commission*, [1979] ECR 461, paragraph 91; and Case T–228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 111).

399 In the present case, the Commission considered, essentially, that the anti-competitive effect of the tying was the result of 'indirect network effects'. Those effects related to the fact that the presence of Windows Media Player in all the operating systems distributed by Windows gives content providers and applications manufacturers an incentive to design their products on the basis of Windows Media Player (recital 842). For the purpose of demonstrating that fact, the Commission relied largely on present or past factual material relating to the incentives for content providers and software developers (recitals 879 to 896). None the less, as may be seen in particular from recitals 842 and 984 to the Decision, that material supports what is at least in part a prospective analysis of the risks for competition resulting from the impugned practice.

400 Admittedly, as the Commission has noted, for the purpose of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having or likely to have that effect (*Michelin* v *Commission*, paragraph 383 above, paragraph 239, and *British Airways* v *Commission*, paragraph 383 above, paragraph 293). The present case none the less raises the complex question whether, and if so on what conditions, the Commission may rely on the probability that the market will 'tip' as a ground for imposing a sanction in respect of tying practised by a dominant undertaking where that conduct is not by nature likely to restrict competition, should that be the case.

401 Second, an important question arises in connection with the examination of Microsoft's argument that the Commission should have given greater weight to the positive effects of the Windows operating system 'design concept'. That argument might lead the Court of First Instance, in the main action, to consider on what conditions the existence of objective justification may permit the conclusion that a tying practice having anti-competitive effects is not prohibited by Article 82 EC. Prima facie, the resolution of that intricate question requires an examination of whether any positive effects associated with the increasing standardisation of certain products may constitute objective justification or whether, as the Commission contends, the positive effects of standardisation may be accepted only when they result from the operation of the competitive process or from decisions taken by standardisation bodies.

402 Third, over and above the questions of principle raised by the examination of these two parts, Microsoft disputes the scope of the factual premisses on which the Commission's analysis is based. It maintains, in particular, in relation to the first part of its argument, that the Commission's analysis relating to the existence of 'indirect network effects' is contradicted by the fact that content providers continue to have recourse to different formats. In that regard, it must be stated that the Commission has not disputed that that was the case, at least to a certain extent. It is for the Court of First Instance to rule, in the main action, on those factual questions and on the consequences, if any, to be drawn from them in regard to the validity of the Commission's analysis.

403 Fourth, Microsoft's argument that 'Windows and its media functionality' do not constitute two distinct products for the purposes of the application of Article 82 EC in regard to tying cannot, in the interim measures proceedings, be considered prima facie unfounded, regard being had in particular to the fact that for many years Microsoft and other manufacturers have integrated certain media functionalities in their client PC operating systems.

404 The first three parts of Microsoft's arguments therefore raise important questions, particularly in regard to the complex economic assessments which they entail both in law and in fact. The President considers that Microsoft's arguments cannot be regarded in the interim measures proceedings as prima facie unfounded, so that the prima facie case requirement is satisfied.

b) Urgency

405 Microsoft maintains that implementation of Article 6(a) of the Decision will irreversibly affect the value of the Windows platform, which would cause it to sustain two kinds of serious and irreparable damage. Those two kinds of damage must be assessed separately.

The alleged damage to the Windows operating system 'basic design concept'

406 Article 6(a) of the Decision requires Microsoft to design and place on the market a product which it does not currently market and which it states to be incompatible with a fundamental element of its business policy. More particularly, Microsoft maintains that Article 6(a) of the Decision causes damage to the Windows operating system 'basic design concept'. In substance, Microsoft thus invokes an interference with its commercial freedom.

407 In that regard, it is apparent from the case-file that Microsoft has for many years marketed an operating system which it regards as offering users common functionalities, which have been gradually expanded and which since 1992 have included, inter alia, certain media functionalities. It is also sufficiently clear from the case-file that Microsoft endeavours to ensure, at least generally, that the most recent version of its general-purpose Windows operating system will run applications designed for its earlier versions.

408 In this context, it should be emphasised that implementation of the Decision would require Microsoft to market an operating system without certain media functionalities which in its view form an integral part of that operating system. The Decision therefore interferes with Microsoft's commercial freedom. Furthermore, certain applications designed to function on the whole package consisting of Windows and Windows Media Player might not function satisfactorily in the Article 6 version, at least if that version should remain without a media player.

409 In that regard, the President recalls that, with regard to the principle of freedom to exercise business activities, which, according to the consistent case-law of the Court of Justice (Case 44/79 *Hauer* [1979] ECR 3727, paragraphs 31 to 33, and judgment of 9 September 2004 in Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council*, not yet reported, paragraph 51), forms part of the general principles of Community law, the undertakings active on the territory of the Community are free, in principle, to choose the commercial policy which they deem appropriate. That means, in particular, that it is in principle for each undertaking to decide freely on the nature and properties of the products which it intends to place on the market. However, it cannot be considered that an interference with an undertaking's business policy always constitutes serious and irreparable damage to that undertaking for the purposes of an application for interim measures. It is thus in the light of the circumstances of each case that the serious and irreparable nature of an interference with an undertaking's commercial freedom must be assessed (see paragraph 292 above).

410 In the circumstances of the present case it must be accepted that the interference with Microsoft's commercial freedom, when considered as such and independently of its actual effects on the

market, cannot be regarded as irreparable. Putting aside any consequences that the Decision may have on the market during the period before the possible annulment of the Decision, if it is annulled, it is not apparent that, if Microsoft is successful in the main proceedings, it would be unable to apply its 'basic design concept' again to all the products which it markets following annulment of the Decision. Consequently, in that situation, even on the assumption that Microsoft did demonstrate that the interference with its commercial freedom in itself constitutes serious damage, that damage would not appear to be irreparable.

411 It is none the less appropriate to examine whether, in the light of its actual consequences on the market during the period up to the judgment in the main proceedings, the interference with Microsoft's commercial freedom is likely to cause serious and irreparable damage to that undertaking. In that regard, it is necessary to take into account the consequences which might result for Microsoft, first, from being required to design the Article 6 version, second, from placing that version on the market and, third, from the possibility that it may be bought by Microsoft's customers.

412 First, Microsoft maintained at the hearing that even if the Article 6 version should not be bought in significant quantities, there would be damage to its 'design', particularly in the light of the 'futile exercise' that the design of the Article 6 version would constitute.

413 In so far as Microsoft thereby refers to the need to design the Article 6 version, it has not provided sufficient details of the disadvantage which would result from that obligation. For the sake of completeness, there is also every reason to think that the damage thereby suffered by Microsoft would essentially consist of development costs. In the absence of proof to the contrary, such damage would constitute financial damage, which, otherwise than in exceptional circumstances which are not present in this case, does not constitute irreparable damage (order of the President of the Court of Justice in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24; and order of the President of the Court of First Instance in Case T–53/01 R *Italian Post* v *Commission* [2001] ECR II-1479, paragraph 119).

414 Second, in so far as Microsoft's argument must be understood as meaning that it would suffer damage from the mere fact that it would be required to place the Article 6 version on the market, and irrespective of whether that version would actually be purchased, it has not provided sufficient details of the nature, the seriousness and the irreparability nature of those alleged disadvantages. In so far as Microsoft's argument must be understood to mean that it would suffer damage to its reputation, it will be examined together with the second head of damage on which it relies (see paragraphs 442 to 475 below).

415 At the hearing, Microsoft none the less further submitted that, even if there should be no demand for the Article 6 version, there would be uncertainty for third parties, in particular content providers. Content providers would not know the number of Article 6 versions delivered. That, in Microsoft's submission, would reduce the appeal of Windows.

416 In that regard, it must be borne in mind that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures (see the case-law cited at paragraph 240 above). Consequently, in so far as the uncertainty on which Microsoft relies may cause damage to third parties, it cannot be taken into account under the head of urgency (see, to that effect, order of the President of the Court of Justice in Case 112/88 *Crete Citron Producers Association* v *Commission* [1988] ECR 2597, paragraph 20). However, it is appropriate to examine Microsoft's arguments that the uncertainty created among third parties would, conversely, reduce the appeal of its platform.

417 First of all, Microsoft provides neither details nor evidence on which it might be possible to assess the precise nature, the existence, the seriousness and the irreparable nature of the reduction in the appeal of Windows that would be caused by that alleged uncertainty. On the assumption in particular that the reduced appeal on which Microsoft relies means that certain third parties relying on 'the stability of Windows' might decide, on account of the marketing of the Article 6 version, that they would no longer design their products for that platform, Microsoft does not adduce sufficient evidence to demonstrate that such a choice might be made by those operators in significant proportions.

418 On that point, the President observes for the sake of completeness that none of the parties which have intervened in support of the form of order sought by Microsoft has maintained that, owing to

the implementation of Article 6(a) of the Decision, it might cease to design its products for the Windows platform. Those parties stated that the implementation of Article 6(a) of the Decision was likely to cause them damage, since, in particular, it would mean that they would have to choose whether or not to adapt to the uncertainty created on the market. On the other hand, first, the possibility that they may choose not to adapt their products to the Article 6 version remains very largely hypothetical at this stage. Second, even on the assumption that the probability that those operators will not adapt their products to the Article 6 version were proved to the requisite legal standard, that, as the Commission emphasises, would not prove that they would however cease to design their products for the version of Windows including Windows Media Player. In fact, none of the interveners in support of the form of order sought by Microsoft maintained that, on account of the Decision, it might be led to design its products for a different operating system. Accordingly, it has not been shown that the reduction in the appeal of Windows, even vis-à-vis those interveners alone, could be significant for Microsoft in practice.

419 Last, at no point has Microsoft specifically demonstrated that the uncertainty as to the uniformity of the Windows platform would reduce its appeal for final consumers or its customers.

420 Third, it is appropriate to examine the consequences for Microsoft of the possibility that the Article 6 version would be purchased in significant quantities.

421 In that regard, it should be stated, by way of preliminary observation, that the remedy referred to in Article 4 and Article 6(a) of the Decision is intended to put an end to the infringement found by the Commission and does not prejudge future developments on the market. As the Commission noted at the hearing, the remedy does not preclude the possibility that Windows Media Player, regard being had to its own merits and as a result of competition which, in the Commission's submission, would be restored, will continue in practice always to be bought with Microsoft's operating system.

422 In addition, Microsoft expresses serious doubts as to the probability that the Article 6 version will sell in significant quantities.

423 In that regard, it follows from recitals 69 and 70 to the Decision that client PC operating systems are marketed essentially through two distribution channels: first, distribution to final consumers and, second, distribution to OEMs, who assemble client PCs and generally install an operating system.

424 As regards distribution to end users, Microsoft indicated in its observations on the statements in intervention, that, '[i]t is difficult to see what benefit a customer in that channel could possibly derive from obtaining the Article 6 version of Windows rather than the full-featured version of Windows, as both would be offered at the same price'. In the same observations, Microsoft states that '[i]t is difficult to see how a rational end user could ever opt for such a version'.

425 As regards OEMs, moreover, Microsoft states that 'it is conceivable that a third party media player vendor might seek to induce an OEM, by payment of compensation, to license the Article 6 version of Windows and bundle it, on an exclusive basis, with its media player'. However, Microsoft then criticises the Commission for having failed to analyse the extent to which OEMs would be prepared to enter into such agreements. It states that '[t]he fact that OEMs currently install multiple media players and that no media player vendor appears to have paid OEMs to remove visible access to Windows Media Player … suggests that media player vendors are not sufficiently interested in exclusive arrangements to pay for the Article 6 version of Windows'. Furthermore, at the hearing, although it continued to envisage the possibility that some of its competitors might enter into exclusivity agreements with OEMs, Microsoft repeated its doubts as to the potentially significant nature of sales of the Article 6 version.

426 It is thus clear that Microsoft seriously doubts that the Article 6 version will sell in significant quantities.

427 It is settled case-law that it is for the party applying for the interim measure to prove that it cannot wait for the outcome of the main proceedings without suffering serious and irreparable damage (see the case-law cited at paragraph 240 above). In that context, it is sufficient, particularly where the occurrence of the damage depends on the occurrence of a series of factors, that damage be foreseeable with a sufficient degree of probability (order in *Germany* v *Council*, paragraph 241 above, paragraphs 22 and 34, and order in *HFB and Others* v *Commission*, paragraph 241 above, paragraph 67). However, the applicant is still required to prove the facts forming the basis of its

claim that serious and irreparable damage is likely (order in *HFB and Others* v *Commission*, paragraph 241 above, paragraph 67).

428 In the present case, as Microsoft has failed to adduce sufficient evidence on which to take the opposite course, it is not for the judge dealing with the application for interim measures to prejudge the effect which the remedy imposed by Article 6(a) of the Decision will have on the market. It must therefore be held that, as Microsoft itself seems to agree, the possibility that sales of the Article 6 version may reach significant levels remains, at this stage and on the basis of the evidence before the President, very largely hypothetical.

429 The premiss on which the damage alleged by Microsoft is based in such a situation cannot therefore be regarded as demonstrated.

430 In any event, even on the assumption that Microsoft has demonstrated to the requisite legal standard the probability that the Article 6 version will sell in significant quantities, it should be noted that, as the Commission maintains, Microsoft does not rely in the present case on an irreversible development of the market as a result of those sales. Should the Decision be annulled, Microsoft would be able to resume marketing the single version of Windows with Windows Media Player and therefore apply, again and exclusively, what it regards as the ‘basic design concept’ of the Windows operating system. It has not been shown that there would be any obstacles capable of preventing Microsoft from regaining the position which it held on the market before the implementation of the remedy.

431 Those factors notwithstanding, Microsoft maintains that it would suffer serious and irreparable damage, for two distinct reasons.

432 In the first place, it claims that ‘the benefits flowing from uniformity of the Windows platform would be irreversibly lost’. Furthermore, the damage caused would not be made good by the annulment of the Decision, since ‘Microsoft’s engineers would have to assume that at least some copies of Windows distributed in the EEA will not have the media functionality’, which would require that they ‘take into account that two versions would be in existence for many years’.

433 However, Microsoft does not state in sufficient detail how the obligation imposed on its engineers would affect or render impossible the resumption of its ‘basic architectural design’ should the Decision be annulled. Thus, Microsoft does not explain first of all how, following the annulment of the Decision, it would be prevented from again distributing solely the version of Windows with Windows Media Player.

434 Microsoft next appears to take the view that the damage which it invokes would not be unlimited in time, since it would be encountered ‘for many years’.

435 Furthermore, Microsoft does not adduce evidence on which it would be possible to evaluate to the requisite legal standard the damage resulting from the additional efforts that its designers would have to make in order to take account of the existence of two versions. In the absence of detailed information in that regard, there is every reason to believe that those efforts would take the form of additional costs and, consequently, of financial damage, which, otherwise than in exceptional circumstances which are not present in this case, does not constitute irreparable damage (orders in *Abertal and Others* v *Commission*, paragraph 413 above, paragraph 24, and *Italian Post* v *Commission*, paragraph 413 above, paragraph 119).

436 Nor does Microsoft demonstrate how it would be impossible, or at least irreparably and seriously damaging, for it, in the event that Article 4 and Article 6(a) of the Decision were annulled, to ignore the existence of copies of the Article 6 version that would already have been marketed.

437 The first head of damage invoked by Microsoft cannot therefore substantiate the prospect of serious and irreparable damage.

438 In the second place, Microsoft contends that ‘third parties that depend on the stability and consistency of the Windows platform’ would also have to take account of the fact that two versions would be in existence for many years, ‘which would increase their costs and reduce the appeal of Windows on an ongoing basis’.

439 In that regard, it is appropriate to reiterate, in this context, the observations set out at paragraphs

421 to 428 above. It has not been demonstrated that there is a sufficiently significant risk in practice, even if the Article 6 version should sell in significant quantities, that the operators who currently design their products for Windows would cease to do so or that consumers, customers or other operators who in Microsoft's view rely on the stability of Windows might reduce their purchases or their use of Windows.

440 Last, as regards the two heads of damage invoked by Microsoft, in addition to the conclusion already drawn at paragraph 430 above, the President considers in any event that the Commission has put forward convincing evidence to show that, following the annulment of the Decision, Microsoft would be able to use certain mechanisms, in particular an update of its operating system, in order to distribute Windows Media Player and, consequently, to restore at least to a very large extent the tying of Windows Media Player with its operating system. Microsoft and the parties intervening in its support have not contradicted those assertions in sufficient detail to exclude the strong probability that Microsoft may distribute Windows Media Player in proportions quite sufficient to avoid the serious damage which it invokes.

441 It must therefore be concluded that Microsoft has not demonstrated that implementation of Article 6 (a) of the Decision would cause it serious and irreparable damage owing to the interference with its 'basic design concept' or, more generally, owing to an interference with its commercial freedom.

The alleged damage to Microsoft's reputation

442 Microsoft maintains that implementation of Article 6(a) of the Decision will damage its reputation as a 'a developer of quality software products', owing essentially to the malfunctions which it claims will affect the Article 6 version.

443 In the present case, the damage alleged by Microsoft relies largely on the premiss that the Article 6 version of Windows will affect the functioning of applications and websites that call upon certain functionalities of Windows Media Player and also on certain parts of the Windows operating system itself.

444 It is therefore first of all necessary to assess the extent to which the problems to which Microsoft refers exist and, if so, whether they could easily be avoided.

445 In that regard, it should be noted at the outset that, in answer to the questions put by the President, the Commission stated that in its view a product having the characteristics referred to by Microsoft – i.e. a product which would not allow the operating system to call upon the functionalities mentioned by Microsoft as missing – would constitute a 'full-functioning' version of Windows, within the meaning of Article 6(a) of the Decision, provided that those functionalities are indeed the ones normally provided by Windows Media Player.

446 It is then appropriate to examine separately, first, the problems which, in Microsoft's submission, would affect the functioning of the Windows operating system and, second, those which it claims would affect the functioning of certain applications and certain websites.

447 As regards, first, the problems which, in Microsoft's submission, would affect the functioning of the Windows operating system, RealNetworks has designed and produced a series of tests to show that they can be resolved by installing a third-party media player. Microsoft does not dispute that that is the case for some of the problems referred to, but none the less maintains that unresolved problems would persist and that the extent to which they could be cured would depend on the media player installed.

448 In the light of the evidence adduced by the parties, the President considers that it has not been shown that third-party media players could guarantee in all circumstances full replacement of the functionalities identified by Microsoft. The replacement of those functionalities depends closely on the technical possibilities of the media player installed. On the other hand, the installation of such a media player could enable those various functionalities to be replaced to a reasonably large extent.

449 As regards, second, the problems concerning the use of certain applications and certain websites, in the light of the evidence adduced by the parties intervening in support of the form of order sought by the Commission, it should also be noted that the functionalities concerned may to a large extent be replaced by the installation of third-party media players. Furthermore, even if there were a cost involved for them, there would be a strong incentive for website and applications designers who

currently rely on Windows Media Player to encourage users to download the software or to distribute it themselves under the licences normally granted by Microsoft for that purpose.

450 The factors mentioned in the three preceding paragraphs substantially reduce the probability that the problems to which Microsoft refers may be detected by final consumers.

451 In its observations on the statements in intervention and at the hearing, Microsoft did admittedly maintain that the alleged problems could be resolved, in the tests carried out by RealNetworks, only if certain Windows Media Player codes are installed. That point was not formally contradicted by the Commission or by RealNetworks in the case of the problems relating to the functioning of certain applications and certain websites. RealNetworks none the less stated that the installation of the codes had been effected by the applications themselves, or, in the case of the websites, by means of a downloading device available on those sites. The parties therefore agree in part on Microsoft's argument. None the less, that argument still has no bearing on the assessment of the urgency in ordering the requested suspension of implementation. It is immaterial in the present case that certain of the problems alleged by Microsoft can be cured only if certain Windows Media Player codes, or even, where appropriate, all the Windows Media Player codes, are installed, by the actual application concerned or via the website itself, if installation of those codes can effectively resolve a sufficient part of the problems alleged by Microsoft.

452 Also irrelevant is Microsoft's argument that the differentiated reinstallation of certain Windows Media Player codes would cause security or stability problems to the Article 6 version. Microsoft has not adduced evidence to show that the possible installation of old Windows Media Player codes might cause instability in the operating system or that other problems of that type might be encountered. Last, in so far as Microsoft means that the addition of distinct codes on various copies of the Article 6 versions calls in question the uniformity of its platform, it adds nothing to the argument relating to the interference with its 'basic design concept', which has already been rejected above (see paragraphs 406 to 441 above).

453 It has therefore not been demonstrated that the problems invoked by Microsoft could not be avoided, at least to a large extent.

454 In the second place, and in any event, in so far as certain of the problems alleged by Microsoft remain, it must be held that Microsoft has not adduced before the President evidence demonstrating to the requisite legal standard that end consumers or, more generally, its customers would associate any absence or malfunction of those functionalities with an unforeseen malfunction of Microsoft's product rather than with the normal consequences of the absence of a media player and, more specifically, of Windows Media Player. Even on the assumption that all the problems mentioned by Microsoft exist and cannot be avoided, Microsoft has not proved that it would be unable to warn its customers of the objective characteristics of the Article 6 version and thus induce them to make choices in full knowledge of the facts, or that it would be prohibited by the Decision from doing so.

455 In that regard, Microsoft has indeed maintained that it would not be possible for it to carry out the tests which would enable it to identify all the defects in the Article 6 version and, in particular, all the applications that would not function on that version. However, it has not adduced any evidence permitting an assessment of the impossibility of carrying out those tests for the problems which it claims would be caused to its operating system. As regards, next, the tests necessary to evaluate the proper functioning of certain applications and certain websites, Microsoft has not shown how the mere fact that its customers are aware that Windows Media Player is not present in the Article 6 version is not sufficient to inform them of the possibility that certain applications and certain websites which rely on the functionalities of Windows Media Player may not function properly.

456 More generally, it should be emphasised that the Commission has expressly stated that in its view Microsoft is entitled to inform its customers that Windows Media Player is absent from the Article 6 version. Microsoft has not demonstrated that that knowledge alone would not be sufficient for its customers to understand the consequences which their choice may have for the availability of certain media functionalities.

457 As regards the direct distribution of its products to final consumers, although Microsoft maintains that few of them understand the way in which Windows applications call upon media functionality, it adduces no evidence to support its allegations and which would permit an assessment of the real extent of consumers' ignorance.

458 As regards the distribution to OEMs, there is every reason to think that they are particularly discriminating purchasers and that they are therefore able to make choices in a particularly informed way. If, consequently, the Article 6 version displays the incurable problems to which Microsoft refers, then, in the absence of proof to the contrary, there is every reason to think either that that version will quite simply not be bought by those OEMs or that they will buy it with full knowledge of the facts and therefore without any damage to Microsoft.

459 In those circumstances, it has not been shown that the fact that a customer of Microsoft, of whatever type, chooses the Article 6 version and encounters the problems to which Microsoft refers would be capable of injuring Microsoft's reputation.

460 In the third place, even on the assumption that it has been demonstrated to the requisite legal standard, first, that none of the problems alleged by Microsoft could be avoided and, second, that customers and consumers could not make an informed choice, Microsoft has not adduced evidence permitting an assessment of the real seriousness of those defects and, in particular, the extent to which they might have specific effects on its reputation with the various operators in the sector.

461 Microsoft does not adduce any evidence to demonstrate that the defects which it identifies would be likely to have a substantial effect on the perception of final consumers and OEMs. In particular, it adduces no evidence relating to the way in which those operators perceive the functionalities which it describes in its application as defective. In that regard, Microsoft on a number of occasions mentions the 'My Music' folder, which provides a detailed view of the files recorded on the hard disk of a client PC and, more particular, of certain digital media contents. Microsoft claims that the Article 6 version would not allow such a detailed view, with or without a third-party media player. None the less, it adduces no evidence which would permit the President to evaluate the probability that that problem is perceived sufficiently readily by final consumers. Nor does Microsoft demonstrate that that problem, on the assumption that it is readily perceived, would be likely to have a significant effect on its reputation. Accordingly, in the absence of sufficient evidence of the actual importance of the functionalities in question for final consumers and of their expectations, the President is unable to evaluate the real consequences of the problems for its reputation which Microsoft invokes.

462 Microsoft has also failed to prove that the implementation of Article 4 and Article 6(a) of the Decision would have significant effects on its reputation with economic operators other than its customers and, in particular, on its reputation with website designers and software developers. In that regard, it is significant that none of the parties intervening in support of Microsoft has indicated that its own perception of Microsoft might be altered or that it might no longer design its products with a view to their being used with Microsoft's products.

463 In the fourth place, it is not apparent that Windows Media Player would not be readily available and could not be easily installed in the Article 6 version. Consequently, even on the assumption that certain consumers or customers should not make an informed choice and therefore prove to be somewhat dissatisfied, Microsoft has not demonstrated how that situation could not readily be resolved if the persons concerned were informed that they could subsequently obtain Windows Media Player.

464 In the fifth place, and still on the assumption that the alleged defects should be proved to the requisite legal standard and be incurable, the seriousness of the adverse effect on Microsoft's reputation would to a large extent depend on the actual distribution of the Article 6 version. It is appropriate to repeat, in that context, the finding already made (see paragraphs 421 to 428 above) that, on the one hand, in the absence of sufficient evidence, it is not for the judge hearing the application for interim measures to prejudge the effects of the remedy on the market and, on the other hand, Microsoft itself expresses doubts as to the extent of sales of the Article 6 version and does not claim that there is a risk of an irreversible development on the market.

465 In the sixth place, even on the assumption that, in spite of all of the foregoing, Microsoft has demonstrated to the requisite legal standard that there is a risk of serious harm to its reputation, it has not demonstrated that there are any structural or legal obstacles preventing it from implementing the publicity measures which would allow it to restore its reputation.

466 Microsoft has therefore not succeeded in demonstrating that implementation of Article 4 and Article 6(a) of the Decision is likely to cause serious and irreparable damage to its reputation.

467 However, Microsoft invokes the existence of damage to its reputation from two further and more

specific aspects, namely damage to its trade marks and breach of its copyright.

– The alleged damage to Microsoft's trade marks

468 As regards, first, the damage to Microsoft's trade marks, in so far as it is supposed to cause damage to its reputation, or be the result of that damage, owing in particular to the poor quality of the Article 6 version, that argument must be rejected on the grounds already stated at paragraphs 454 to 459 above. Microsoft has not demonstrated, in particular, that the alleged defects, even on the assumption that they exist, would have a negative and significant effect on the perception of final consumers. The argument developed in the 'Trade Marks Opinion' (annex R.6) attached to Microsoft's application must therefore be rejected.

469 Furthermore, in so far as Microsoft's argument means that its Windows trade mark would no longer guarantee the presence of its 'basic concept', the President recalls that the essential function of the trade mark is to guarantee the identity of the origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or service from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the EC Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have been produced under the control of a single undertaking which is responsible for their quality (see, in particular, judgment of 29 April 2004 in Case C-371/02 *Björnekulla Fruktindustrier*, not yet reported, paragraph 20). In so far as the trade mark makes it possible to guarantee the presence of certain objective characteristics of a product, as Microsoft appears to contend, the President does not in any event have evidence allowing him to assess with sufficient precision, beyond the perception which Microsoft has of its 'basic concept' and its trade mark, the way in which that trade mark is actually perceived by customers on the relevant market. That is the case, in particular, of the evidence which permits an assessment, from the customers' point of view, of the objective characteristics which might be associated with it and, where appropriate, the real gravity of a variation in those characteristics.

470 In any event, since, first, should Article 6(a) of the Decision be annulled, Microsoft would again be able to market solely the version of Windows with Windows Media Player and, second, Microsoft has not demonstrated that it would be impossible for it to implement appropriate publicity measures, where necessary, it has not demonstrated that the alleged damage to its trade mark, on the assumption that it is established and serious, would be irreparable.

– The alleged breach of Microsoft's copyright

471 As regards, last, the alleged breach of Microsoft's copyright, it must be stated by way of preliminary observation that Microsoft has not indicated how breach of its copyright could be linked to the damage to its reputation which it alleges.

472 Furthermore, Microsoft's argument on that point is very succinct and particularly vague. In that context, it does not refer to any specific rules to the effect that the fact that it itself adapts its work – albeit under compulsion – would constitute a breach of its copyright.

473 Moreover, the mere fact that a Commission decision may to a certain extent affect intellectual property rights is, in the absence of further explanation, insufficient to support the conclusion that there is serious and irreparable damage, at least independently of the actual effects of that breach. In the present case, the only actual effects alleged by Microsoft are those which have been previously described and rejected as not sufficient to constitute serious and irreparable damage (paragraphs 411 to 466 above).

474 Last, in so far as Microsoft indicates that the circulation of copies of the Article 6 version, i.e. of a mandatory adaptation of its work, would cause it non-pecuniary damage, that damage, in the absence of proof to the contrary, would be neither serious nor irreparable. That is *a fortiori* the case when, as already found above (paragraphs 422 to 429 above), it is not demonstrated that the Article 6 version might be distributed in significant quantities or that the subsequent distribution of Windows Media Player would not to a very large extent provide a remedy for the distribution of the Article 6 version.

475 Microsoft has therefore failed to demonstrate that implementation of Article 6(a) of the Decision would be likely to cause it serious and irreparable damage by reason of damage to its reputation.

476 Consequently, Microsoft has not shown that the implementation of Article 6(a) of the Decision was likely to cause it serious and irreparable damage. Consequently, without there being any need to balance the interests at stake, the application for suspension of operation of Article 6(a) must be dismissed.

477 As regards the application for suspension of Article 4 of the Decision (paragraph 27 above), it cannot be upheld. First, the first subparagraph of that article refers to Articles 5 and 6 of the Decision. The lack of urgency in ordering suspension of operation of Articles 5 and 6 therefore necessarily entails dismissal of the application for suspension of operation of that reference provision. Second, in so far as the application for interim measures seeks suspension of operation of the second subparagraph of Article 4 of the Decision, it is sufficient to state that Microsoft has not developed sufficient argument to support that form of order and that, in any event, at this stage the effects of the prohibition referred to in that article remain purely hypothetical.

478 The application must therefore be dismissed in its entirety.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The request for confidential treatment submitted by Microsoft Corporation is granted at the interim measures stage;**

2. **Audiobanner.com, trading as VideoBanner, is granted leave to intervene in support of the form of order sought by the Commission in the interim measures proceedings;**

3. **The Computer & Communications Industry Association is removed from the case as intervener in support of the form of order sought by the Commission in the interim measures proceedings;**

4. **Novell Inc. is removed from the case as intervener in support of the form of order sought by the Commission in the interim measures proceedings;**

5. **The application for interim measures is dismissed;**

6. **Costs are reserved.**

Luxembourg, 22 December 2004.

H. Jung	B. Vesterdorf
Registrar	Presiden

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1 – Language of the case: English.

Case T-201/04 R

Microsoft Corp.

v

Commission of the European Communities

(Proceedings for interim relief – Intervention)

Summary of the Order

1. *Procedure – Intervention – Conditions of admissibility – Direct and present interest*

   (Statute of the Court of Justice, Arts 40, second para., and 53, first para.)

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4. *Procedure – Intervention – Interested persons – Representative association having as its object the protection of its members – Admissibility in cases raising questions of principle liable to affect those members – Conditions – Broad interpretation*

   (Statute of the Court of Justice, Arts 40, second para., and 53, first para.)

1. An interest in the result of a case within the meaning of the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, must be understood as being a direct and present interest in the granting of the form of order sought by the party whom the prospective intervener wishes to support. To that end, it is necessary, in order to grant leave to intervene, to determine that the prospective intervener is directly affected by the contested measure and that his interest in the result of the case is established.

   (see para. 32)

2. When the application for leave to intervene is made in proceedings for interim measures, the interest in the result of the case must be understood as being an interest in the result of the interim proceedings. In the same way as the result of the main proceedings, the result of the interim relief proceedings may adversely affect the interests of third parties or be favourable to them. It follows that, in interim relief proceedings, the interests of the parties seeking leave to intervene must be appraised in the light of the consequences which granting the interim relief sought or rejecting that request may have on those parties' economic or legal position.

   (see para. 33)

3. The direct and present nature of the interest in the result of interim relief proceedings must be appraised having regard to the specific nature of such proceedings. In interim relief proceedings, the

interest invoked by the intervener is, if appropriate, taken into account in the balancing of interests. It is even possible that the balancing of the interests involved will prove to be decisive once the judge with responsibility for granting interim relief has formed the view, in his analysis of the request before him, that the conditions relating to a prima facie case and urgency are satisfied. The notion of an interest in the result of a case should therefore be given a broad interpretation by the judge responsible for granting interim relief in order to ensure that the appraisal of the various interests in issue is not prejudiced.

(see para. 34)

4. Representative associations whose object is to protect their members may be granted leave to intervene in cases raising questions of principle that are liable to affect those members. More particularly, an association may be granted leave to intervene in a case if it represents an appreciable number of undertakings active in the sector concerned, if its objects include that of protecting its members' interests, if the case may raise questions of principle affecting the functioning of the sector concerned, and if the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment or order.

The adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of such cases while avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure.

(see paras 37-38)

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
26 July 2004 (1)

(Proceedings for interim relief – Intervention)

In Case T-201/04 R,

Microsoft Corp., having its registered offices in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I.S. Forrester QC,

applicant,

v

Commission of the European Communities, represented by R. Wainwright, W. Mölls, F. Castillo de la Torre and P. Hellström, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for suspension of the application of Articles 4, 5(a), 5(b), 5(c) and 6(a) of Commission Decision C(2004)900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C–3/37.792 – Microsoft),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES,

makes the following

Order

The contested decision

1 Microsoft Corp. ('Microsoft') develops and markets a variety of software products, including operating systems for personal computers and servers.

2 On 24 March 2004 the Commission adopted a decision relating to a proceeding under Article 82 EC in Case COMP/C-3/37.792 – Microsoft ('the Decision'). According to the Decision, Microsoft had infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area ('EEA') by committing two abuses of a dominant position.

3 The first abuse established in the Decision consists in Microsoft's refusal to supply to its competitors, over the period from October 1998 to the date on which the Decision was adopted, 'interoperability information', as defined in Article 1 of the Decision, and to allow the use of such information for the development and distribution of products in competition with Microsoft's own products on the market for work group server operating systems (Article 2(a) of the Decision).

4 The second established abuse, according to the Decision, lay in the fact that Microsoft had, for the

period from May 1999 to the date on which the Decision was adopted, made availability of the Windows client personal computer operating system conditional on the simultaneous acquisition of the Windows Media Player software (Article 2(b) of the Decision).

5 Those two abuses were penalised by the Commission through the imposition of a fine amounting to EUR 497 196 304 (Article 3 of the Decision).

6 Under Article 4 of the Decision, Microsoft is required to bring to an end the infringements referred to in Article 2 in accordance with Articles 5 and 6 of the Decision. Microsoft is also required to refrain from repeating any act or conduct described in Article 2 and to refrain from any act or conduct having the same or equivalent object or effect.

7 By way of remedy for the first infringement, Article 5 of the Decision orders Microsoft to act as follows:

‘(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the *Interoperability Information* available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the *Interoperability Information* by such undertakings for the purpose of developing and distributing work group server operating system products;

(b) Microsoft Corporation shall ensure that the *Interoperability Information* made available is kept updated on an ongoing basis and in a *Timely Manner*;

(c) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the *Interoperability Information*; as regards this evaluation mechanism, Microsoft Corporation may impose reasonable and non-discriminatory conditions to ensure that access to the *Interoperability Information* is granted for evaluation purposes only’.

8 The date on which the 120-day period referred to in Article 5 of the Decision expires is 27 July 2004.

9 By way of remedy for the second infringement, Article 6 of the Decision orders as follows:

‘(a) Microsoft Corporation shall, within 90 days of the date of notification of this Decision, offer a full-functioning version of the *Windows Client PC Operating System* which does not incorporate *Windows Media Player*; Microsoft Corporation retains the right to offer a bundle of the *Windows Client PC Operating System* and *Windows Media Player*;

…’.

10 The date on which the 90-day period referred to in Article 6 of the Decision expires is 28 June 2004.

Procedure and arguments of the parties

11 By application lodged with the Registry of the Court of First Instance on 7 June 2004, Microsoft brought an action under the fourth paragraph of Article 230 EC in which it seeks the annulment of the Decision or, in the alternative, the annulment of or substantial reduction in the fine imposed.

12 By separate document lodged with the Registry of the Court of First Instance on 25 June 2004, Microsoft also applied under Article 242 EC for suspension of the operation of Articles 4, 5(a), 5(b), 5(c) and 6(a) of the Decision. By that document Microsoft also seeks, on the basis of Article 105(2) of the Court’s Rules of Procedure, suspension of the operation of those provisions until such time as there has been a decision on the application for interim relief.

13 Also on 25 June 2004, the President of the Court of First Instance, acting in his capacity as the judge responsible for dealing with the application for interim relief, requested the Commission to specify whether it intended to proceed with enforcement of the Decision before a ruling has been made on the application for interim relief.

14 By letter received at the Court Registry on 25 June 2004, the Commission informed the President of its decision not to proceed with enforcement of Articles 5(a), 5(b), 5(c) and 6(a) of the Decision pending the outcome of the proceedings for interim relief.

15 By application lodged with the Court Registry on 25 June 2004, Novell Inc. ('Novell'), established in Waltham, Massachussets (United States), represented by C. Thomas, M. Levitt, V. Harris, Solicitors, and A. Müller-Rappard, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

16 By application lodged with the Court Registry on 30 June 2004, RealNetworks Inc. ('RealNetworks'), established in Seattle, Washington (United States), represented by A. Winckler, M. Dolmans and T. Graf, lawyers, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

17 By application lodged with the Court Registry on 30 June 2004, Computer & Communications Industry Association ('CCIA'), established in Washington, DC (United States), represented by J. Flynn QC and D. Paemen and N. Dodoo, lawyers, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

18 By application lodged with the Court Registry on 1 July 2004, Software & Information Industry Association ('SIIA'), established in Washington, DC (United States), represented by C.A. Simpson, Solicitor, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

19 By application lodged with the Court Registry on 1 July 2004, The Computing Technology Industry Association Inc. ('CompTIA'), established in Oakbrook Terrace, Illinois (United States), represented by G. Van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

20 By application lodged with the Court Registry on 2 July 2004, The Association for Competitive Technology ('ACT'), established in Washington, DC (United States), represented by L. Ruessmann, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

21 By application lodged with the Court Registry on 5 July 2004, Digimpro Ltd, established in London (United Kingdom), TeamSystem SpA, established in Pesaro (Italy), Mamut ASA, established in Oslo (Norway), and CODA Group Holdings Ltd, established in Chippenham, Wiltshire (United Kingdom) (hereinafter referred to collectively as 'Digimpro and Others'), represented by G. Berrisch, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

22 By application lodged with the Court Registry on 5 July 2004, DMDsecure.com BV, established in Amsterdam (Netherlands), MPS Broadband AB, established in Stockholm (Sweden), Pace Micro Technology plc, established in Shipley, West Yorkshire (United Kingdom), Quantel Ltd, established in Newbury, Berkshire (United Kingdom), and Tandberg Television Ltd, established in Southampton, Hampshire (United Kingdom) (hereinafter referred to collectively as 'DMDsecure.com and Others'), represented by J. Bourgeois, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

23 By application lodged with the Court Registry on 8 July 2004, IDE Nätverkskonsulterna AB, established in Stockholm, Exor AB, established in Uppsala (Sweden), T. Rogerson, residing in Harpenden, Hertfordshire (United Kingdom), P. Setka, residing in Sobeslav (Czech Republic), D. Tomicic, residing in Nuremberg (Germany), M. Valasek, residing in Karlovy Vary (Czech Republic), R. Rialdi, residing in Genoa (Italy), and B. Nati, residing in Paris (France) (hereinafter referred to collectively as 'IDE Nätverkskonsulterna and Others'), represented by S. Martínez Lage and H. Brokelmann, lawyers, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

24 In accordance with Article 116(1) of the Rules of Procedure, those applications for leave to intervene were served on the applicant and defendant.

25 By letter of 6 July 2004, received on the same date at the Court Registry, Microsoft informed the Court that it had no objections to the application by RealNetworks for leave to intervene. By letter

of 7 July 2004, received on the same date at the Court Registry, Microsoft submitted observations on the application by Novell for leave to intervene. Microsoft did not lodge observations within the prescribed period on the other applications for leave to intervene.

26 In regard to all of the parties which might be granted leave to intervene, Microsoft, by letters of 6 July and 8 July 2004, requested confidential treatment of the data contained in the Decision which the Commission had accepted would not be made public in the version available on its internet site.

27 By letters of 6 July 2004, received at the Court Registry on 7 July 2004, the Commission informed the Court that it had no objections in regard to the applications for leave to intervene lodged respectively by Novell, RealNetworks, CCIA and SIIA, and stated that it was not seeking any confidential treatment. By contrast, the Commission took the view that the application by CompTIA for leave to intervene ought to be rejected.

28 By letter of 13 July 2004, received at the Court Registry on the same date, the Commission informed the Court that it had no objections to the application by ACT for leave to intervene and that it was not seeking any confidential treatment.

29 By letter of 13 July 2004, and subsequently by letters of 14 July 2004, on the other hand, the Commission submitted observations on the applications for leave to intervene that had been submitted respectively by Digimpro and Others, DMDsecure.com and Others, and by IDE Nätverkskonsulterna and Others.

30 The Commission submitted its written observations on the application for interim relief on 21 July 2004. Those observations were notified to Microsoft on the same date.

The applications for leave to intervene

31 Under the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, the right of an individual to intervene is subject to the condition that that individual is in a position to establish an interest in the result of the case in question.

32 An interest in the result of a case must be understood as being a direct and present interest in the granting of the form of order sought by the party whom the prospective intervener wishes to support (order of the President of the Court of Justice in Case C-186/02 P *Ramondín and Ramondín Cápsulas* v *Commission* [2003] ECR I-2415, paragraph 7). To that end, it is necessary, in order to grant leave to intervene, to determine that the prospective intervener is directly affected by the contested measure and that his interest in the result of the case is established (order of the President of the Court of Justice in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 53).

33 When the application for leave to intervene is made in proceedings for interim measures, the interest in the result of the case must be understood as being an interest in the result of the interim proceedings (see, to that effect, the order of the President in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, paragraphs 26 and 27). In the same way as the result of the main proceedings, the result of the interim relief proceedings may adversely affect the interests of third parties or be favourable to them. It follows that, in interim relief proceedings, the interests of the parties seeking leave to intervene must be appraised in the light of the consequences which granting the interim relief sought or rejecting that request may have on those parties' economic or legal position.

34 It is necessary to point out that the direct and present nature of the interest in the result of interim relief proceedings must be appraised having regard to the specific nature of such proceedings. In interim relief proceedings, the interest invoked by the intervener is, if appropriate, taken into account in the balancing of interests (see, in that regard, the order of the President of the Court of Justice in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343). It is even possible that the balancing of the interests involved will prove to be decisive once the judge with responsibility for granting interim relief has formed the view, in his analysis of the request before him, that the conditions relating to a *prima facie* case and urgency are satisfied. The notion of an interest in the result of a case should therefore be given a broad interpretation by the judge responsible for granting interim relief in order to ensure that the appraisal of the various interests in issue is not prejudiced.

35 In any event, the appraisal by the judge responsible for granting interim relief of the interest in the result of the case before him cannot affect the appraisal by the Court when dealing with an application for leave to intervene in the main proceedings.

36 The applications for leave to intervene brought by associations of undertakings and those brought on an individual basis, including those brought by companies, shall now be examined in turn.

The applications brought by associations of undertakings

37 According to settled case-law, intervention is permissible by representative associations whose object is to protect their members in cases raising questions of principle that are liable to affect those members (orders in *National Power and PowerGen*, cited above in paragraph 32, paragraph 66, and in Case C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6; orders in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 15, and in Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 51). More particularly, an association may be granted leave to intervene in a case if it represents an appreciable number of undertakings active in the sector concerned, if its objects include that of protecting its members' interests, if the case may raise questions of principle affecting the functioning of the sector concerned, and if the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment or order (see, to that effect, the order in Case T-87/92 *Kruidvat* v *Commission* [1993] ECR II-1375, paragraph 14).

38 Moreover, the adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of such cases while avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure (order in *National Power and PowerGen,* cited above in paragraph 32, paragraph 66).

39 It is in the light of the conditions and considerations thus set out that the question whether CCIA, SIIA, CompTIA and ACT should be granted leave to intervene falls to be examined.

The application submitted by CCIA

40 CCIA is an association which groups together undertakings operating within the information technology and telecommunications sectors. CCIA is seeking leave to intervene in support of the form of order sought by the Commission. It states in this regard that it has legal personality, that its objects and activities include representation of its members and defence of their interests, that it represents an appreciable number of undertakings active in the relevant sectors and that the present case raises questions of principle that are liable to affect its members.

41 CCIA states that its members are affected in numerous ways by the main action and by the present interim relief proceedings. It points out, in particular, that a number of its members manufacture operating systems for work group servers and that certain others produce software that is in competition with the Windows Media Player. More generally, some members of CCIA are active on markets on which Microsoft applies strategies of tied sales and refusal to sell that are similar to those in issue in the Decision. Finally, virtually all of the members of CCIA are significant users of work group server operating systems and are for that reason detrimentally affected by Microsoft's conduct. CCIA also submits that its members will be affected not only by the result of the main action but also by the timeframe in which the case will be settled, inasmuch as the abuses identified in the Decision have already had serious effects on the market.

42 CCIA adds, in conclusion, that it played an active role during the administrative procedure which resulted in the adoption of the Decision.

43 The Commission has stated that it does not have any objections to the application submitted by CCIA. Microsoft, for its part, did not lodge any observations.

44 The President of the Court finds that the application by CCIA for leave to intervene must be granted.

45 First, CCIA has stated, without being contradicted on this point by the applicant or the defendant institution, that it represents the interests of undertakings operating within the information technology sector, including major undertakings that are in direct competition with Microsoft on some of the markets concerned by the Decision. CCIA must for that reason be regarded as being

sufficiently representative of undertakings that are active within the sector concerned.

46 Second, according to Article 2A of CCIA's Articles of Incorporation, its purpose is, inter alia, to promote the interests of the computer and communications industries, and to promote the interests of its members. Article I, Section 2, of CCIA's Bylaws indicates, moreover, that one of its objectives is to educate government and the general public on the importance of 'full, fair and open competition' within those industries. Article I, Section 2, of CCIA's Bylaws also provides that CCIA may take 'such … action of … [a] legal nature as may be appropriate to carry out these objectives'. CCIA must therefore be regarded as having among its purposes that of safeguarding the interests of its members.

47 Third, the present case raises, among others, the question as to the circumstances in which a software producer in a dominant position may be required to provide third parties with information covered by intellectual property rights in order to allow interoperability of the products of those third parties with the products of that producer. The present case also raises the question as to the circumstances in which it may be contrary to Article 82 EC for a producer of software or computer hardware in a dominant position to incorporate new products or new functionalities within an existing product. The position which the President, acting as the judge responsible for granting interim relief, may take on those two questions of principle is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

48 Fourth, as the members of CCIA are active within the sector concerned, their interests are liable to be affected by the position taken by the judge dealing with the application for interim relief.

49 Furthermore, CCIA took part in the administrative procedure which resulted in the adoption of the Decision.

50 CCIA must therefore be granted leave to intervene in the present interim relief proceedings.

The application submitted by SIIA

51 SIIA is an association of software developers comprising more than 600 members. It requests leave to intervene in support of the form of order sought by the Commission.

52 SIIA submits that it was granted leave to intervene in its own name during the administrative procedure, in the same way as Time Warner Inc., Novell and RealNetworks, which are three of its members. SIIA points out further that the Court's decision in the main proceedings in the present case will impact on its members' prospects of competing with Microsoft and that, moreover, the commercial viability of some of those members will be jeopardised if the remedies provided for in the Decision are not enforced. SIIA points out, in conclusion, that maintaining the Decision will allow its members to allocate additional resources to research and development.

53 The Commission has declared that it has no objections to the application made by SIIA. Microsoft did not submit observations.

54 The President of the Court takes the view that the application by SIIA for leave to intervene must be granted.

55 First, SIIA states, without being contradicted by Microsoft or the Commission, that it is the principal association of software developers, with more than 600 members operating world-wide. SIIA may therefore be regarded as representing a significant number of undertakings within the information technology sector.

56 Second, Article II of SIIA's Bylaws states that it is a 'trade group formed to represent the common business and public policy interests of the computer software and digital content industries'. Article II also provides that SIIA has the capacity to engage in 'all lawful activities' in furtherance of those purposes. SIIA may therefore be regarded, at this stage, as having among its purposes that of protecting the interests of its members.

57 Third, for the reasons set out in paragraph 47 above, the position which the President, acting as the judge responsible for granting interim relief, may take on the questions of principle raised by the present case is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

58 Fourth, SIIA has submitted, without being contradicted by Microsoft or the Commission, that it represents undertakings, in particular software designers, that are in competition with Microsoft on the markets in issue in the Decision. In those circumstances, the interests of SIIA's members are liable to be affected by the position taken by the judge responsible for granting interim relief.

59 Furthermore, SIIA participated in the administrative procedure which resulted in the adoption of the Decision.

60 SIIA must therefore be granted leave to intervene in the present interim relief proceedings.

The application made by CompTIA

61 CompTIA is an association of undertakings active within the area of information and communications technology. CompTIA seeks leave to intervene in support of the form of order sought by Microsoft.

62 CompTIA submits that it satisfies the conditions governing leave to intervene that have been laid down in the case-law (order in *Kruidvat* v *Commission,* cited above in paragraph 37; order of the President of the Court of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-0000, paragraph 4).

63 First, CompTIA claims to be the world's largest information and telecommunications technology trade association, with more than 16 000 members in 89 countries.

64 Second, CompTIA is, by reason of its Bylaws, charged with safeguarding the interests of its members and is authorised to intervene in the present proceedings inasmuch as the issues raised therein directly affect its members.

65 Third, the Decision raises fundamental questions that affect the entire information technology sector.

66 CompTIA does not, in the Commission's view, have a sufficient interest in the result of the case. The Commission notes in this regard that the Bylaws of CompTIA do not include the protection of its members' interests or their representation. Moreover, the antitrust policy statement which CompTIA has annexed to its application is no more than a draft common position which does not recommend or in any way authorise CompTIA to adopt measures designed to protect that position. In addition, the admission of CompTIA as an *amicus curiæ* before some American courts is irrelevant in the present context. Finally, the admission of CompTIA as an interested party during the administrative procedure is not, as such, determinant, since the applicable criterion for leave to submit observations during the administrative procedure is not necessarily identical to that defined in the second paragraph of Article 40 of the Statute of the Court of Justice.

67 Microsoft did not submit observations on the application by CompTIA.

68 On 13 July 2004 the President of the Court of First Instance called on CompTIA to specify, inter alia, the provisions of its Bylaws on which it was relying for its submission that its purpose was to protect the interests of its members.

69 By letter of 16 July 2004, CompTIA stated that it was relying, for that purpose, on Articles II and XI of its Bylaws, on the antitrust policy statement adopted by its board of directors, and on Section 2 of its Certificate of Incorporation. CompTIA also emphasised its past interventions with the American judicial authorities. On 21 July 2004 the Commission submitted observations in which it expressed the view that CompTIA could, at best, be described as having as its purpose the promotion of its members' interests, but not their representation and defence. The Community Courts, it claims, have already turned down applications for leave to intervene made by associations which are simply responsible for promoting the collective interests of their members (order of the President of the Third Chamber of the Court of 25 June 1999 in Case T-13/99 *Pfizer Animal Health* v *Commission*, not published in the ECR, paragraph 28).

70 The President of the Court takes the view that the application by CompTIA for leave to intervene must be granted.

71 First, CompTIA has stated, without being contradicted by Microsoft or the Commission, that it represents more than 16 000 members in more than 80 countries, 200 of whom, moreover, have their headquarters in Europe. Those members are involved at all levels of the information technology industry and include software designers, manufacturers of computer hardware, application service providers, distributors, retailers and resellers. CompTIA can thus be regarded as representing a significant number of undertakings active within the information technology sector.

72 Second, with regard to the purpose of CompTIA, Section 2 of its Certificate of Incorporation states that its purpose is to engage in ‘any lawful transaction or activity … for which corporations may be formed under the Revised Nonstock Corporation Act of the State of Connecticut, as amended’. Section 2 also provides that, ‘without limiting the foregoing’, CompTIA is formed ‘to promote and encourage the highest standards of professional and business competence and ethics among its members and within the information technology industry as a whole’. Article II of its Bylaws recapitulates those various purposes and further states that, in order to achieve those goals, CompTIA ‘shall endeavor to … establish a programme for conveying the collective views of its members to the information technology industry, governmental agencies and the public’. CompTIA also points out that it has intervened before the American judicial authorities and in the administrative procedure before the Commission with a view to complying with the antitrust policy statement adopted by its Board of Directors. In light of those facts, CompTIA can be regarded as having, among its purposes, that of protecting the interests of its members.

73 Third, for the reasons set out in paragraph 47 above, the position which the President, acting as the judge responsible for granting interim relief, may take on the questions of principle raised by this case is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

74 Fourth, CompTIA represents numerous undertakings active on the markets concerned, including software designers, whose interests are liable to be affected by the position taken by the judge dealing with the application for interim relief.

75 Furthermore, CompTIA participated in the administrative procedure leading to adoption of the Decision.

76 The application by CompTIA for leave to intervene in the present interim relief proceedings must for those reasons be granted.

The application submitted by ACT

77 ACT is a trade association representing just below 3 000 undertakings active in the development of software, system integration, information technology consultancy and training and e-commerce. ACT requests leave to intervene in support of the form of order sought by Microsoft.

78 ACT considers that it satisfies the conditions governing the granting to associations of leave to intervene, as set out in the case-law (order in *Kruidvat* v *Commission*, cited above in paragraph 37). ACT first points out that it was admitted to participate in the administrative procedure which led to the adoption of the Decision. It submits further that the action brought by Microsoft raises questions of principle which could have consequences for the entire information technology sector and, more particularly, for the activities of its members. ACT claims that it has a particular interest in convergence in and stability of the legal treatment of platform software in the United States and the European Union.

79 The members of ACT also have significant activities within the EEA and would be detrimentally affected in the event of the main action failing or of immediate implementation of the Decision. Such implementation would diminish the value of their intellectual property right portfolios and would precipitate a fall in investments in those companies which are active within the information technology sector. Disclosure of the communications protocols of the Windows system would also constitute a precedent liable to lead to increased instability within server operating systems and risks of malfunction. The remedy requiring the Windows system to be marketed without the Windows Media Player software would, for its part, deprive ACT’s members of the possibility of having recourse to certain application programming interfaces (API) and would, moreover, discourage production and maintenance of a secure platform.

80 The Commission has stated that it has no objections to the application submitted by ACT. Microsoft did not submit any observations within the prescribed period.

81 The President of the Court takes the view that the application by ACT for leave to intervene must be granted.

82 First, ACT has stated, without being contradicted by Microsoft or the Commission, that it is a trade association representing almost 3 000 undertakings active in the development of software, system integration, information technology consultancy and training and e-commerce. ACT also states that its members are established world-wide, including within the EEA, and that they include various sizes of undertakings. ACT can for those reasons be regarded as representing a significant number of undertakings within the information technology sector.

83 Second, according to Article II(D) of its Bylaws, one of ACT's purposes is to 'seek protection of [its members'] rights and privileges'. Article II(F) of ACT's Bylaws states that a further purpose is to 'enhance competition in and among the technology industries and to protect technology products, companies and industries from undue regulation or intervention that would undermine free and open competition by and among such products, companies and industries'. ACT's purposes thus include, in particular, that of protecting its members' interests.

84 Third, for the reasons set out in paragraph 47 above, the position which the President, acting as the judge responsible for granting interim relief, may take on the questions of principle raised by the present case is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

85 Fourth, ACT includes undertakings specialising in software design, whose interests are liable to be affected by the position taken by the judge dealing with the application for interim relief.

86 Furthermore, ACT participated in the administrative procedure that resulted in the adoption of the Decision.

87 ACT must for those reasons be granted leave to intervene in the present interim relief proceedings.

The applications brought on an individual basis

The application brought by Novell

88 Novell and its subsidiaries are active in a variety of software markets. Novell has been active in the area of computer networking ever since it developed and marketed the NetWare software in 1983. In support of its application for leave to intervene in support of the form of order sought by the Commission, Novell argues that its interest in the result of the interim relief proceedings follows on from several factors. First, its participation in the administrative procedure which led to the adoption of the Decision was very active from the outset and allowed it to influence the Commission's assessment of the relevant factual and legal issues. Second, as Microsoft's main competitor on the market in work group server operating systems, Novell has been affected by Microsoft's refusal to supply interoperability information. Novell's competitive position weakened rapidly in consequence, as the Commission has confirmed in the Decision (recitals 590, 593 and 594 of the Decision). Third, in concluding that Microsoft's refusal to provide interoperability information formed part of a general pattern of conduct on Microsoft's part, the Commission based itself on, inter alia, the treatment of requests for interoperability information submitted by Novell (recital 573 of the Decision). Fourth, Novell expects to benefit from the remedies ordered in Article 5 of the Decision, inasmuch as it is an 'undertaking having an interest in developing and distributing work group server operating system products' within the meaning of that article.

89 While the Commission has not raised any objections to the application for leave made by Novell, Microsoft has submitted several observations. It first submits that, according to recital 573 of the Decision, Novell did not request Microsoft to forward to it its communications protocols but simply asked to be able to replace a directory in the Windows operating system with a directory from the NetWare system. Next, Microsoft submits that Novell did not seek to obtain a licence relating to the client-to-server communications protocols, in accordance with the settlement concluded between the American authorities and Microsoft. Microsoft accordingly asks whether, as Novell argues, it can be fairly stated that Novell is a 'direct beneficiary' of the remedy imposed by the Commission. The urgency in having access to Microsoft's technology is belied by the interoperability of the NetWare server operating systems with the Windows client operating systems and by the fact that no application has been made for a licence in regard to Microsoft's communications protocols.

90 The President of the Court takes the view that Novell must be granted leave to intervene in support of the form of order sought by the Commission.

91 To the extent to which the Decision finds that Microsoft abused its dominant position by refusing to provide interoperability information and to authorise the use of such information for the development and distribution of products in competition with its own on the market in work group server operating systems, it must be held that Novell, as an undertaking in competition with Microsoft, does have an interest in the immediate cessation of the abuse which has been confirmed. It must be pointed out in this regard that the Decision states that Microsoft's share of the market in work group server operating systems 'has grown since it entered the market, and continues to grow to such an extent that its main competitor in the market, Novell, has gone from a leading position to being a relatively minor player in the space of just a few years' (recital 590) and that '[the] data collected by the Commission show that there is a risk of elimination of competition in the work group server operating system market' (recital 781).

92 Furthermore, Novell played a very active role in the administrative procedure before the Commission. As is clear from the Decision, the observations which Novell submitted in its capacity as an interested third party within the meaning of Article 19(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), were taken into proper account by the Commission.

93 Finally, Novell has a direct interest in dismissal of the request for suspension of the application of Article 5 of the Decision inasmuch as it is an undertaking which comes within the scope of that provision.

The application submitted by RealNetworks

94 In its application for leave to intervene in support of the form of order sought by the Commission, RealNetworks points out that it operates on the markets affected by Microsoft's conduct in tying the sale of the Windows Media Player software to that of the Windows operating system for personal computers and that, as an interested third party, it played an active role in the administrative procedure before the Commission.

95 Neither Microsoft nor the Commission has raised any objections to RealNetworks' application for leave to intervene.

96 RealNetworks develops and supplies specialised software for network-delivered digital multimedia services and the technology that makes possible the creation, distribution and consumption of digital multimedia content. Having regard to the factors raised by RealNetworks in support of its application for leave to intervene, the established nature of which is evident from the Decision (in particular, recitals 112 to 118, 125 to 134, 812, 855 and 856), the President of the Court takes the view that RealNetworks has demonstrated a sufficient interest in dismissal of the application for interim relief.

The application submitted by Digimpro and Others

97 Digimpro and Others have requested leave to intervene in support of the form of order whereby Microsoft seeks suspension of application of the provisions of the Decision which require Microsoft to offer a version of its Windows operating system for personal computers which does not incorporate the Windows Media Player software or the code governing its functionality. Each of those applicants considers that it has a direct and present interest in the suspension of application of Articles 2, 4, first paragraph, and 6 of the Decision in so far as immediate implementation of those provisions would cause them serious and irreparable damage.

98 The applicants for leave to intervene manufacture or develop software and applications which function under the Windows operating system and, as such, they state that they are dependent, directly or indirectly, on the functionality of the Windows Media Player software tied to that operating system.

99 First, certain of the applicants have developed and marketed, or are developing at present, products which function with the Windows Media Player software of the Windows operating system for personal computers. The Decision would thus have the effect of forcing them to modify their products in such a way as to include in them a functionality designed to detect whether the

operating system installed in the computers of their customers contains the Windows Media Player software and, if not, to indicate to them the steps which must be followed in order to install the Windows Media Player software. In the alternative, they could modify their products by copying in them the code of the Windows Media Player software. Interventions of this kind would, however, be costly in terms of time and money.

100 Second, they submit that a number of them would have to provide update software to customers using present or previous versions of their products in so far as those customers may find themselves having to use their products on a computer equipped with a Windows operating system which lacks the Windows media player software. Providing a corrective measure of this kind would involve significant cost and give rise to many practical difficulties.

101 Third, the separation of the Windows Media Player software from the Windows operating system for personal computers could upset the operation of the applicants' products, even if a customer had himself installed the Windows Media Player software on his personal computer. The search for solutions to defective functionality of this kind would involve the applicants in additional expense.

102 Fourth, the applicants fear that the Decision represents the first step in the fragmentation of the Windows operating system for personal computers and for that reason it gives rise to great commercial uncertainty.

103 Fifth, the applicants contend that the improvements which Microsoft has introduced into its Windows operating system enable them to improve their own products or to offer new products. These derived improvements would no longer be possible if Microsoft were to be prevented from developing its own operating system.

104 Microsoft did not submit observations within the prescribed period.

105 The Commission, for its part, has expressed grave reservations as to the interest which Digimpro and Others may have in intervening. The Commission submits that the interest of the applicants, which appear to belong to the broad category of independent software sellers, is not direct, present or certain.

106 The Commission expresses the view, first, that the arguments relating to future disputes or to the future development of the Windows operating system cannot be regarded as establishing such an interest in the result of the case.

107 The Commission also takes the view that the arguments relied on in the application for leave to intervene demonstrate at most that the independent sellers are encouraged to develop applications which feature the Windows Media Player software because they know that this software is incorporated in the Windows operating system and that those purchasing that system therefore automatically have it at their disposal. However, the Commission argues, the Decision does not oblige the applicants to modify their products. The Decision has the effect of allowing consumers to choose the version of the operating system which incorporates, or does not incorporate, the Windows Media Player software, a choice linked to the merit of the product on offer and not to the mere fact that it is coupled to the Windows operating system. Sellers of software ought therefore to adapt themselves to consumer choice and organise their activities accordingly. It will always be possible for them to design products exclusively for the Windows Media Player software and subsequently persuade consumers, on the basis of the merits of their products and services, to opt for the version of the Windows operating system which incorporates the Windows Media Player software. There is therefore no reason to believe that the applicants will incur costs or suffer harm as a direct result of the Decision. As any costs which they may have to bear will depend on decisions to be taken in the future, the applicants' interest in the result of the case cannot be regarded as sufficient (order of the Court in Case T-18/97 *Atlantic Container Line and Others* v *Commission* [1998] ECR II-589, paragraph 14). So far as concerns the applicants' assertion that their products might no longer be able to function correctly, this, the Commission argues, reveals the hypothetical nature of an interest in the result of the case in this regard.

108 With more specific regard to the interests claimed by each of the applicants, the Commission submits that Digimpro Ltd is not, at present, active on any market, that the damage relied on by TeamSystem SpA is liable to materialise only in so far as consumers decide to use the version of the Windows operating system which does not feature the Windows Media Player software – a situation that may already possibly obtain – and that Mamut ASA invokes problems of compatibility between its products and those of Microsoft that are scarcely credible in view of the close relations existing

between those two companies. As for CODA Group Holdings Ltd's interest in the result of the case, this is neither certain nor direct as its products are not based directly on the Windows Media Player software of the Windows operating system.

109 The Commission adds that to accept the applicants' arguments would be tantamount to having to admit virtually all software designers world-wide.

110 The President of the Court finds that implementation of the Decision would have the effect of requiring Microsoft to offer for sale two versions of its operating system for personal computers, the first without the Windows Media Player software and the second incorporating that software. As a result of that new situation, software designers would no longer be entitled to assume that all computers fitted with the Windows operating system will contain multimedia application programming interfaces (API). The resulting adaptation of their products and assumption of responsibility for the additional technology which this might involve may give rise to significant extra costs for the designers concerned; conversely, failure to adapt their products to the new market situation resulting from implementation of the Decision might prevent them from winning over customers in line with expectations.

111 Regard being had to those factors, the view must be taken that marketing of the Windows operating system for personal computers which does not incorporate the Windows Media Player software risks having a significant effect on the activity of the software designers concerned and that their interest in having implementation of the Decision suspended is consequently established. The matters set out in their application justify the conclusion that TeamSystem SpA and Mamut ASA must be granted leave to intervene in support of the form of order which Microsoft is seeking in the proceedings for interim relief.

112 By contrast, in light of the argument developed in the application for leave to intervene, it cannot be concluded that Digimpro Ltd has established that it has a present interest in the result of the interim proceedings. As is clear from its application, the main product of that company is not yet on the market, and the company states, without indicating a precise timetable for its launch, that this product 'will be' software that permits users to interact with stored audio information and that it 'will operate' as an accessory to Windows Media Player.

113 In light of the information provided in the application for leave to intervene, the application must also be rejected in so far as it has been submitted by CODA Group Holdings Ltd. The risk that uncoupling the Windows Media Player software from the Windows operating system may affect the proper functioning of some of its applications cannot be regarded as being sufficient to establish that this company has an interest in intervening, as it is clear from the request for leave to intervene that those applications are already being delivered to its customers on several platforms other than the Windows platform, such as IBM AS/400 and Unix, and that the products which it designs do not rely directly on the Windows Media Player code in the Windows operating system.

114 The application for leave to intervene must accordingly be granted in so far as it has been submitted by TeamSystem SpA and Mamut ASA but must be rejected in so far as it has been submitted by Digimpro Ltd and CODA Group Holdings Ltd.

The application submitted by DMDsecure.com and Others

115 DMDsecure.com and Others, which are companies operating in the areas of media, entertainment and telecommunications, seek leave to intervene in support of the form of order sought by Microsoft. DMDsecure.com markets content protection and digital rights management server-side systems, components and solutions. MPS Broadband distributes Internet Protocol-based international broadband TV-contents. Pace Micro Technology is primarily active in the area of digital set-top television technology. Quantel provides computer hardware products within the television and cinema sectors. Finally, Tandberg TV markets video products and systems live and on demand across a variety of networks.

116 They claim that they have a direct and specific interest in having implementation of the Decision suspended inasmuch as their activities could be directly and substantially affected by the result of the interim relief proceedings and of the main proceedings (order in *Kruidvat* v *Commission*, cited above in paragraph 37, paragraph 10). The obligation imposed on Microsoft to develop and offer a version of its operating system which does not feature the Windows Media Player software concerns the applicants to the extent to which their products operate with that software. They would as a consequence be obliged to modify their products in such a way as to enable them to be used with

other software. A modification of this kind would be costly, technically complex and would have repercussions on the services provided in conjunction with the products in question.

117 While Microsoft did not lodge observations on the application for leave to intervene within the prescribed period, the Commission has expressed serious doubts as to the applicants' interest in intervening.

118 The Commission's view is that the applicants have failed to demonstrate a direct, present and certain interest in the result of the interim relief proceedings. The applicants' arguments, it submits, indicate their natural inclination to favour a single technology and make it clear that their decision to base themselves on the Windows Media Player software stems from the fact that they know that this software is tied to the Windows operating system and is thus automatically acquired by consumers.

119 Contrary to what the applicants contend, the Decision, in the Commission's view, does not in any case oblige them to modify their products. The Decision simply allows consumers to choose to acquire the version which does, or does not, incorporate the Windows Media Player, a choice which has to do with the merit of the product on offer and not with the fact that it is tied to the Windows operating system. The companies, in particular those which base themselves on the omnipresence of the Windows Media Player software, ought therefore to adapt to consumer choice and arrange their activities accordingly. It will always be possible for those companies to base themselves exclusively on the Windows Media Player software and subsequently persuade consumers, on the basis of the merits of their products and services, to opt for the version of the Windows operating system which does incorporate the Windows Media Player software. There is thus no reason to believe that the applicants will incur costs or suffer harm as a direct result of the Decision. As any costs which they may have to bear would depend on decisions which they, other companies and their customers might take in the future, the applicants' interest in the result of the case cannot be regarded as sufficient (order in *Atlantic Container Line and Others*, cited above in paragraph 107, paragraph 14).

120 The Commission adds that to grant the applicants leave to intervene would, given that they belong to a heterogenous group of companies, give rise to an obligation to admit virtually all software designers world-wide.

121 The President of the Court takes the view, in light of the matters which they have set out in their application for leave to intervene, that DMDsecure.com and Others have a direct and present interest in suspension of implementation of the Decision in so far as the technologies which they use are at present designed to operate to a large extent with the platform of the Windows operating system that incorporates the Windows Media Player software. If the Decision is implemented, there is a risk that their activities could be significantly affected, not only by making it necessary for them to adapt to such changed circumstances by modifying the technologies used but also obliging them initially to bear the costs of such modification.

122 DMDsecure.com and Others must for those reasons be granted leave to intervene in support of the form of order sought by Microsoft.

The application submitted by IDE Nätverkskonsulterna and Others

123 IDE Nätverkskonsulterna and Others request leave to intervene in support of the form of order sought by Microsoft. They provide, within the information technology sector, services such as the installation, integration and migration of data and systems, support and outsourcing, web design and software development. Their services are dependent on the technology developed by Microsoft. The applicants' in-depth knowledge of the products developed by Microsoft has been recognised by Microsoft, which has awarded them the title of 'Microsoft Most Valuable Professionals'. IDE Nätverkskonsulterna and Exor AB alone have not received that title.

124 Relying on the case-law of the Court of Justice (order in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471), IDE Nätverkskonsulterna and Others take the view that, as implementation of the Decision would impact significantly on their legal and/or economic situation, they have a direct and present interest in the suspension of Articles 4 and 6(a) of that Decision requested by Microsoft.

125 The applicants argue that the negative effects of the remedy of untying the Windows Media Player software from the Windows operating system will vary according to the activities in which they

engage.

126 First, some of the applicants are responsible for installation of the operating systems and application software in personal computers, integration services for, inter alia, various applications, and support services such as the provision of periodic software updates. So far as they are concerned, the existence of two versions of the Windows operating system would give rise to additional costs associated with the need to adapt services according to the customer's version of the Windows operating system and to ensure the proper functioning of the version which does not feature the Windows Media Player software.

127 Second, the applicants which provide web design services use the technology developed by Microsoft. In order for the audiovisual content of the internet sites which they install to be accessible to those using a computer which does not have the Windows Media Player software, the applicants will be obliged to incur development and support costs.

128 Third, the applicants which provide training services in regard to Microsoft products will have to adapt their training programmes to the users' profile.

129 Finally, a number of the applicants provide software development services, for which they use the media functionality of the Windows Media Player. By reason of the Decision, their activities will be limited to those customers who have opted for the Windows operating system equipped with the Windows Media Player software or, for customers who have not made such a choice, those activities will oblige them to modify the content of their products.

130 Microsoft did not submit observations on the application for leave to intervene within the prescribed period.

131 For its part, the Commission has expressed serious doubts as to the applicants' interest in intervening. As the Commission's arguments are similar to those which it set out in response to the application made by DMDsecure.com and Others, reference is made to paragraphs 118 to 120 above.

132 The President of the Court takes the view that the application by IDE Nätverkskonsulterna AB cannot be upheld.

133 So far as that company is concerned, immediate enforcement of the Decision might indeed force it to adapt the services which it offers to its customers, that is to say, consulting and outsourcing services. The uncoupling of the Windows Media Player software and the Windows operating system may thus lead it to take account of that development and to adapt its services accordingly. However, adaptation of the services in question could not be classified as a direct consequence of implementation of the Decision but would have to be regarded as being dependent primarily on the choice made by customers to opt for a Windows operating system not featuring the Windows Media Player software and to demand services resulting from that choice. On the basis of the information provided in the application for leave to intervene, that company's interest thus cannot be regarded as being direct and present within the meaning of the case-law cited above.

134 By contrast, the Exor company must be granted leave to intervene in support of the form of order sought by Microsoft. It is clear from the application for leave to intervene that Exor designs web sites and develops applications at a significant level, as its customers include the largest Swedish recruitment agency after the Swedish public employment agency, and that the technologies which it uses in developing such web sites are at present designed to function exclusively with the platform of the Windows operating system which incorporates the Windows Media Player software. If the Decision is implemented, there will therefore be a risk that its activities could be significantly affected, not only in making it necessary for it to adapt to this change in circumstances through modification of the technologies used but also in forcing the company initially to bear the costs of that modification. Its direct and present interest must consequently be regarded as having been sufficiently demonstrated at this stage.

135 With regard to the remaining applicants, their interest in the result of the interim relief proceedings cannot, on the basis of the information contained in the application, be regarded as having been sufficiently established.

136 As the claims made in the application for leave to intervene have not been proved, it is not possible

to conclude that the activities engaged in by those applicants would be affected in a sufficiently significant way if the application for interim relief were to be dismissed. With more particular regard to Mr Rogerson, Mr Tomicic, Mr Valasek and Mr Nati, the portion of their activities that involves software development is not at all specified in their application.

137 It must also be added that adaptation of the computer support services (Mr Rogerson, Mr Setka and Mr Tomicic), computer training services (Mr Setka) and consulting services (Mr Tomicic) cannot be considered a direct consequence of implementation of the Decision but must be regarded as being dependent primarily on the choice made by customers to opt for a Windows operating system that does not incorporate the Windows Media Player software and to demand services resulting from that choice (see paragraph 133 above).

138 With regard to the interest alleged by Mr Rialdi, this cannot be treated as being direct, as dismissal of the application for interim relief is likely to affect him only in so far as he participates in the results of the company in which he is a member of the board and vice-president of its advanced technology division.

139 In the light of the foregoing, the application for leave to intervene by IDE Nätverkskonsulterna and Others must be granted in so far as it was submitted by Exor AB but must be rejected in so far as it was submitted by the other applicants.

The application for confidential treatment

140 Microsoft has requested that the confidential version of the Decision should not be disclosed to the applicants for leave to intervene.

141 As the interventions are to be allowed under the conditions laid down in Article 116(2) of the Court's Rules of Procedure, transmission of the procedural documents served on the parties must, at this stage, be limited to the non-confidential version produced by Microsoft. A decision as to whether the application for confidential treatment is well founded shall, if necessary, be taken at a later stage in the light of any objections which may be submitted on that issue.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

orders:

1. **Computer & Communications Industry Association is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.**

2. **Software & Information Industry Association is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.**

3. **The Computing Technology Industry Association Inc. is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.**

4. **The Association for Competitive Technology is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.**

5. **Novell Inc. is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.**

6. **RealNetworks Inc. is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.**

7. **TeamSystem SpA and Mamut ASA are granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.**

8. **The application submitted by Digimpro Ltd and by CODA Group Holdings Ltd in Case T-201/04 R in support of the form of order sought by the applicant is dismissed.**

9. **DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd and Tandberg Television Ltd are granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.**

10. **The application submitted by IDE Nätverkskonsulterna AB, by Mr T. Rogerson, by Mr P. Setka, by Mr D. Tomicic, by Mr M. Valasek, by Mr R. Rialdi and by Mr B. Nati in Case T-201/04 R in support of the form of order sought by the applicant is dismissed.**

11. **Exor AB is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.**

12. **The Registrar shall transmit to the intervening parties the non-confidential version of the procedural documents.**

13. **A period shall be fixed for the intervening parties to submit observations on the application for confidential treatment. The decision on whether that application is well founded is reserved.**

14. **A period shall be fixed for the intervening parties to submit a statement in intervention, without prejudice to the possibility of supplementing it later, should the need arise, in the light of a decision as to whether the application for confidential treatment is well founded.**

Luxembourg, 26 July 2004.

H. Jung	B. Vesterdor
Registrar	Presiden

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1 – Language of the case: English.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

16 January 2008 (*)

(Competition – Abuse of dominant position – Allegation of excessive charges applied by the operator of Athens International Airport – Rejection of the complaint – No Community interest)

In Case T‑306/05,

Isabella Scippacercola, residing in Brussels (Belgium),

Ioannis Terezakis, residing in Brussels,

represented by A. Krystallidis and G. Stylianakis, lawyers,

applicants,

v

Commission of the European Communities, represented by P. Hellström, A. Nijenhuis and F. Amato, acting as Agents,

defendant,

APPLICATION for annulment in part of the Commission's decision of 2 May 2005 pursuant to Article 7(2) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), rejecting complaint No COMP/D3/38469 concerning the levy of certain charges by the operator of Athens International Airport at Spata and by Olympic Fuel Company,

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

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2007,

gives the following

Judgment

Legal framework

Community legal framework applicable to complaints relating to infringements of the competition rules of the EC Treaty

Legal framework applicable until 30 April 2004

1 Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) provided:

'1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article [81 EC] or Article [82 EC], it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

...'

2 That provision was repealed by Article 43(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), applicable, according to Article 45 of that regulation, from 1 May 2004.

3 Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18) provided:

'Where the Commission, having received an application made under Article 3(2) of Regulation No 17 ..., considers that on the basis of the information in its possession there are insufficient grounds for granting the application or acting on the complaint, it shall inform the applicant or complainant of its reasons and set a date by which the applicant or complainant may make known its views in writing.'

4 That provision was repealed by Article 18 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), applicable, according to Article 20 of that regulation, from 1 May 2004.

Legal framework in force from 1 May 2004

5 Article 7 of Regulation No 1/2003 which, according to Article 45 of that regulation, applies from 1 May 2004, provides:

'1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 [EC] or 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end ...

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.'

6 Regulation No 773/2004 entered into force on 1 May 2004, in accordance with Article 20.

7 According to Article 7 of Regulation No 773/2004:

'1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.'

8 Article 8 of Regulation No 773/2004 provides:

'1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 [EC] and 82 [EC] may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.'

Greek legal framework

9 Article 1 of Law No 2338/1995 (FEK A' 202/14.9.1995) ratified the agreement concluded on 31 July 1995 between the Greek State and a consortium of companies concerning the development of Athens International Airport at Spata ('the agreement'). Article 3 of Law No 2338/1995 created Athens International Airport SA ('AIA'). AIA's shareholders are the Greek State, with 55% of the capital, and the abovementioned consortium of companies holding 45% of the capital and having the right to appoint the Chief Executive Officer.

10 According to Article 2(2)(1) and Article 4(1) of the agreement, AIA was granted a 30-year exclusive right to carry out the design, financing, construction, completion, commissioning, maintenance, operation, management and development of Athens International Airport at Spata ('Athens airport').

11 According to Article 3(2)(1) of the agreement:

'The Greek State shall ensure that, during the contract period:

(a) no new or existing airport will be developed as, or improved or upgraded into, an international airport within a radius of 100 kilometres of Syntagma Square, Athens, with the benefit of Greek State support, before the 20th anniversary of the commencement date;

and furthermore

(b) no new airport will be developed as an international airport within a radius of 50 kilometres of Syntagma Square, Athens, with the benefit of Greek State support, until and unless more than 50 million passengers by air (arrivals including transits, and departures) use the airport in any continuous period of 12 months.'

12 Pursuant to Article 14 of the agreement, the various charges for the services provided by Athens Airport are set by AIA. According to that provision, the charges for air activities are set by reference to AIA's costs, allowing for a maximum return of 15%.

13 Law No 2065/1992 (FEK A' 113) imposed a passenger departure fee, known also as 'the Spatosimo', of EUR 20 for an international flight and EUR 10 for a domestic flight for passengers departing from Greek airports, the receipts from which had to be used for the modernisation or construction of airports in Greece.

14 Article 26(1) of the agreement extended the Spatosimo as a 'contribution to the construction of Athens airport' until at least 2014.

15 Law No 2892/2001 (FEK A' 46) amended Law No 2065/1992 by increasing the Spatosimo with effect from 1 March 2001 to EUR 22 for international flights (outside the European Economic Area (EEA)) and to EUR 12 for flights within the EEA.

Facts and administrative procedure

16 On 5 July 2002, Mr Koeune, acting on behalf of 'a number of [Athens] airport users', lodged a complaint with the Commission's Directorate General (DG) for Competition, which was registered as Case COMP/D3/38469. The complaint, based on Articles 82 EC and 86 EC, challenged, inter alia, the Spatosimo imposed by Law No 2065/1992 and claimed that certain charges imposed on air companies and passengers by AIA were excessive.

17 By letter of 28 August 2002, the Commission acknowledged receipt of the complaint and asked Mr Koeune, inter alia, to produce the power of attorney of the Athens airport users on whose behalf he had lodged the complaint.

18 By letter of 4 October 2002, Mr Koeune informed the Commission that the powers of attorney in question would be sent separately by registered courier. In addition, he claimed that the Spatosimo

was discriminatory.

19 By letter of 28 November 2002, the Commission informed Mr Koeune that the group of Athens airport users on whose behalf the complaint had been lodged had not yet been clearly identified, and that it had not yet received the powers of attorney requested. The letter also stated, by way of an initial position within the meaning of the judgment of the Court of First Instance in Case T‑64/89 *Automec* v *Commission* [1990] ECR II‑367, paragraphs 45 to 47, that Articles 81 EC and 82 EC did not apply to the charges complained of as the charges were akin to taxes imposed by a Member State and those Treaty provisions applied only to the conduct of undertakings.

20 By letter to the Commission of 24 December 2002, Mrs Scippacercola, an individual user of Athens airport, identified herself as one of the persons on whose behalf the complaint of 5 July 2002 had been lodged, and attached the power of attorney in favour of Mr Koeune. In the same letter, Mrs Scippacercola opposed the initial position taken by the Commission in its letter of 28 November 2002.

21 By letter of 29 January 2003, Mrs Scippacercola formally requested the Commission, pursuant to Article 232 EC, to adopt a decision regarding the infringement of Articles 86 EC and 82 EC consisting in the airport's exclusive rights and the excessive charges imposed by it; the infringement of Article 87 EC consisting in the State aid granted to Athens airport; and the opening of a procedure under Article 226 EC against the Greek Government in respect of the Spatosimo.

22 By letter of 10 February 2003, the Commission informed Mrs Scippacercola that only the first aspect of her formal request relating to the alleged infringements of Articles 86 EC and 82 EC fell within the competence of the DG for Competition and that the two other aspects had been communicated to the DG for Energy and Transport. The letter stated that the DG for Competition would respond to the aspect that fell within its competence by 29 March 2003.

23 By letter of 18 February 2003, Mrs Scippacercola provided the Commission with further information in relation in particular to the security charge and to the passenger terminal facilities charge. The letter stated also that 'all charges except [the Spatosimo] imposed on passengers and on air companies [were] fixed by the [Athens] airport administration'.

24 By letter of 26 February 2003, Mrs Scippacercola pointed out that the complaint of 5 July 2002 and the letters of 24 December 2002 and 18 February 2003 concerned not only the Spatosimo but also the other charges imposed on passengers and air companies by AIA.

25 By letter to Mrs Scippacercola of 28 February 2003, the Commission's DG for Energy and Transport stated that, following a modification to Law No 2065/92 by Law No 2892/2001, the Spatosimo was no longer discriminatory since it had been fixed at EUR 12 for all destinations within the European Union.

26 By letter to Mrs Scippacercola of 19 March 2003, the DG for Competition announced, after observing that the Spatosimo had been fixed at EUR 12 for all destinations within the EEA, that it intended to take no further action on the complaint in so far as it related in particular to the excessive nature of that tax, since it did not concern the conduct of an undertaking for the purposes of Articles 81 EC and 82 EC. So far as the other charges at issue in the complaint and, in particular, the security charge, were concerned, the Commission claimed that Mrs Scippacercola had not shown that she had a legitimate interest within the meaning of Article 3(2) of Regulation No 17.

27 By letter of 12 April 2003, Mrs Scippacercola asked the Commission to undertake an in-depth examination of the airport charges in the light of the definition of excessive prices adopted by the Court of Justice in Case 27/76 *United Brands* v *Commission* [1978] ECR 207.

28 By letter of 26 May 2003, the Commission informed Mrs Scippacercola of its decision of 22 May 2003 not to take further action on the complaint of 5 July 2002 in so far as it related to practices attributable to the Greek State, namely the Spatosimo.

29 By a further letter of 26 May 2003, the Commission informed Mrs Scippacercola that the practices criticised in the complaint of 5 July 2002 which had been attributed to AIA did not appear to fall within the scope of Article 82 EC or to justify the opening of an inquiry.

30 By letter of 12 June 2003, Mrs Scippacercola provided the Commission with further information concerning the charges levied by AIA and reiterated her view that those tariff practices fell within the scope of Article 82 EC.

31 By letter of 15 October 2003, the Commission informed Mrs Scippacercola that it maintained its assessment of AIA's tariff practices that had been set out in its letter of 26 May 2003, and announced that a letter would be sent pursuant to Article 6 of Regulation No 2842/98.

32 By letter of 27 November 2003, Mr Terezakis, also an individual user of Athens airport, lodged a complaint at the Commission's Secretariat-General concerning (1) the abusive use of subsidies granted by the Cohesion Fund for the construction of Athens airport; (2) the excessive charges applied by AIA in the light of the judgment in *United Brands* v *Commission*, cited in paragraph 27 above; and (3) the incompatibility of the Spatosimo with Community law.

33 By letter of 23 February 2004, the Commission informed Mr Terezakis that '[his] complaint [had] been registered under reference number 2004/4134, SG(2004) A/1724'.

34 By letter to Mrs Scippacercola of 25 March 2004 pursuant to Article 6 of Regulation No 2842/98, the Commission announced its intention to take no further action on the complaint of 5 July 2002.

35 By letters of 8 April and 5 May 2004, Mrs Scippacercola requested the Commission to reconsider its provisional position regarding the complaint, and in particular in relation to the security charge, the passenger terminal facilities charge and the charge for parking cars at the airport. The letter of 5 May 2004, which was also signed by Mr Christofidis, also formally requested the Commission, pursuant to Article 232 EC, to take a formal decision within one month from the date of receipt of the letter.

36 By letters of 8 May 2004, Mrs Scippacercola and Mr Christofidis informed the Commission that it was being requested to take a decision on the complaint of 5 July 2002 within two months.

37 By letter of 28 June 2004, Mrs Scippacercola sent the Commission further information on the construction and operation of Athens airport, concerning the costs and profits relating in particular to the security and car parking arrangements.

38 By letter of 2 July 2004, the Commission informed Mrs Scippacercola and Mr Christofidis that, in the light of the information provided in their letters of 5 and 8 May 2004, it had decided to carry out further investigation by addressing requests for information, in particular, to the Greek authorities and to AIA.

39 By letter of 15 July 2004, Mrs Scippacercola sent the Commission new information concerning the costs and profits in relation, in particular, to the security and car parking arrangements, to enable the Commission to assess the excessive nature of the charges imposed by AIA.

40 AIA replied to the Commission's request for information by letter of 27 August 2004 and provided further information by letters of 27 September and 11 October 2004.

41 The Commission informed Mrs Scippacercola by letter of 5 October 2004 that it had received the replies to the requests for information referred to in paragraph 38 above.

42 By letter of 22 October 2004, Mrs Scippacercola and Mr Christofidis referred to certain matters already included in their letters of 5 May and 15 July 2004. That letter, and also Mr Christofidis's letter of 26 October 2004, requested the Commission to make further enquiries about the costs incurred by AIA for the construction of Athens airport.

43 By letter of 12 January 2005, the Commission informed Mrs Scippacercola and Mr Christofidis, in accordance with Article 7(1) of Regulation No 773/2004, of its intention to reject the complaint of 5 July 2002. They were asked to submit any comments within one month from the date of receipt of the letter.

44 By letter of 13 January 2005, Mr Terezakis informed the Commission that he was joining in the complaint of 5 July 2002 made by Mr Christofidis and Mrs Scippacercola, and reminded the Commission that it had not responded to his own complaint No 2004/4134, SG(2004) A/1724 of 27

November 2003.

45 By letter of 26 January 2005 referring to the complaint of 5 July 2002 and to complaint No 2004/4134, SG(2004) A/1724 of 27 November 2003, Mr Christofidis, Mrs Scippacercola and Mr Terezakis submitted their comments to the Commission in response to the letter of 12 January 2005. They invited the Commission to reconsider its position and to carry out an in-depth investigation. They formally requested the Commission, pursuant to Article 232 EC, to take a final decision within two months.

46 By letter of 21 February 2005, the Commission informed Mr Terezakis that he could not ‘join’ in the complaint of 5 July 2002 made by Mrs Scippacercola and Mr Christofidis, as no such procedure was provided for in Regulations No 1/2003 and No 773/2004. The Commission also stated that the information about Athens airport which he had supplied on 27 November 2003 was not regarded as a formal complaint, because he had submitted it in his capacity as a Commission official using the Commission’s letterhead, by e-mail and internal mail.

47 By a further letter of 21 February 2005, the Commission informed Mrs Scippacercola and Mr Christofidis that it would not be in a position to adopt a final decision on the complaint of 5 July 2002 within the two months referred to in the letter of 26 January 2005. It announced that a final decision would be taken as soon as was reasonably possible.

48 By letter to the Commission of 4 March 2005, Mr Terezakis stated that he had never asked for authorisation to join in the complaint of 5 July 2002. He explained that, by his letter of 13 January 2005, he had wished to inform the Commission of its obligation to acknowledge receipt of the fax and letters that were mentioned in his letter. He maintained, furthermore, that he was one of the ‘users’ on whose behalf the complaint of 5 July 2002 had been launched by Mr Koeune, and that it was in his capacity as a European citizen and frequent flyer that he had supplied information on Athens airport. He noted that the Secretariat-General of the Commission had, moreover, registered his complaint of 27 November 2003.

49 By letter of 24 March 2005, Mrs Scippacercola, together with Mr Christofidis and Mr Terezakis, formally requested the Commission, pursuant to Article 232 EC, to take a final decision on the complaint of 5 July 2002 by 25 May 2005, stating that, in the absence of a decision by that date, they would bring actions based on Articles 232 EC and 288 EC.

The contested decision

50 On 2 May 2005, the Commission adopted a decision pursuant to Article 7(2) of Regulation No 773/2004 rejecting complaint No COMP/D3/38469 of 5 July 2002 (‘the contested decision’). The contested decision was notified to the persons to whom it was addressed, Mrs Scippacercola and Mr Christofidis. Mrs Scippacercola received notification of the contested decision on 31 May 2005.

51 In the contested decision, the Commission examined the various charges disputed by the complainants, namely the passenger security charge, the passenger terminal facilities charge, the charges for supplying aviation fuel and for aircraft parking, and the airport car parking charge. It set out the following conclusions in paragraph 141 of the contested decision:

‘… there are insufficient grounds for acting on [the] complaint. This is based on the [following] reasons … :

(a) With regard to the application to passengers of an allegedly excessive airport security charge:

– Article 82 [EC] is not applicable, because by carrying out security checks on the passengers departing from the Athens International Airport of Spata, AIA exercises essential functions of the State, and in any event

– it is not in the Community interest to open an in-depth investigation.

(b) With regard to the application to passengers of an allegedly excessive passenger terminal facilities charge, it is not in the Community interest to open an in-depth investigation.

(c) With regard to the application to airlines of allegedly excessive charges for aviation fuel:

– The complainants do not have a legitimate interest within the meaning of Article 3(2) of Regulation 17/62 or of [Article] 7(2) of Council Regulation 1/2003, and in any event

– it is not in the Community interest to open an in-depth investigation.

(d) With regard to the application to airlines of allegedly excessive charges for the parking of aeroplanes:

– The complainants do not have a legitimate interest within the meaning of Article 3(2) of Regulation 17/62 or of [Article] 7(2) of Council Regulation 1/2003, and in any event

– it is not in the Community interest to open an in-depth investigation.

(e) With regard to the application to passengers of allegedly excessive charges for parking cars at the airport, it is not in the Community interest to open an in-depth investigation.'

Procedure and forms of order sought by the parties

52 By application lodged at the Registry of the Court of First Instance on 10 August 2005, the applicants brought the present action.

53 By letter of 31 July 2006, received at the Registry of the Court of First Instance on 4 August 2006, the applicants requested a derogation from the rule on the use of the language of the case laid down in Article 35(2) of the Rules of Procedure of the Court of First Instance. The Commission submitted its observations on that request on 24 August 2006.

54 By decision of 7 September 2006 of the President of the Fifth Chamber of the Court of First Instance, the request for a derogation from the rule on the use of the language of the case was rejected.

55 Upon hearing the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, invited the Commission to produce certain documents. The request concerned, inter alia, the non-confidential version of AIA's reply of 27 August 2004 to the Commission's request for information. The Commission complied with that request within the prescribed period.

56 By letter of 7 June 2007, sent to the Registry of the Court of First Instance by fax on the same date, the applicants made a further request for a derogation from the rule on the use of the language of the case for the purposes of the hearing. That request was rejected by decision of the President of the Fifth Chamber of the Court of First Instance on 7 June 2007.

57 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 12 June 2007. At the hearing, the applicants were authorised to answer the questions of the Court in French.

58 The applicants claim that the Court should:

– annul the contested decision to the extent that it refuses to open an in-depth investigation into AIA's costs and revenues relating to the provision of passenger security services, passenger terminal facilities and car parking services in order to establish whether the charges levied by AIA constitute an abuse of a dominant position;

– order the Commission to pay the costs.

59 The Commission contends that the Court should:

– dismiss the application with regard to Mr Terezakis as inadmissible;

– dismiss the application for annulment as unfounded;

– order the applicants to pay the costs.

Admissibility

Arguments of the parties

60 The Commission claims that the action is inadmissible in so far as it was brought by Mr Terezakis. The addressees of the contested decision were only Mrs Scippacercola and Mr Christofidis.

61 It recalls that Mr Terezakis is not mentioned in the initial complaint lodged by Mr Koeune or in the subsequent exchanges between Mrs Scippacercola and the Commission. Mr Koeune never replied to the Commission's repeated requests to identify which clients he was representing. The Commission accepted Mrs Scippacercola as a complainant because she identified herself as such in her letter of 24 December 2002, in which she referred to the Commission's letter of 28 November 2002 and to which she attached the power of attorney which she had given to Mr Koeune to lodge the complaint of 5 July 2002.

62 The Commission observes that Mr Terezakis lodged a separate complaint at the Secretariat-General of the Commission on 27 November 2003, which was registered as No 2004/4134, SG (2004) A/1724. That complaint was not the subject of the contested decision. Further, the Commission's services acknowledged receipt of 'market information' provided by Mr Terezakis in so far as it was relevant to the present matter, but noted explicitly in a letter of 21 February 2005 that this was not regarded as a formal complaint, as the information had been provided by Mr Terezakis in his capacity as a Commission official and by using internal communication channels.

63 It was only in his letter dated 13 January 2005, that is to say, after the Commission's letter of 12 January 2005 to Mrs Scippacercola and Mr Christofidis pursuant to Article 7(1) of Regulation No 773/2004, that Mr Terezakis expressed his wish to join in the complaint which they had lodged. The use in that letter of the expressions 'je rejoins' (I join) and 'leur plainte' (their complaint) shows that Mr Terezakis did not consider himself to be a party to the complaint of 5 July 2002.

64 It follows that Mr Terezakis has no legal standing to challenge the contested decision, since he is not an addressee of that decision and did not establish in the application that he was directly and individually concerned by it.

65 The applicants claim that this action is entirely admissible.

Findings of the Court

66 It has been consistently held that it is in the interests of the proper administration of justice and of the correct application of Articles 81 EC and 82 EC that natural or legal persons who are entitled to make a request pursuant to Article 3(2)(b) of Regulation No 17 should be able to institute proceedings in order to protect their legitimate interests if their request is not complied with either wholly or in part (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13; Case 210/81 *Schmidt* v *Commission* [1983] ECR 3045, paragraph 14; Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 36; and Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraph 38). That case-law can be applied to natural or legal persons who are entitled to make a complaint on the basis of Article 7(2) Regulation No 1/2003, which replaced Article 3(2)(b) of Regulation No 17 from 1 May 2004.

67 In the present case, it must be noted first of all that, on 5 July 2002, Mr Koeune, acting on behalf of 'a number of [Athens] airport users', lodged complaint No COMP/D3/38469 with the Commission.

68 Next, it must be noted that, by letter to the Commission of 24 December 2002, Mrs Scippacercola identified herself as one of the persons on whose behalf the complaint of 5 July 2002 had been lodged, and attached the power of attorney granted to Mr Koeune.

69 Finally, the contested decision was addressed, inter alia, to Mrs Scippacercola.

70 In view of the case-law cited in paragraph 66 above, the action is therefore admissible in relation to Mrs Scippacercola.

71 Next, it must be observed that the applicants have brought one and the same action. It has consistently been held that, where one and the same application is involved, a finding of admissibility in relation to one applicant means that there is no need to consider whether the other applicants are entitled to bring proceedings, since it is sufficient that at least one of the applicants fulfils the conditions laid down in Article 230 EC (Case C‑313/90 *CIRFS and Others* v *Commission* [1993] ECR I‑1125, paragraph 31; Case T‑12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II‑1247, paragraph 44; Joined Cases T‑374/94, T‑375/94, T‑384/94 and T‑388/94 *European Night Services and Others* v *Commission* [1998] ECR II‑3141, paragraph 61; and Case T‑317/02 *FICF and Others* v *Commission* [2004] ECR II‑4325, paragraph 40).

72 It follows from all the foregoing that the action must be declared admissible without there being any need to consider whether Mr Terezakis is entitled to bring proceedings.

Substance

Preliminary observations

73 It must be noted, first, that the applicants dispute the lawfulness of the contested decision only so far as concerns the security charge, the passenger terminal facilities charge and the car parking charge. The applicants do not, therefore, dispute the contested decision in so far as it relates to charges for the provision of aviation fuel (paragraphs 93 to 108 of the contested decision) or the charge for the provision of aeroplane parking services (paragraphs 109 to 119 of the contested decision).

74 Next, it must be noted that the fundamental reason given in the contested decision for the Commission's rejection of the complaint of 5 July 2002 is the lack of Community interest in opening an in-depth investigation (paragraphs 39 to 43, 78 and 79, 92 and 136 to 141 of the contested decision). It is, moreover, the only reason given in the contested decision for rejecting the complaint as to the allegedly excessive passenger terminal facilities charge and charge for parking cars at the airport (paragraph 141 of the contested decision). As far as the alleged infringement related to the security charge is concerned, the Commission mentions another reason for rejecting the complaint, in addition to the lack of Community interest, namely the fact that the practices in question do not fall within the scope of Article 82 EC (paragraph 141 of the contested decision).

75 The applicants rely on four pleas in law in the application. The first plea in law alleges an error of law and a manifest error of assessment in that the Commission did not carry out a proper comparison of the costs and revenues related to the provision of security services, the provision of airport terminal facilities to passengers and the provision of airport car parking services, by failing to verify the reliability of the information supplied by AIA and by failing to examine one by one the economic and financial data submitted by the applicants. The second plea in law alleges an infringement of Article 82 EC in that, first, the Commission considered that the security checks did not constitute an economic activity for the purposes of that provision and, second, the car parking services did not constitute a relevant market for the purposes of that provision. The third plea in law alleges an error of law concerning the application to passengers of a higher terminal facility charge for those on intra-Community and international flights than for those on domestic flights, and the application to passengers on scheduled flights of a terminal facility charge and a security charge which are not applied to those travelling on charter flights. Finally, the fourth plea in law alleges an infringement of Article 253 EC and a departure from established rights and procedures.

First plea in law, alleging an error of law and a manifest error of assessment in that the Commission did not carry out a proper comparison of the costs and revenues related to the provision of security services, the provision of airport terminal facilities to passengers and the provision of car parking services, by failing to verify the reliability of the information supplied by AIA and by failing to examine one by one the economic and financial data submitted by the applicants

Arguments of the parties

76 The applicants claim that, contrary to the requirements laid down in *United Brands* v *Commission* (cited in paragraph 27 above), the Commission failed to carry out a proper comparison of the costs

and revenues related to the provision of passenger security services, the provision of terminal facilities to passengers and the provision of car parking services. In addition, by concluding that it was not in the Community interest to open an in-depth investigation, the Commission did not pay due attention to the content of the complaints, in particular complaint No 2004/4134, SG(2004) A/1724.

77 First, as regards the security charge, the applicants observe that an activity performed in the public interest should not produce excessive profits. According to the applicants' calculations, however (which take into account a construction cost in respect of the security installations of EUR 3 454 966, security staff salary costs in 2002 of EUR 2 164 433 and annual income from passenger security activities of EUR 14 429 559 in 2002), AIA realises a capital return equal to 7 236% on its security activities. The charges levied, which do not bear any reasonable relationship to the costs incurred by AIA, are thus excessive prices, contrary to Article 82 EC (*United Brands* v *Commission*, cited in paragraph 27 above, paragraphs 249 to 252).

78 The comparisons and explanations put forward by the Commission in paragraphs 65 to 68, 70 and 71 of the contested decision are inconclusive, as they concern other airports unconnected with the relevant market in the present case. The Commission itself stated, in paragraph 69 of the contested decision, that 'simple comparisons of levels of charges at different airports cannot be considered to be sufficient evidence to demonstrate excessive pricing'.

79 In addition, the applicants observe that the security charge was increased from EUR 1.29 when Athens airport opened in March 2001 to EUR 2.44 in October 2002 owing to the events of 11 September 2001. In view of this sharp increase of almost 90%, the applicants request the Court to order the Commission to explain on what economic grounds AIA raised the security charge to EUR 2.44.

80 In view of the foregoing, the applicants take the view that the Commission was not entitled to conclude in paragraph 77 of the contested decision that none of the elements submitted by the complainants appears sufficiently persuasive to justify the opening of an in-depth investigation.

81 The applicants also dispute the Commission's finding in paragraph 74 of the contested decision that 'a comparison between costs for and revenues from [the] security activities as supplied by AIA … in the confidential version of its reply [to the request for information], to which the complainants cannot be granted access, does not produce a surplus … [with the result that] there is no evidence of excessive prices that would justify any further investigation'. The applicants claim that the Commission did not state why information concerning the revenues from the passenger security services and the related fixed and variable costs constituted confidential information for the purposes of Article 8(1) of Regulation No 773/2004. They note that, in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), the Commission, by letter of 26 June 2003, had already granted Mrs Scippacercola access to the Cohesion Fund application made by the Greek authorities for assistance for the construction of Athens airport, which contains information concerning the cost of the airport's passenger security systems. The security charge is known and AIA publishes its staff costs on its website and also monthly and annual statistics on the numbers of passengers served at the airport. Such information is not, therefore, confidential.

82 The applicants therefore ask the Court to order the Commission to provide them with the figures supplied by AIA in respect of security costs and revenues for the years 2001 to 2004 so that they can be verified and assessed in the light of the applicants' arguments to demonstrate that AIA realises excessive profits. They observe that AIA acted as the authority responsible for implementation of an airport project financed by Community funds and carried out in the common interest. Accordingly, the information concerning the airport's construction costs cannot be within the scope of business secrets or constitute confidential information. In addition, as regards AIA's staff costs, as to which the global figure (EUR 27 147 458) can be found on the internet (www.aia.gr), the Commission has not explained how AIA's business secrets would be affected if the information concerning the breakdown by category of activity were to be given to the applicants.

83 The irregularities in connection with the construction of Athens airport referred to in complaint No 2004/4134, SG(2004) A/1724 are relevant not only from the viewpoint of the Cohesion Fund grant but also from that of the competition rules since AIA's pricing strategy is based on an airport construction cost of EUR 1 746 167 573. The applicants recall that Commission Decision C(96) 1356 of 23 May 1996 granting Cohesion Fund assistance mentions a construction cost of EUR 973 303 266, whereas the Commission refers in the defence (paragraphs 38 and 51) to a cost

of EUR 2 100 000 000. Furthermore, Mr Terezakis informed the Commission of the disappearance of VAT receivables from AIA's balance sheet for 2001 and the following years. The applicants therefore ask the Court of First Instance to order the Commission to submit documentary evidence establishing the true construction cost of Athens airport in order to determine the exact annual depreciations to be taken into account for the purpose of comparing the costs and revenues of the services concerned. In the reply, the applicants further request the Court to order the Commission to state the names of the undertakings to which AIA paid EUR 2 100 000 000.

84 As regards the exchange of correspondence between Mr Terezakis and the Commission following complaint No 2004/4134, SG(2004) A/1724, the applicants submit that, by ignoring information supplied by the complainant concerning the deletion of the VAT receivables from AIA's balance sheets, by deciding to suspend the correspondence with the complainant, and by adopting Decision C(2005) 3243 of 1 September 2005 slightly reducing the Cohesion Fund assistance rather than envisaging the recovery of the entire assistance, the Commission has not complied with its Communication COM(2002) 141 to the European Parliament and the European Ombudsman of 20 March 2002 on relations with the complainant in respect of infringements of Community law, or its Communication COM(2002) 725 of 16 May 2003 on better monitoring of the application of Community law.

85 Second, as regards the passenger terminal facilities charge, the applicants claim that the comparisons and explanations put forward by the Commission in paragraphs 83 to 86 of the contested decision are inconclusive, as the Commission itself stated in paragraph 85 of the contested decision that 'simple comparisons of levels of charges at different airports cannot be considered to be sufficient evidence to demonstrate excessive pricing'.

86 The applicants note that, according to their calculations (which take into account a fixed cost related to passenger terminal facilities of EUR 200 000 000, salary costs of EUR 25 529 845 in 2001 and EUR 27 147 498 in 2002, and revenue of EUR 60 911 666 in 2002 and EUR 63 099 829 in 2003), AIA realised a capital return on the written-down fixed costs of 329% in 2002, 451% in 2003 and 523% in 2004. The charges levied, which do not bear any reasonable relationship to the costs incurred by AIA, are thus excessive prices, contrary to Article 82 EC (*United Brands* v *Commission*, cited in paragraph 27 above, paragraphs 249 to 252).

87 The information on which the applicants based their calculations was brought to the Commission's attention during the administrative procedure. The figure of EUR 200 000 000 for the fixed costs relating to passenger terminal facilities is the result of the conversion of DEM 370 000 000, which corresponds to the total cost of the works relating to the passenger terminal facilities referred to in appendix 7 to the Greek authorities' application for assistance from the Cohesion Fund. The applicants request the Court of First Instance to order the Commission to provide them with the figures available to the Commission if the applicants' calculations are disputed, and also the names of the constructors and of the suppliers concerned.

88 The applicants observe also that the Commission never took into account the particulars provided in complaint No 2004/4134, SG(2004) A/1724 of 27 November 2003, whereby the Commission was informed inter alia that AIA had manifestly manipulated the operational expenses and interest payments and that it had dealings with non-existent 'affiliated undertakings'. Nor did the Commission take into account the letters containing information on AIA's abusive practices which were sent to the DG for Competition between June and October 2004 (letters of 28 June, 15 July, 22 October and 26 October 2004), and which were mentioned in the letter of 26 January 2005. The Commission was wrong also to take the view that the construction cost of the airport was EUR 2 100 000 000 (see paragraph 83 above).

89 Third, as regards the car parking charge, the applicants claim that, according to their calculations (which take into account a construction cost in respect of the car park of EUR 753 206, as mentioned in the Greek authorities' application for assistance from the Cohesion Fund, practically no salary costs and revenues of EUR 9 289 247 in 2002), AIA realises an annual capital return which is higher than the total cost invested. The charges levied, which do not bear any reasonable relationship to the costs incurred by AIA, are thus excessive prices, contrary to Article 82 EC (*United Brands* v *Commission*, cited in paragraph 27 above, paragraphs 249 to 252).

90 The Commission contends that this plea in law should be rejected.

Findings of the Court

– Preliminary observations

91 It has consistently been held that Article 3(2) of Regulation No 17 does not give a person making an application under that article the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraphs 17 and 18; Case C–119/97 P *Ufex and Others* v *Commission* [1999] ECR I–1341, paragraph 87; Case T–24/90 *Automec* v *Commission* [1992] ECR II–2223, paragraph 75; and Joined Cases T–185/96, T–189/96 and T–190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II–93, paragraph 48). The same applies to a person making a complaint under Article 7(2) of Regulation No 1/2003, which replaced Article 3(2) of Regulation No 17 from 1 May 2004.

92 The Commission, to which Article 85(1) EC entrusts the task of ensuring application of the principles laid down in Articles 81 EC and 82 EC, is responsible for defining the orientation of Community competition policy and implementing it. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it, and has a discretion for that purpose (*Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraph 88, and Case C–449/98 P *IECC* v *Commission* [2001] ECR I–3875, paragraph 36).

93 The Commission is entitled in particular to refer to the Community interest in order to determine the degree of priority to be applied to the various complaints brought to its notice (Case T–24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 85, and Joined Cases T–9/96 and T–211/96 *Européenne automobile* v *Commission* [1999] ECR II–3639, paragraph 28). The fact that the Commission may reject a complaint for lack of Community interest is, moreover, explicitly acknowledged in Regulation No 1/2003 (recital 18).

94 The discretion which the Commission has in that respect is not unlimited, however (*Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraph 89, and *Européenne automobile* v *Commission*, cited in paragraph 93 above, paragraph 29).

95 First, the Commission must consider attentively all the matters of fact and of law which the complainant brings to its attention (*Schmidt* v *Commission*, cited in paragraph 66 above, paragraph 19; Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18; Joined Cases 142/84 and 156/84 *BATand Reynolds* [1987] ECR 4487, paragraph 20; *Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraph 86; and *IECC* v *Commission*, cited in paragraph 92 above, paragraph 45).

96 Second, the Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint. Since the reasons stated must be sufficiently precise and detailed to enable the Court of First Instance effectively to review the Commission's use of its discretion to define priorities, the Commission must set out the facts justifying the decision and the legal considerations on the basis of which it was adopted (*Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraphs 90 and 91; Case T–24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 85; and *Européenne automobile* v *Commission*, cited in paragraph 93 above, paragraph 29).

97 Finally, it must be noted that the judicial review of decisions to reject complaints must not lead the Court to substitute its assessment of the Community interest for that of the Commission but focuses on whether or not the contested decision is based on materially incorrect facts, or is vitiated by an error of law, a manifest error of assessment or misuse of powers (Case T–24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 80; Case T–387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II–961, paragraph 46; and *Européenne automobile* v *Commission*, cited in paragraph 93 above, paragraph 29).

98 In the present case, the Commission rejected the complaint of 5 July 2002 after concluding that the practices complained of did not represent a sufficient Community interest to justify an in-depth investigation (paragraphs 39 to 43, 78, 79, 92, 140 and 141 of the contested decision). In that regard, it found that there was insufficient likelihood of being able to establish the existence of the infringements complained of, taking into account the limited amount of evidence provided by the complainants and the unconvincing nature of that evidence, the results of the Commission's initial inquiry and the complex nature of the investigation that would still be needed in order to establish

whether or not there was an infringement (paragraphs 78, 92 and 140 of the contested decision). It therefore took the view that the efforts required to establish, with any certainty, the existence of an infringement would be disproportionate in the light of the small likelihood of the existence of an infringement and of its low significance as regards the functioning of the common market (paragraphs 79, 92 and 140 of the contested decision).

99 By the present plea, the applicants essentially make three submissions. The first calls in question the comparison made in the contested decision between the charges levied at Athens airport and those imposed by other airports (paragraphs 100 to 105 below). The second relates to the alleged failure to take sufficient account in the contested decision of the evidence submitted by the complainants during the administrative procedure (paragraphs 106 to 125 below). The third concerns the fact that the Commission did not verify the information provided by AIA (paragraphs 126 to 133 below).

– The comparison between the charges levied at Athens airport and those imposed by other airports

100 First, it must be borne in mind that in *United Brands* v *Commission*, cited in paragraph 27 above (paragraph 250), the Court of Justice held that 'a price which is excessive because it has no reasonable relation to the economic value of the product supplied' could constitute an abuse within the meaning of Article 82 EC. In that regard, 'the questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products' (paragraph 252).

101 Second, it must be noted that, in their complaint of 5 July 2002, the complainants themselves based their allegation as to the excessive nature of the security charge, passenger terminal facility charge and car parking charge on a comparison of the charges imposed at Athens airport with those at other European airports.

102 In the present case, so far as the various charges at issue are concerned, the Commission examined the charges which apply at other established airports in the European Community in paragraphs 70, 86 and 135 of the contested decision, and compared the charges at Athens airport and those imposed at Amsterdam, Barcelona, Brussels, Frankfurt, Madrid, Paris (Roissy) and Rome (Fiumicino) airports.

103 By so doing, the Commission carefully considered the elements of the complaint and complied with the requirements set out in *United Brands* v *Commission*, cited in paragraph 27 above, of comparing the charges imposed and the price of competing services.

104 Furthermore, the applicants do not dispute the material accuracy of the information contained in paragraphs 70, 86 and 135 of the contested decision. Even though an infringement of Article 82 EC cannot be established on the basis of a simple comparison of levels of charges payable at different airports, as the Commission correctly maintains in paragraphs 65 to 69, 84 and 85 of the contested decision, it must nevertheless be noted that the security charge, the passenger terminal facilities charge and the car parking charge at Athens airport are not in the higher band of similar charges payable at the other airports examined.

105 Contrary to the complainants' submission in their complaint of 5 July 2002, the comparison with other European airports does not therefore provide any indication of the existence of excessive pricing in breach of Article 82 EC.

– The alleged failure to take sufficient account of the evidence submitted by the complainants during the administrative procedure

106 In the first place, the complainants put forward various items of evidence during the administrative procedure to show that the charges covered by the present proceedings bore no reasonable relation to the economic value of the service supplied (*United Brands* v *Commission*, cited in paragraph 27 above, paragraph 250).

107 Thus, in their letters of 28 June 2004**,** 15 July 2004 and 26 January 2005, the complainants provided the Commission with estimates of the costs incurred by AIA for the provision of security services and passenger terminal facilities, and compared those estimates with the revenues which

AIA is presumed to obtain from the security charge and from the passenger terminal facilities charge.

108 As regards security, the calculations submitted by the complainants are based on estimated costs of EUR 4 000 000. The letter of 26 January 2005 (p. 2) refers in that regard to staff costs (400 staff at EUR 900 per month) related to the services in question, and the letters of 28 June and 15 July 2004 refer to a security systems cost of DEM 6 281 757 or EUR 3 454 966. According to the letter of 26 January 2005 (p. 2), the security charge generates revenues of EUR 15 000 000.

109 As to airport terminal facilities, the costs calculation is based, in the letter of 26 January 2005 (pp. 2 and 3), on an estimate of the fixed costs of the facilities needed in order to provide the services in question (EUR 200 000 000), amortised over an investment period of 24 years (EUR 8 300 000) and increased to include estimated staff costs (EUR 16 000 000) and other unidentified costs (EUR 2 700 000) related to the services in question. According to the letter of 26 January 2005 (p. 2), the passenger terminal facilities charge generates revenues of EUR 67 000 000. By comparing the costs with the revenues generated by the charges, the complainants conclude that the charges are excessive, contrary to Article 82 EC. In their letter of 26 January 2005 (pp. 3 and 4), they claim that profits are in excess of 1000% for security and EUR 40 000 000 for providing passengers with terminal facilities.

110 As regards car parking, the complainants' claim as to the excessive nature of the charges is based, in their letters of 28 June 2004, 15 July 2004 and 26 January 2005, on an investment cost estimated at DEM 1 364 010 or EUR 753 206, and they conclude that the profits from those services are in excess of 1000%.

111 It must be noted that the Commission commented in the contested decision on the information brought to its attention by the letters referred to in paragraphs 107 to 110 above.

112 Thus, as regards security, the Commission states in paragraph 73 of the contested decision that the applicants' comparisons between revenues and expenses are based on erroneous and incomplete information. Furthermore, the applicants took only passenger and hand luggage screening services into consideration, whereas security activities encompass also guarding, access and patrol security services, general security supervision services, all security equipment, alarm systems, etc. Likewise, as regards passenger terminal facilities and car parking services, the Commission draws attention, in paragraphs 83 and 135 of the contested decision respectively, to the lack of reference to the complainants' sources and to the inaccurate and unfounded nature of the calculations made.

113 However, save for the fact that they take the view that the Commission was aware, during the administrative procedure, of the source of the information used to calculate the cost of the security systems, airport facilities and parking (namely the Greek authorities' Cohesion Fund application for assistance), the applicants do not deny the findings of the Commission set out in the previous paragraph.

114 In any event, the inaccurate and unfounded nature of the applicants' calculations is apparent from the very documents to which the applicants made reference during these proceedings.

115 Firstly, as regards the costs of the security systems, appendix 7 to the Greek authorities' Cohesion Fund application for assistance refers to a sum of DEM 6 281 757 for 'passenger security systems' in the Main Terminal Building East. The applicants do not, however, refer to the figure of DEM 1 073 633 provided for 'passenger security systems' in Satellite I. Their calculations on the basis of an installation cost of DEM 6 281 757 are therefore manifestly inaccurate. Furthermore, the applicants have not denied that the costs of providing security services cannot be reduced to the cost of installing a 'passenger security system'.

116 Secondly, as regards the passenger terminal facilities charge, the applicants refer to the figure of EUR 200 000 000 for the purposes of calculating AIA's fixed costs, having already relied on that figure during the administrative procedure (paragraph 83 of the contested decision). According to the applicants, that figure corresponds to the total cost of works related to the airport facilities referred to in appendix 7 to the Greek authorities' application for assistance from the Cohesion Fund.

117 However, it must be noted that the appendix to which the applicants refer mentions a total cost of DEM 2 440 536 638 or approximately EUR 1 250 000 000 for the works related to Athens airport. Furthermore, it must be pointed out that Commission Decision C(96) 1356 of 23 May 1996 granting Cohesion Fund assistance for the construction of Athens airport provides for total Community

assistance of EUR 250 000 000, which necessarily implies that the figure of EUR 200 000 000 put forward by the complainants during the administrative procedure cannot correspond to the total cost of construction of the airport.

118 Thirdly, as regards the car parking charge, appendix 7 to the Cohesion Fund application for assistance for the construction of the new Athens airport, to which the applicants refer, mentions an estimated investment cost of DEM 1 364 010 or approximately EUR 753 206 in respect of parking. However, the same appendix makes two further references to 'parking', at a cost of DEM 663 073 and DEM 256 733 respectively. The applicants' calculations are therefore incomplete in any event.

119 In addition, it must be pointed out that the Commission found, in paragraphs 137 to 139 of the contested decision, that it was not in the Community interest to investigate further the alleged infringement in relation to the car parking charge, taking the view, in essence, that that car parking market is unlikely to constitute a relevant market, that the alleged infringement would not have an effect on intra-Community trade and would not appreciably affect competition in the common market, and that its centre of gravity was in Greece, with the result that the complainants could lodge a complaint with the Greek authorities or bring an action before the Greek courts. However, aside from the definition of the market concerned, the applicants have not disputed in the application the other factors in the light of which the Commission found that it was not in the Community interest to investigate further the alleged infringement in relation to the car parking charge.

120 Finally, the non-confidential version of AIA's replies of 27 August 2004 to the Commission's request for information, which was produced to the Court of First Instance following a measure of organisation of procedure, confirms that the applicants' calculations in relation to the allegedly excessive nature of AIA's charges are incorrect. It is apparent from that reply (p. 4) that, as regards its air activities, AIA's charges, taken as a whole, do not even cover its costs although, according to Article 14 of the agreement, which was ratified by Article 1 of Law No 2338/1995, AIA is entitled to set its charges not only to reflect its costs but also to take into account a minimum profit margin of 15%.

121 In the second place, as regards the applicants' argument concerning the failure to take account of the letters of 28 June, 15 July, 22 and 26 October 2004, it must be pointed out that the information in those letters was repeated in the letter of 26 January 2005, the contents of which were carefully considered by the Commission, as paragraph 73 of the contested decision shows (see paragraphs 107 to 111 above).

122 In the third place, the applicants' arguments concerning the irregularities in the consideration of complaint No 2004/4134, SG(2004) A/1724 of 27 November 2003, and the failure to take into account the evidence submitted in connection with that complaint cannot be accepted either.

123 The Commission takes certain aspects of complaint No 2004/4134, SG(2004) A/1724 of 27 November 2003 into consideration in paragraph 73 and footnote 25 of the contested decision. They are, however, those aspects of the complaint that were reproduced verbatim in the complainants' letter of 26 January 2005 in relation to the administrative procedure concerning the complaint of 5 July 2002.

124 Since the contested decision relates only to the complaint of 5 July 2002 and not to complaint No 2004/4134, SG(2004) A/1724 of 27 November 2003, the Commission had to take into account in that decision only the evidence relied on in relation to the first complaint. Therefore, any irregularities in the handling of complaint No 2004/4134, SG(2004) A/1724 of 27 November 2003 cannot affect the lawfulness of the contested decision.

125 It follows from all the foregoing that the applicants have not established that the Commission failed to consider carefully the evidence brought to its attention or that it made a manifest error of assessment in considering that that evidence did not constitute sound evidence of the existence of an infringement of Article 82 EC and therefore that there was no Community interest in pursuing its investigation.

– The failure to verify the information supplied by AIA

126 It must be observed first of all that, as paragraph 22 of the contested decision shows, the Commission considered it necessary, in spite of the unconvincing evidence adduced by the complainants, to carry out an initial investigation of AIA's costs and revenues by sending a request

for information, inter alia, to AIA.

127 The information relating to costs and revenues provided in its reply of 27 August 2004 to that request for information is, according to the Commission, confidential with respect to the complainants (footnote 23 of the contested decision). In the contested decision, particularly in paragraphs 74, 76, 90, 91 and 135, the Commission merely draws conclusions from AIA's reply without mentioning the figures on which those conclusions are based.

128 Accordingly, the Commission maintains, in paragraph 74 and at the end of paragraph 76 of the contested decision, that it follows from AIA's reply to the request for information that security activities do not generate a surplus and that there is consequently no evidence of excessive pricing that would justify further investigation. The Commission maintains also, in paragraph 90 of the contested decision, that it follows from that reply that the charges levied by AIA do not generate a surplus and in fact do not even cover the cost of AIA's air activities. As to the car parking charge, the Commission states in paragraph 135 of the contested decision that the figure of EUR 700 000 mentioned by the complainants in respect of parking-related costs refers only to fixed costs – whereas a comparison of the costs and revenues should also include other costs – and is not, in any event, supported by the information given by AIA in its reply to the request for information.

129 Contrary to the applicants' claim, the fact that the Commission did not verify the reliability of the information supplied by AIA cannot affect the lawfulness of the contested decision.

130 It must be borne in mind in that regard that the Commission is not required to establish the existence or non-existence of an infringement (*GEMA* v *Commission*, cited in paragraph 91 above, paragraphs 17 and 18; *Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraph 87; Case T‑24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 75; and *Riviera Auto Service and Others* v *Commission*, cited in paragraph 91 above, paragraph 48).

131 In the present case, the Commission concluded that there was insufficient likelihood of an infringement for it to be in the Community interest to investigate the practices criticised in the complaint. In that regard, the Commission acted on the basis of, first, its finding that the information on AIA's costs and revenues submitted by the complainants did not support the conclusion that an infringement had occurred and, second, two factors which indeed suggest that no infringement occurred, namely (1) the comparison of AIA's charges and those imposed at other airports, and (2) the comparison of AIA's costs and revenues resulting from AIA's reply of 27 August 2004 to the Commission's request for information.

132 It must be noted that the non-confidential version of AIA's reply of 27 August 2004 (p. 4) shows that, as regards its air activities, AIA's charges, taken as a whole, do not even cover its costs although, according to Article 14 of the agreement, which was ratified by Article 1 of Law No 2338/1995, AIA is entitled to set its charges not only to reflect its costs but also to take into account a minimum profit margin of 15%.

133 Furthermore, the applicants have not denied that the verification of information in AIA's reply which would be needed in order to establish the existence of an infringement would involve disproportionate efforts on the Commission's part (paragraphs 78, 79, 92 and 140 of the contested decision). The complexity of the analysis which would have to be undertaken in order to establish an infringement in the present case relates in particular to the determination of the exact costs which would have to be taken into account in order to assess whether or not each charge imposed by AIA is excessive. It is the complexity of such an analysis for the purposes of determining whether there was an infringement and the small likelihood of the existence of such an infringement which caused the Commission not to verify the reliability of the confidential information on AIA's costs and revenues and to reject the complaint for lack of Community interest (see paragraphs 76, 78, 90 to 92, 135 and 140 of the contested decision).

134 Accordingly, since the assessment of the Community interest does not depend on the material accuracy of the information supplied by AIA, the failure to verify that information cannot affect the lawfulness of the contested decision. That last complaint cannot, therefore, be upheld either.

135 It follows from all the foregoing that the applicants have not demonstrated that the Commission failed to consider sufficiently all the matters of fact and of law which were brought to its attention or that it made a manifest error of assessment in finding that there was no Community interest in pursuing the investigation of the practices criticised in the complaint.

136 It follows that the first plea in law must be rejected in its entirety.

Second plea in law, alleging an infringement of Article 82 EC in that, first, the Commission considered that the security checks did not constitute an economic activity and, second, the car parking services did not constitute a relevant market for the purposes of that article

Arguments of the parties

137 First, the applicants submit that the Commission infringed Article 82 EC by concluding, in paragraphs 48 and 49 of the contested decision, that AIA was not exercising an economic activity for the purposes of that article when carrying out security checks on passengers departing from Athens airport. In that regard, the applicants note that, as they observed in their letters of 8 April and 5 May 2004, AIA is a private company which charges passengers for security services. They point out, moreover, that the security services are provided by private companies.

138 The applicants submit that paragraph 17.2 of the Greek Ministerial Decision of 29 December 2000 concerning the national regulation of civil aviation security provides that responsibility for the security systems in Greek airports lies with the national civil aviation authority. That decision does not preclude passenger security checks from being carried out by private companies, but this is only an option, as the rule in all Greek airports is that the national police are responsible for carrying out passenger security checks free of charge. The fact that passenger checks are carried out by private security companies in Athens airport is not, therefore, the consequence of a public service obligation imposed on AIA by the Greek State, but reflects a choice made by AIA itself. The applicants further submit that paragraph 13.6.3 of the Ministerial Decision of 29 December 2000 stipulates that compulsory body searches of passengers are the prerogative of the Greek police and that passengers have the right to refuse such searches by private security personnel.

139 The applicants emphasise that the Commission itself acknowledges in paragraph 55 of the contested decision that the security companies are selected by and on behalf of AIA and not by the police. The main selection criterion is the price asked by the candidate security company. They note also that AIA is free to charge whatever it deems appropriate for security services, thereby realising profit margins which are subject to no constraint whatsoever.

140 Second, the applicants claim that the Commission was in breach of Article 82 EC in taking the view in paragraphs 122 to 132 of the contested decision that the car parking services did not constitute a relevant market for the purpose of that article. They argue that, for passengers using Athens airport and travelling to the airport by their own car, alternative means of transport, such as travel by taxi or public transport, cannot be regarded as a substitute. The airport car park is used not only by those making a journey by air but also for a variety of other reasons, such as collecting passengers. In addition, the Commission, which claims that passengers would use other means of transport ‘if the prices of car parking at the airport were raised significantly above competitive levels’, has not explained to what level car parking charges would have to be raised to achieve that effect. Furthermore, the metro is not a quicker way for most Athenians to reach the airport, as most do not live in the city centre.

141 The applicants submit that the needs of passengers who use their private cars to reach Athens airport cannot be regarded as being similarly served if they are obliged to take a taxi or to use public transport while having to carry their luggage. There is, therefore, no interchangeability within the meaning of the Commission’s Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

142 Finally, the Commission’s argument that passengers residing outside Greece will never use the car parking facilities at Athens airport is unfounded, as a number of people who work in Brussels or London return to Athens for weekends and use the car parking facilities at Athens airport.

143 The Commission contends that this plea in law should be rejected.

Findings of the Court

144 First, as regards the security charge, it must be borne in mind that, in the contested decision, the Commission rejected the complaint after concluding that Article 82 EC did not apply to security checks, and that, ‘in any event … it [was] not in the Community interest to open an in-depth investigation’.

145 It must be noted that, as far as the security charge is concerned, the applicants' arguments concerning the assessment of the Community interest have all been rejected in relation to the first plea in law (paragraphs 100 to 135 above). In those circumstances, the arguments relied on in the present plea concerning the allegedly economic nature of the security activities must be regarded as being immaterial (see, to that effect, Case T–50/00 *Dalmine* v *Commission* [2004] ECR II–2395, paragraph 146, and the case-law cited, and also *Piau* v *Commission*, cited in paragraph 66 above, paragraph 119). They relate to a reason that was included in the contested decision for the sake of completeness.

146 Second, as regards the car parking charge, the Commission rejected the complaint of 5 July 2002 in so far as it relates to the allegedly excessive nature of that charge on the ground that 'it [was] not in the Community interest to open an in-depth investigation' (paragraph 141 of the contested decision). In its assessment of the Community interest in investigating the complaint, the Commission took into account the likelihood that the airport car parking market does not constitute a separate market for the purposes of Article 82 EC (paragraph 119 above).

147 However, it must be noted in relation to the present plea that the applicants do not challenge the assessment of the Community interest made in the contested decision, but only complain that the Commission infringed Article 82 EC in so far as it found that car parking services did not constitute a relevant market for the purposes of that article. That being said, it must be noted that the Commission explicitly stated in the contested decision (paragraph 130) that it did not propose to reach a conclusion on that point.

148 In any event, it is not apparent that the Commission made a manifest error of assessment in concluding that, in view of the alternative means of transport to Athens airport (metro, train, bus and taxi), 'it appears likely that a significant number of passengers who wished to travel to the airport using their own car would switch to other means of transport to and from the airport if the prices of car parking at the airport were raised significantly above competitive levels' (paragraph 127 of the contested decision). Moreover, the applicants do not dispute the Commission's assertions in the contested decision (paragraph 139) that the centre of gravity of the alleged abuse is in Greece and that an action against that alleged abuse could be brought before the Greek courts. However, it is apparent from the case-law that such points are in themselves sufficient reason for a complaint to be rejected for lack of Community interest (see, to that effect, Case T–5/93 *Tremblay and Others* v *Commission* [1995] ECR II–185, paragraph 74).

149 Furthermore, the Court cannot accept the applicants' argument at the hearing that the Commission was not entitled to refer in the contested decision to the metro as an alternative means of transport because the complaint was lodged in July 2002 and the metro did not become operational until 2004. A decision rejecting a complaint must be based on the Commission's consideration of all relevant matters of law and of fact which exist at the time the decision is adopted (see, to that effect, *Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraphs 92 to 96, and Case T–206/99 *Métropole télévision* v *Commission* [2001] ECR II–1057, paragraphs 64 and 65).

150 The second plea in law cannot therefore be accepted either.

Third plea in law, alleging an error of law concerning the application to passengers of a higher terminal facility charge for those on intra-Community and international flights than for those on domestic flights, and the application to passengers on scheduled flights of a terminal facility charge and a security charge which are not applied to those travelling on charter flights

Arguments of the parties

151 The applicants recall that they informed the Commission by letter of 18 February 2003 that, on domestic flights, passengers pay a terminal facility charge of EUR 7.79, whereas on intra-Community and international flights they pay EUR 10.30 (raised to EUR 11.20 on 1 November 2004). Further, the security charge and the passenger terminal facility charge are levied only in respect of passengers on scheduled flights, not of passengers on charter flights.

152 It follows from the judgment of the Court of Justice in Case C–92/01 *Stylianakis* [2003] ECR I–1291 that such practices are in breach of Community law.

153 The Commission contends that this plea should be rejected.

Findings of the Court

154 It must be noted, first of all, that, during the administrative procedure, the complainants challenged the discriminatory nature of the Spatosimo. Thus, by letter of 4 October 2002, Mr Koeune explicitly drew attention to the fact that the Spatosimo amounted to EUR 20 for international flights and EUR 10 for domestic flights.

155 By letter of 28 February 2003 to Mrs Scippacercola, the DG for Energy and Transport pointed out that, following the amendment of Law No 2065/1992 by Law No 2892/2001, the Spatosimo was no longer discriminatory since it had been set at EUR 12 for all destinations within the European Union.

156 By letter of 19 March 2003 to Mrs Scippacercola, the DG for Competition announced, after observing that the Spatosimo had been fixed at EUR 12 for all destinations within the EEA, that it intended to take no further action on the complaint in so far as it related in particular to the excessive nature of that tax, since it did not concern the conduct of an undertaking for the purposes of Articles 81 EC and 82 EC. The complaints relating to the Spatosimo were thus covered by a decision made by the Commission on 22 May 2003 to take no further action. By letter of 26 May 2003, the Commission informed Mrs Scippacercola of that decision, which is not being challenged in an action before the Court of First Instance.

157 Next, it must be noted that, so far as the charges considered in the contested decision are concerned, the complainants did not at any time during the administrative procedure complain that they were discriminatory, only that they were excessive.

158 While Mrs Scippacercola's letter of 18 February 2003 – the only letter referred to by the applicants in relation to this plea – refers separately to the levels of charges for domestic, intra-Community and international departures, it complains only that they are excessive, particularly by comparison with the previous situation and by comparison with charges at other airports. It must be observed in that respect that Mrs Scippacercola's letter of 26 February 2003, which contains a reference to the letter of 18 February 2003, describes the subject-matter of the complaint of 5 July 2002 as '[c] harges excessives pour les usagers' (excessive charges for passengers).

159 Since the complaints expressed in the third plea were not expressed during the administrative procedure prior to the adoption of the contested decision, the Commission cannot be criticised for failing to examine those complaints in its decision (see, to that effect, Case T‑319/99 *FENIN* v *Commission* [2003] ECR II‑357, paragraph 43).

160 In any event, where a complainant considers that the Commission, in its decision to take no action on a complaint on a competition matter, has failed to express a view on one of the aspects of that complaint, such a failure cannot be held unlawful in the context of a review of legality under Article 230 EC. In fact, in those circumstances, the onus is on the complainant to request the Commission to express a view and, if necessary, to bring an action under the second paragraph of Article 232 EC for a declaration by the Community judicature that the Commission has failed to act (Case T‑52/00 *Coe Clerici Logistics* v *Commission* [2003] ECR II‑2123, paragraphs 71 and 80).

161 It follows from the foregoing that the third plea also is unfounded.

Fourth plea in law, alleging an infringement of Article 253 EC and a departure from established rights and procedures

Arguments of the parties

162 First, the applicants claim that the Commission incorrectly assessed the information supplied by AIA in relation to the security charge, the passenger terminal facilities charge and the car parking charge. Referring to Case T‑92/98 *Interporc* v *Commission* [1999] ECR II‑3521, paragraph 77, they submit that, in so doing, the Commission infringed Article 253 EC.

163 In the present case, the Commission simply informed the applicants in a summary way that it found that AIA did not engage in excessive pricing, without allowing the applicants to know the figures used in its analysis or to identify the calculations behind the refusal to open an in-depth investigation.

164 Further, the applicants claim that the Commission failed in its duty of care and infringed the principle of sound administration. In accordance with settled case-law, it is for the Commission, when supplied with sufficient prima facie evidence of the existence of an abuse of a dominant position as a result of excessive pricing, to establish beyond doubt that the practices complained of are either non-existent or pure conjecture or speculation. However, there is no suggestion in the contested decision that the Commission examined the prima facie evidence put forward by the applicants during the administrative procedure. Further, the contested decision does not include any information about AIA's costs and revenues as supplied in AIA's response to the Commission's request for information.

165 Second, the applicants claim in the reply that the fundamental reason which the Commission put forward in the contested decision to justify the rejection of the complaint is the lack of Community interest. However, the Commission did not provide adequate reasoning in the contested decision as to precisely what that Community interest comprises.

166 The applicants accept that the Commission has a certain discretion in fixing its priorities according to the degree of Community interest, and accordingly that it may reject a complaint when it considers that there is insufficient Community interest to justify the initiation of an in-depth investigation (Case T‑24/90 *Automec* v *Commission*, cited in paragraph 91 above). However, although the lodgment of a complaint does not oblige the Commission to initiate an investigation, that institution is nevertheless required to examine with all due care the factual and legal aspects of the complaint in order to determine whether they disclose conduct that may distort competition in the common market (*Schmidt* v *Commission*, cited in paragraph 66 above, and *Riviera Auto Service and Others* v *Commission*, cited in paragraph 91 above).

167 It follows, according to the applicants, that the Commission cannot refer to a lack of Community interest in the abstract if it is rejecting the complaint on that ground (Case T‑24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 85). It is required to disclose in a clear and unequivocal fashion, and not in a summary way, the matters of fact and of law which led it to conclude that there was no Community interest, so as to enable the Community judicature to exercise its powers of review of the pleas in law invoked and the applicant to defend its rights (Case T‑575/93 *Koelman* v *Commission* [1996] ECR II‑1, paragraph 83, and *Asia Motor France and Others* v *Commission*, cited in paragraph 97 above, paragraph 103). Nor can the Commission simply invoke lack of priority as an excuse for not initiating an investigation. It is required to assess how serious the alleged infringements are and how persistent their effects (Commission Notice on the handling by the Commission of complaints lodged under Articles 81 EC and 82 EC (OJ 2004 C 101, p. 65, point 44)).

168 In the present case, the Commission did not examine the complaint with due care and failed to evaluate correctly the factual and legal particulars of the case before deciding to reject it for lack of Community interest. Consequently, contrary to Article 253 EC, the contested decision failed to set out properly and clearly the considerations of fact and of law on the basis of which the complaint was rejected, with the result that the applicants are not in a position to assert their rights before the Court and the Court is not able to carry out its review of legality.

169 Furthermore, the Commission did not ensure that the Treaty is properly applied, particularly the competition rules. In order to fulfil its functions conferred by Article 85 EC, and in view of the objectives of Article 3(g) EC, the Commission should have investigated the matter and established whether an infringement of Article 82 EC had in fact taken place.

170 The applicants maintain in that regard that case-law applies three strict criteria to the Commission's right to reject a complaint for lack of Community interest, namely the significance of the alleged infringement for the functioning of the common market, the probability of being able to establish the existence of the infringement, and the scope of the investigation required in order for the Commission to be able to fulfil under the best possible conditions the task of ensuring that Articles 81 EC and 82 EC are complied with (Case T‑24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 86, and *Européenne automobile* v *Commission*, cited in paragraph 93 above, paragraph 42). Given AIA's dominant position and the significance of the potential infringement of Article 82 EC, they take the view that the Commission was not entitled to reject the complaint of 5 July 2002 for lack of Community interest, since the difficulty and the need for more resources for further investigations are not an excuse that can relieve the Commission of its obligations and responsibilities under the Treaty and certainly cannot be regarded as constituting adequate grounds for rejecting the complaint for lack of Community interest.

171 Finally, the Commission's duty of care and diligence is more demanding in cases where it decides not to reject the complaint at an early stage for lack of Community interest. Although the Commission is not obliged to take up a complaint, it decided in the present case to take it up initially by undertaking a preliminary evaluation of the market power of the undertaking concerned and by accepting indirectly that there might be an infringement that could affect trade between Member States. It went on to reject the complaint because the likelihood of establishing an infringement was too small in the light of the findings of its initial limited investigation. According to the applicants, the Commission should have properly weighed up the probability of being able to establish the existence of the infringement through a full investigation against the significance of such an infringement for the functioning of the common market. However the Commission failed not only to carry out that balancing exercise, but also, as a result, to state clearly its conclusions on that balancing exercise. Thus, the applicants are unable to understand clearly on what basis the Commission considered that the infringement was not significant for the functioning of the common market.

172 The Commission contends that this plea should be rejected.

Findings of the Court

173 First, it must be borne in mind that the contested decision is essentially based on the lack of Community interest in pursuing an investigation of the practices criticised in the complaint. That is the only ground on which the complaint of 5 July 2002 was rejected so far as the allegedly excessive passenger terminal utilities and airport car parking charges are concerned. As regards the alleged infringement related to the security charge, the Commission additionally took the view that the practices in question did not fall within the scope of Article 82 EC.

174 Next, it must be borne in mind that the Commission is under an obligation to state reasons if, as in this case, it declines to continue with the examination of a complaint for lack of Community interest. Since the reasons stated must be sufficiently precise and detailed to enable the Court of First Instance effectively to review the Commission's use of its discretion to define priorities, the Commission must set out the facts justifying the decision and the legal considerations on the basis of which it was adopted (*Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraphs 90 and 91; Case T-24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 85; and *Européenne automobile* v *Commission*, cited in paragraph 93 above, paragraph 29).

175 In the present case, it is apparent from the contested decision that the Commission analysed the evidence adduced by the applicants during the administrative procedure, that it compared the charges to those imposed at other established airports in the European Community, and that it sent a request for information to, inter alia, AIA.

176 Its conclusion that there was no Community interest in pursuing the investigation of the practices complained of was based on the finding that the likelihood of an infringement was small in the light of the evidence in the complaint and the results of an initial investigation, that the efforts required to establish any infringement of Article 82 EC would be disproportionate, and that the significance of the infringement complained of was low as regards the functioning of the common market (paragraphs 43, 78, 79, 92, 136 to 138 and 140 of the contested decision). As regards the alleged infringement related to the car parking charge, the Commission refers further to the fact that the centre of gravity of the infringement lies in Greece, with the result that the complainants could bring an action before the Greek courts or lodge a complaint with the national competition authority (paragraph 139 of the contested decision).

177 As regards the alleged infringement related to the security charge, the Commission explains in paragraphs 47 to 57 of the contested decision why it considers further that the activities in question do not fall within the scope of Article 82 EC.

178 Moreover, it follows from the analysis of the first plea in law that more precise figures for any calculations carried out by the Commission during the administrative procedure or for AIA's costs and revenues were not necessary in order for the applicants to be aware of the reasons for the contested decision or to enable the Court of First Instance to undertake its review.

179 Accordingly, it must be held that the contested decision rejecting the complaint is sufficiently reasoned.

180 Finally, the applicants' argument that the Commission is obliged, in a decision rejecting a complaint, to establish beyond any doubt that the practices complained of do not infringe the competition rules is an argument that concerns the lawfulness of the substance of the contested decision and cannot be accepted either. It has consistently been held that the Commission is not obliged to take a final decision as regards the existence or otherwise of an infringement of the Treaty rules on competition (*GEMA* v *Commission*, cited in paragraph 91 above, paragraphs 17 and 18; *Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraph 87; Case T-24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 75; and *RivieraAuto ServiceandOthers* v *Commission*, cited in paragraph 91 above, paragraph 48).

181 Second, the applicants make various submissions in the reply concerning the allegedly inadequate reasoning for a lack of Community interest in pursuing the investigation of the practices criticised in the complaint.

182 However, as is apparent from paragraphs 175 and 176 above and from the substantive examination of the first plea in law, it must be held that sufficient reasons are given in the contested decision on that point. In fact, the contested decision sets out clearly the matters of law or of fact which, according to the Commission, justified rejecting the complaint for lack of Community interest.

183 Furthermore, it must be noted that a number of arguments which the applicants raised in the reply in relation to the first plea in law concern errors of law or of assessment by the Commission in rejecting the complaint for lack of Community interest. This applies to the applicants' argument that, by overlooking the significance of a possible infringement as regards the functioning of the common market, the Commission did not correctly weigh up the three criteria set out in Case T-24/90 *Automec* v *Commission*, cited in paragraph 91 above (paragraph 86), for the rejection of a complaint for lack of Community interest. The same applies to the arguments that the Commission should have undertaken an in-depth investigation because AIA has a dominant position and the alleged abuse could affect trade between the Member States, or because it had decided not to reject the complaint at an earlier stage.

184 The applicants also maintain in the reply that the Commission did not examine with all due care the factual and legal aspects of the complaint and that it should have investigated the matter and established whether Article 82 EC had indeed been infringed.

185 As to whether the arguments referred to in paragraphs 183 and 184 above are included in the application, it must be observed that, while the applicants did not set out a plea in law relating specifically to the Commission's alleged manifest error of assessment in considering that the practices criticised in the complaint did not represent a sufficient Community interest to justify an in-depth investigation, they nevertheless complained within the first plea in law of the fact that the Commission had not paid due attention to the content of the complaint before concluding that it was not in the Community interest to open an in-depth investigation. However, since the Commission must consider attentively the matters of fact and of law which a complainant brings to its attention in order to assess the Community interest in pursuing the investigation of a case (*Schmidt* v *Commission*, cited in paragraph 66 above, paragraph 19, and *Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraph 86), the arguments put forward in relation to the first plea in law relate implicitly but necessarily to the Commission's assessment of the Community interest in pursuing the investigation of the practices in question. It follows that the argument mentioned in paragraph 184 above is incorporated in the first plea raised in the application and that it has already been addressed in the Court's assessment of that plea.

186 By contrast, the arguments mentioned in paragraph 183 above do not concern the assessment of the matters of fact and of law which the complainants brought to the Commission's attention. They are, therefore, new submissions which are not included in the first plea in the application. Such submissions must be declared inadmissible under Article 48(2) of the Rules of Procedure (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156, and Case T-274/02 *Ritek and Prodisc Technology* v *Council* [2006] ECR II-4305, paragraph 75).

187 For the sake of completeness, as regards the criteria set out in Case T-24/90 *Automec* v *Commission*, cited in paragraph 91 above (paragraph 86), it must be borne in mind that, in order to reject a complaint for lack of Community interest, the Commission must weigh up the significance of the alleged infringement for the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required, so that it may perform, under the best possible conditions, its task of supervising compliance with

Articles 81 EC and 82 EC (Case T–24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 86; *Riviera AutoService and Others* v *Commission*, cited in paragraph 91 above, paragraph 46; and *Européenne automobile* v *Commission*, cited in paragraph 93 above, paragraph 42).

188 It must be held that, in the present case, the Commission gave priority to investigating two of the three criteria set out in the preceding paragraph, namely the probability of being able to establish the existence of an infringement and the extent of the investigative measures required. An in-depth investigation of the significance of the alleged infringement for the functioning of the common market was carried out by the Commission only in relation to the car parking charge (paragraphs 138 and 139 of the contested decision).

189 Nevertheless, the Court of Justice has also held that, since the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria to which the Commission may refer for its assessment should not be limited, nor conversely should it be required to have recourse exclusively to certain criteria (*Ufex and Others* v *Commission*, cited in paragraph 91 above, paragraphs 79 and 80, and Case C–450/98 P *IECC* v *Commission* [2001] ECR I–3947, paragraph 58).

190 It follows from this that the Commission did not err in law in giving priority to the investigation of two of the three criteria set out in the case-law referred to in paragraph 187 above (Case C–450/98 P *IECC* v *Commission*, cited in paragraph 189 above, paragraph 59).

191 As regards the other arguments advanced in the reply, it must be borne in mind that the Commission is not obliged to carry out an investigation when a complaint is lodged (Case T–24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 76). Furthermore, when carrying out an initial investigation, it is not precluded thereby from rejecting the complaint for lack of Community interest. The existence of the Commission’s discretion in that regard does not depend on the stage to which the investigation of a case has advanced (Case C–449/98 P *IECC* v *Commission*, cited in paragraph 92 above, paragraph 37).

192 Finally, the argument that the Commission is required to open an in-depth investigation where the undertaking to which the complaint relates holds a dominant position is unsupported by case-law and, on the contrary, is at odds with the Commission’s discretion in that area which has been recognised by the Community judicature (see, to that effect, Case C–449/98 P *IECC* v *Commission*, cited in paragraph 92 above, paragraph 37, and Case T–24/90 *Automec* v *Commission*, cited in paragraph 91 above, paragraph 76).

193 It follows from all the foregoing that this last plea in law must also be rejected.

The measures of organisation of procedure applied for

194 It must be noted that, as a result of the measures of organisation of procedure taken by the Court of First Instance, the Commission lodged a non-confidential version of AIA’s reply of 27 August 2004 to the Commission’s request for information.

195 However, the applicants are critical of the fact that neither the contested decision nor the non-confidential version of AIA’s reply of 27 August 2004 contains specific details of AIA’s costs and revenues. They request that the figures relating to security service costs and revenues supplied by AIA for 2001 to 2004 be submitted to the Court of First Instance, so that these can be verified and assessed in the light of their arguments to show that AIA is making excessive profits. They also seek the production of all documents proving the true cost of construction of the airport (and the names of the constructors and of the suppliers concerned), and an explanation of the economic reasons justifying the increase in the security charge in 2002.

196 In that regard, it must be held that it follows from the foregoing considerations in relation to the various pleas in law relied on by the applicants that the Court of First Instance has been able to rule on the present action in the light of the documents submitted by the parties during the written procedure and the documents supplied by the Commission in the context of the measure of organisation of procedure (Case T–281/01 *Huygens* v *Commission* [2004] ECR–SC I–A–203 and II–903, paragraph 145). As regards, in particular, the lawfulness of the assessment of the Community interest made in the contested decision, it should be borne in mind, first, that the non-

confidential version of AIA's reply (p. 4) confirms that, as far as its air activities are concerned, AIA's charges do not even cover its costs and, second, that the lawfulness of the Commission's assessment does not depend on the material accuracy of the information supplied by AIA. It is, in particular, the complexity of the analysis which would have had to be undertaken to establish an infringement of Article 82 EC and the small probability of the existence of such an infringement which caused the Commission not to verify the reliability of the confidential information on AIA's costs and revenues and to reject the complaint for lack of Community interest (see paragraphs 76, 78, 90 to 92, 135 and 140 of the contested decision).

197 Accordingly, the applicants' applications must be dismissed in so far as they relate to documents other than the non-confidential version of AIA's reply to the Commission's request for information.

198 In the light of all those considerations, the action must be dismissed.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Isabella Scippacercola and Ioannis Terezakis to pay the costs.

Vilaras	Martins Ribeiro	Jürimäe

Delivered in open court in Luxembourg on 16 January 2008.

E. Coulon	M. Vilaras

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* Language of the case: English.

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DEFENDA	Commission ; Institutions
NATIONA	Belgium

NOTES	Idot, Laurence: Confirmation du régime de la plainte, Europe 2008 Mars Comm. no 93 p.21-22
PROCEDU	Action for annulment
DATES	of document: 16/01/2008 of application: 10/08/2005

Case T-271/03

Deutsche Telekom AG

v

Commission of the European Communities

(Competition – Article 82 EC – Charges for access to the fixed-line telecommunications network in Germany – Margin squeeze – Charges approved by the national regulatory authority for telecommunications – Leeway of the dominant undertaking)

Summary of the Judgment

1. *Competition – Community rules – Substantive scope*

   (Arts 81 EC and 82 EC)

2. *Competition – Dominant position – Abuse – Margin squeeze – Meaning – Criteria for assessment*

   (Art. 82 EC)

3. *Competition – Dominant position – Abuse – Margin squeeze – Telecommunications network access services offered by the owner-operator of the only infrastructure available*

   (Art. 82 EC)

4. *Competition – Dominant position – Abuse – Margin squeeze – Telecommunications network access services offered by the owner-operator of the only infrastructure available*

   (Art. 82 EC)

5. *Competition – Community rules – Infringements – Committed intentionally or negligently – Meaning*

   (Arts 82 EC and 226 EC; Council Regulation No 17, Art. 15(2))

6. *Competition – Fines – Amount – Determination – Criteria – Gravity of the infringement*

   (Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Sections 1A and 3)

7. *Competition – Dominant position – Abuse – Concept – Dominant undertaking's knowledge of the abusive nature of its conduct – No effect*

   (Art. 82 EC)

1. The fact that the charges of a telecommunications undertaking in a dominant position had to be approved by the national regulatory authority for telecommunications does not absolve that undertaking from responsibility under Article 82 EC, since the restrictive effects on competition caused by those charges do not originate solely in the applicable national legal framework, because the dominant undertaking, having been able to influence the level of those charges through applications to the regulatory authority for authorisation, had sufficient scope to fix its charges at a level that would have enabled it to end or reduce those restrictive effects. In the context of the special responsibility of an undertaking in a dominant position, that undertaking is obliged to submit applications for adjustment of its charges at a time when those charges have the effect of impairing

genuine undistorted competition on the common market.

That conclusion is not affected by the fact that the national regulatory authority for telecommunications checks the compatibility of its charges with Article 82 EC beforehand. Even though, like all organs of the State, that authority is obliged to respect the provisions of the Treaty, it is responsible for regulating the telecommunications sector, and is not the competition authority of the Member State concerned. However, the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition policy. In any event, even on the assumption that the regulatory authority is obliged to consider whether charges proposed by a dominant undertaking are compatible with Article 82 EC, the Commission would not thereby be precluded from finding that the undertaking is responsible for an infringement; the Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC.

(see paras 107-108, 113, 120-122)

2. The abusive nature of a dominant undertaking's pricing practices, which take the form of a margin squeeze, is connected with the unfairness of the spread between its retail price for the derived product on the downstream market and its price for the raw material which it offers to its competitors on the upstream market if the difference between those prices is negative, or insufficient to cover the specific costs of its own derived product. It follows that, in order to find that there has been such abuse, the Commission is not required to demonstrate that the retail prices are, as such, abusive.

The Commission is entitled to analyse the abusive nature of the dominant undertaking's prices solely on the basis of that undertaking's particular situation and therefore on the basis of its own charges and costs rather than on the basis of the situation of actual or potential competitors. Any other approach could be contrary to the general principle of legal certainty since, if the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities.

In order to assess whether there is a margin squeeze, it is necessary to consider whether the dominant undertaking, or an undertaking that is equally efficient, would have been in a position to offer the derived product otherwise than at a loss if it had first been obliged to pay the charge for the raw material.

(see paras 166-167, 188, 191-194)

3. Where a telecommunications operator is the owner of the only infrastructure available, with the result that the network access services which it offers its competitors (wholesale services) are indispensable to enabling those competitors to enter into competition with that operator on the downstream market in retail access services, a margin squeeze between the operator's wholesale and retail charges will in principle hinder the growth of competition in the downstream markets. If the dominant operator's retail prices are lower than its wholesale charges, or if the spread between the dominant operator's wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as the dominant operator would not be able to enter the retail access services market without suffering losses. Admittedly, the competitors of the dominant operator will normally resort to cross-subsidisation, in that they will offset the losses suffered on the retail access market with the profits made on other markets, such as the telephone calls markets. However, in view of the fact that, as the owner of the network, the dominant operator does not need to rely on wholesale services in order to be able to offer retail access services and therefore, unlike its competitors, does not have to try to offset losses suffered on the retail access market on account of the pricing practices of a dominant undertaking, the margin squeeze distorts competition not only on the retail access market but also on the telephone calls market.

As regards the calculation of the margin squeeze, the Commission is entitled to take account only of revenues from all access services and to exclude revenues from other services, including those deriving from call services.

Thus, in the first place, even though, from the point of view of the end-user, access services and call services constitute a whole, it is open to the Commission to take into account only revenues from the dominant operator's access services, and to exclude revenues from other services, such as call services, which may be supplied via access to a network. As far as the dominant operator's competitors are concerned, the provision of call services to end–users via that operator's network requires access to that network. Equality of opportunity as between the dominant operator, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the dominant operator as regards the provision of call services. Equality of opportunity is secured only if the dominant operator sets its retail prices at a level which enables competitors – presumed to be just as efficient as the dominant operator – to reflect all the wholesale costs in their retail prices. However, if the dominant operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to network access by higher call charges, which would also distort competition in telecommunications markets.

In the second place, the Commission can compare the dominant operator's charges to its competitors for network access to the weighted average of retail prices for all the various access services offered directly to its end–users, even if the competing operators do not offer all those services. Since the abusive nature of the dominant operator's pricing practices must be assessed on the basis of its particular situation and therefore on the basis of its charges and costs, it cannot therefore be influenced by any preferences which its competitors may have for one or other access services market.

Finally, the Commission can include in the calculation of the total price of wholesale services the discontinuance charge payable to the dominant operator by the competing recipient of wholesale access when one of that recipient's end–users discontinues his subscription for access services, since that discontinuance charge forms part of the total cost of the wholesale service which must be reflected in the retail prices of the dominant operator's competitors.

(see paras 199-200, 203-204, 206, 210-211, 236-238)

4. A Commission decision finding that a telecommunications operator has abused its dominant position as a result of the margin squeeze resulting from the negative or insufficient spread between the charges for network access services provided to its competitors (wholesale services), and the charges for retail access services, is not contrary to the principles of proportionality and of legal certainty on account of the fact that it entails the double regulation of those charges. The Community legal framework for telecommunications does not affect the powers which the Commission derives directly from Article 3(1) of Regulation No 17 and, since 1 May 2004, from Article 7(1) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] to find infringements of Articles 81 EC and 82 EC.

Nor is such a decision contrary to the principle of the protection of legitimate expectations, even though, after considering whether a margin squeeze existed and finding the negative or insufficient spread between the wholesale and retail prices, the national regulatory authority for telecommunications took the view that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidisation of access services and call services. Such a finding, from which it follows implicitly but necessarily that those pricing practices have an anti-competitive effect, since the competitors have to resort to cross-subsidisation in order to be able to remain competitive on the market in access services, is not liable to create a legitimate expectation on the part of the dominant operator that its charges were compatible with Article 82 EC.

Finally, even if the national regulatory authority for telecommunications had infringed a Community rule and even if the Commission could have initiated proceedings against that Member State for failure to fulfil obligations, such possibilities cannot affect the lawfulness of the Commission's decision, which is not vitiated by any misuse of powers. By confining itself to finding an infringement of Article 82 EC, a provision which concerns only economic operators, not the Member States, that decision refers only to the dominant undertaking's pricing practices and not to the decisions of the authorities of the Member State.

(see paras 263, 267-269, 271)

5. The infringements of the competition rules which are liable to be punished by a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17 are those which are committed intentionally or negligently. That condition is satisfied where the undertaking concerned cannot be unaware of the anti–competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty.

That is the case where a telecommunications operator has a monopoly on the market for the network access services which it offers to its competitors (wholesale services) and a virtual monopoly on the market in retail access services, the charges for which create a margin squeeze in respect of those services. That operator cannot be unaware that that margin squeeze, resulting from the negative or insufficient spread between its charges for those different services, entails serious restrictions on competition.

That conclusion is not affected by the initiation of proceedings against the Member State for failure to fulfil obligations on account of the fact that those charges had been approved by the national regulatory authority for telecommunications where the dominant operator nevertheless had scope to increase its retail prices and, therefore, to reduce the margin squeeze, since the initiation of proceedings for failure to fulfil obligations does not affect the conditions for punishing an infringement of competition rules laid down under the first subparagraph of Article 15(2) of Regulation No 17.

(see paras 295-296, 298)

6. The Commission is entitled to characterise as serious the infringement consisting in the application of a margin squeeze by a telecommunications undertaking in a dominant position. Those pricing practices strengthen the barriers to entry to the recently liberalised markets and thus jeopardise the proper functioning of the common market. The Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (Section 1A, second paragraph) thus describe the exclusionary behaviour of dominant firms as serious infringements, or even very serious infringements if committed by undertakings holding a virtual monopoly.

Having regard to the Commission's discretion when determining the amount of a fine, it duly takes into account as an attenuating circumstance the fact that the national regulatory authority for telecommunications intervened in setting the undertaking's prices and that that authority has, on several occasions, considered the question of the existence of a margin squeeze resulting from the tariff practices of the undertaking, when reducing the basic amount of the fine by 10%.

(see paras 310-313)

7. An 'abuse' within the meaning of Article 82 EC is an objective concept. The dominant undertaking's own knowledge of the abusive nature of its conduct is not, therefore, a prerequisite for the application of Article 82 EC.

(see para. 327)

Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 10 April 2008
Deutsche Telekom AG v Commission of the European Communities. Competition - Article 82 EC - Charges for access to the fixed-line telecommunications network in Germany - Margin squeeze - Charges approved by the national regulatory authority for telecommunications - Leeway of the dominant undertaking. Case T-271/03.

In Case T271/03,

Deutsche Telekom AG, established in Bonn (Germany), represented initially by K. Quack, U. Quack and S. Ohlhoff, and subsequently by U. Quack and S. Ohlhoff, lawyers,

applicant,

v

Commission of the European Communities, represented initially by K. Mojzesowicz and S. Rating, then by K. Mojzesowicz and A. Whelan, and subsequently by K. Mojzesowicz, W. Mölls and O. Weber, acting as Agents,

defendant,

supported by

Arcor AG & Co. KG, established in Eschborn (Germany), represented initially by M. Klusmann, F. Wiemer and M. Rosenthal, then by M. Klusmann and F. Wiemer, and subsequently by M. Klusmann, lawyers,

and by

Versatel NRW GmbH, formerly Tropolys NRW GmbH, formerly CityKom Münster GmbH Telekommunikationsservice and TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, established in Essen (Germany),

EWE TEL GmbH, established in Oldenburg (Germany),

HanseNet Telekommunikation GmbH, established in Hamburg (Germany),

Versatel Nord-Deutschland GmbH, formerly KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, established in Flensburg (Germany),

NetCologne Gesellschaft für Telekommunikation mbH , established in Cologne (Germany),

Versatel Süd-Deutschland GmbH, formerly tesion Telekommunikation GmbH, established in Stuttgart (Germany),

Versatel West-Deutschland GmbH, formerly Versatel Deutschland GmbH & Co. KG, established in Dortmund (Germany),

represented by N. Nolte, T. Wessely and J. Tiedemann, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 EC (Case COMP/C1/37.451, 37.578, 37.579 - Deutsche Telekom AG) (OJ 2003 L 263, p. 9), and, in the alternative, reduction of the fine imposed on the applicant in Article 3 of that decision,

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

composed of M. Vilaras, President, M.E. Martins Ribeiro, D. vaby, K. Jürimäe and N. Wahl, Judges, Registrar: K. Andova, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2007,

gives the following

Judgment

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders Deutsche Telekom AG to bear its own costs and to pay those incurred by the Commission;

3. Orders (1) Arcor AG & Co. KG and (2) Versatel NRW GmbH, EWE TEL GmbH, HanseNet Telekommunikation GmbH, Versatel Nord-Deutschland GmbH, NetCologne Gesellschaft für Telekommunikation mbH, Versatel Süd-Deutschland GmbH and Versatel WestDeutschland GmbH to bear their own costs.

Delivered in open court in Luxembourg on 10 April 2008.

Facts

1. The applicant, Deutsche Telekom AG, is the incumbent telecommunications operator in Germany. The German State holds 30.92% of shares directly in the capital of the applicant and (through the Kreditanstalt für Wiederaufbau) 12.13% indirectly; the remaining 56.95% of the shares are held by institutional and private investors.

2. The applicant operates the German fixed telephone network. Before the full liberalisation of telecommunications markets, it enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. The German markets in the provision of infrastructure and in the provision of telephone services have been liberalised since 1 August 1996, when the Telekommunikationsgesetz (German Law on telecommunications; TKG') of 25 July 1996 (BGBl. 1996 I, p. 1120) came into force. Since then, the applicant has faced varying degrees of competition from alternative operators on the two markets.

3. The applicant's local networks each consist of a number of local loops for subscribers. The term local loop' signifies the physical circuit connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.

4. The applicant offers access to its local networks to other telecommunications operators and to subscribers. As regards the applicant's access services and charges, it is therefore necessary to distinguish between the local network access services which the applicant offers its competitors (wholesale access') and the local network access services which the applicant offers its subscribers (retail access').

I - Wholesale access

5. By Decision No 223a of the Federal Ministry of Post and Telecommunications (BMPT') of 28 May 1997, the applicant was required to offer its competitors fully unbundled access to the local loop with effect from June 1997.

6. The applicant's charges for wholesale access are made up of two components: a monthly subscription charge, and a one-off charge. When a competitor discontinues access to a local loop, the applicant charges him the cost of discontinuance.

7. Under Paragraph 25(1) of the TKG, the applicant's wholesale access charges must be approved in advance by the Regulierungsbehörde für Telekommunikation und Post (German regulatory authority for telecommunications and post; RegTP').

8. In that context, RegTP checks whether the wholesale access charges proposed by the applicant satisfy the requirements laid down by Paragraph 24 of the TKG. Thus, under Paragraph 24(1) of the TKG, [r]ates shall be based on the costs of efficient service provision'. Furthermore, under Paragraph 24(2) of the TKG, rates shall not:

1. contain surcharges which prevail solely as a result of the provider's dominant position... in the relevant telecommunications market;

2. contain discounts which prejudice the competitive opportunities of other companies in a telecommunications market; or

3. create any advantages for individual users in relation to other users of identical or similar telecommunications services in the relevant telecommunications market;

unless there is evidence of an objectively justifiable reason therefor'.

9. Under Paragraph 29(1) of the TKG, the applicant is required to apply the charges authorised by RegTP throughout the period of validity of RegTP's authorisation.

II - Retail access

10. As regards retail access, the applicant offers two basic variants: the traditional analogue connection (brand name: TNet') and the digital narrowband connection (integrated services digital network, or ISDN; brand name: TISDN'). Both these variants of end-user access can be provided over the applicant's existing copper pair network (narrowband connections). The applicant also offers end-users a broadband connection (asymmetrical digital subscriber line, or ADSL; brand name: TDSL'), for which it had to upgrade the existing TNet and TISDN networks so as to be able to offer broadband services such as faster Internet access.

11. The applicant's charges for retail access (also referred to as retail charges' or retail prices') for analogue and ISDN lines are regulated by a price cap system. By contrast, the applicant sets its retail prices for ADSL at its own discretion, but these may be reviewed subsequently.

12. The applicant's retail prices are made up of two components: a basic monthly charge, which depends on the quality of the line and services supplied, and a one-off charge for a new connection or takeover of a line, depending on the work needed at the two ends of the line. The applicant does not charge its end-users the cost of discontinuance.

A - Charges for retail analogue lines (TNet) and digital narrowband or ISDN lines (TISDN)

13. Retail prices for analogue and ISDN lines are regulated under a price cap system. Under point 2 of Paragraph 27(1) and Paragraph 25(1) of the TKG, and Paragraphs 4 and 5 of the Telecommunications Charges Order of 1 October 1996 (BGBl. 1996 I, p. 1492; the Charges Order'), retail prices for connection to the applicant's network and for telephone calls are not regulated separately for each service, according to the individual cost of that service; they are regulated for a block of services at a time, with different services being grouped together in baskets'.

14. The price cap system for access to the applicant's network was introduced by decision of the BMPT of 17 December 1997 (Communication 202/1997, Amtsblatt (BMPT) 34/97, p. 1891). The system was taken over by RegTP on 1 January 1998, whereupon RegTP established two baskets, one for services to residential customers and the other for services to business customers. Each basket contained both retail access (standard analogue and ISDN connections) and the full range of telephone products offered by the applicant, such as local, regional, long-distance and international calls.

15. In accordance with Paragraph 4(1) and (2) of the Charges Order, RegTP determines a starting charge level for all the services grouped in a basket, and targets for the movement of basket prices over a specified period.

16. The tariff system in question thus establishes a price ceiling for each basket but makes no provision for mandatory minimum basket prices.

17. Under the terms of the decision of the BMPT of 17 December 1997, the applicant was to reduce the aggregate price for each of the two baskets by 4.3% in the period from 1 January 1998 to 31 December 1999 (first price cap period). When that first period ended on 31 December 1999, RegTP - by decision of 23 December 1999 - essentially maintained the composition of the baskets and lowered the prices by a further 5.6% in the period from 1 January 2000 to 31 December 2001 (second price cap period).

18. Within this framework of binding price reductions, the applicant could modify the charges for individual components of each basket after obtaining prior authorisation from RegTP. Under Paragraph 27(2) of the TKG and Paragraph 5(3) of the Charges Order, adjustments to charges would be authorised if the average price of a basket did not exceed the price cap index imposed. The system thus enabled the charges for one or more components of a basket to be increased, provided that the price ceiling for the basket was not exceeded. However, under Paragraph 27(3) of the TKG, approval could be refused if it [was] obvious that [the charges did] not meet the requirements of points 2 or 3 of Paragraph 24(2) [of the TKG] or where they [were] not in conformity with [the TKG] or other legal provisions'.

19. In the first two price cap periods, the applicant reduced the retail prices in both baskets substantially, going far beyond the mandatory reductions. Those price reductions essentially applied to call charges. Retail prices for analogue lines (monthly and one-off access charges), on the other hand, remained unchanged throughout both price cap periods, that is, from 1998 until the end of 2001. As regards retail prices for ISDN lines, the applicant lowered basic monthly charges during the same period, but did not adjust its one-off charges to end-users.

20. A new price cap system was adopted by decision of RegTP of 21 December 2001 and has been in effect since 1 January 2002 (Amtsblatt (RegTP) 2/2002, of 6 February 2002, p. 75). In place of the two baskets for residential and business customers, the new system uses four baskets, for end-user lines (basket A), local calls (basket B), domestic long-distance calls (basket C), and international calls (basket D).

21. On 15 January 2002, the applicant informed RegTP that it proposed to increase its monthly charges for analogue and ISDN lines by EUR 0.56. That increase was authorised by RegTP by decision of 13 March 2002.

22. On 31 October 2002, the applicant made a further application to increase its retail charges. RegTP partly refused that application by decision of 19 December 2002 and authorised an increase of EUR 0.33 in the monthly charge for a TNet analogue line instead of the increase of EUR 0.99 sought by the applicant, and refused the increase of EUR 13.40 in the one-off takeover charge for TNet and TISDN lines.

B - Charges for ADSL lines (TDSL)

23. ADSL (T-DSL) charges are not subject to advance regulation under the price cap system. Under Paragraph 30 of the TKG, those charges may be reviewed subsequently.

24. On 2 February 2001, following a number of complaints from competitors of the applicant, RegTP initiated a retrospective investigation of the applicant's ADSL prices in order to determine whether there was any practice of below-cost selling, contrary to the German rules on competition. RegTP

closed the proceeding on 25 January 2002, having found that the price increase which the applicant had announced on 15 January 2002 did not give rise to a suspicion of price dumping.

Administrative procedure

25. Between 18 March and 20 July 1999, the Commission received complaints from 15 companies which were competitors of the applicant, challenging the applicant's pricing.

26. On 15 July 1999, the Commission sent the applicant a request for information pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87). The applicant responded to that request by letters of 13 and 25 August 1999.

27. On 19 January 2000, the Commission sent a request for information to the applicant's competitors.

28. On 22 June 2001, the Commission sent a further request for information to the applicant.

29. On 2 May 2002, the Commission sent the applicant a statement of objections pursuant to Article 19(1) of Regulation No 17.

30. On 29 July 2002, the applicant filed observations on the statement of objections.

31. On 25 October 2002, the applicant filed observations on the complainants' responses to the statement of objections.

32. On 21 February 2003, the Commission sent the applicant a further statement of objections.

33. On 14 March 2003, the applicant filed observations on the further statement of objections.

The contested decision

34. On 21 May 2003, the Commission adopted Decision 2003/707/EC relating to a proceeding under Article 82 EC (Case COMP/C1/37.451, 37.578, 37.579 - Deutsche Telekom AG) (OJ 2003 L 263, p. 9; the con tested decision'). The decision was notified to the applicant on 30 May 2003.

35. According to the Commission, the relevant product or service markets are the upstream market in local network access for the applicant's competitors at the wholesale level and the downstream market in access to narrowband connections (analogue and ISDN lines) and broadband connections (ADSL lines) at the retail level (recital 91 to the contested decision). Geographically, those markets cover the territory of Germany (recital 92 to the contested decision).

36. The Commission finds that the applicant holds a dominant position on all the relevant product and service markets (recital 96 to the contested decision).

37. According to the Commission, the applicant has infringed Article 82 EC by operating abusive pricing in the form of a margin squeeze' by charging its competitors prices for wholesale access that are higher than its prices for retail access to the local network (recitals 1, 57, 102 and 103 to the contested decision).

38. As regards the margin squeeze, recitals 102 to 105 to the contested decision state:

102 A margin squeeze exists if the charges to be paid to [the applicant] for wholesale access, taking monthly charges and one-off charges together, are so expensive that competitors are forced to charge their end-users prices higher than the prices [the applicant] charges its own end-users for similar services. If wholesale charges are higher than retail charges, [the applicant's] competitors, even if they are at least as efficient as [the applicant], can never make a profit, because on top of the wholesale charges they pay to [the applicant] they also have other costs such as marketing, billing, debt collection, etc.

103 If [the applicant] charges its competitors prices for wholesale access to the local loop that are higher than its own prices for retail local network access, it prevents its competitors from offering access via the local loop in addition to call services. If a competitor might be interested in ordering unbundled local loops in order to offer access services to its customers, [the applicant] forces it to offset its losses on access services out of higher revenue on telephone calls, as [the applicant] itself does. But in recent years call charges have fallen substantially in Germany, so that competitors often have no realistic possibility of offsetting one price against another.

104 [The applicant] takes the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because wholesale charges are imposed by the regulatory authority. A margin squeeze, [the applicant] contends, must be the result of excessive wholesale prices or insufficient retail prices, or a combination of the two, and it must be legally possible to end the situation by varying either of them. But the wholesale price is fixed by the regulatory authority, so that [the applicant] controls only the retail charges, and those are subject to review only for compatibility with the principles of abusive below-cost selling or predation.

105 Contrary to [the applicant's] view, however, the margin squeeze is a form of abuse that is relevant to this case. On related markets on which competitors buy wholesale services from the established operator, and depend on the established operator in order to compete on a downstream product or service market, there can very well be a margin squeeze between regulated wholesale and retail prices. To show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges such that competition is restricted. Of course it has also to be shown that the undertaking subject to price regulation has the commercial discretion to avoid or end the margin squeeze on its own initiative. If it has that discretion, as it has in the present case..., the question which prices the undertaking can change without the intervention of the State is relevant only for purposes of the choice of remedies to bring the margin squeeze to an end.'

39. As regards the methodology of the margin squeeze test, the Commission finds that, through access to the applicant's local network, its competitors can offer their end-users a range of retail access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services. Since RegTP applies single charges for the applicant's wholesale services, irrespective of the nature of the downstream service provided over the line, the applicant's monthly and one-off charges (pro rata according to the average length of subscription) for wholesale access must therefore be compared with its monthly and one-off charges (pro rata according to the average length of subscription) for retail access. In order to calculate the applicant's average retail access prices, the Commission carries out a quantitative weighting exercise in respect of the applicant's various retail charges for analogue, ISDN and ADSL lines, and for the ISDN and ADSL line variants (recitals 113, 115, 116, 142 to 151 to the contested decision).

40. For the purpose of calculating the margin squeeze, the Commission takes account only of charges for local network access. Telephone call charges are not included in that calculation (recital 119 to the contested decision).

41. According to the Commission, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision).

42. The Commission reaches the conclusion in its margin squeeze calculations that there was a negative spread between the applicant's wholesale and retail prices between 1998 and 2001 (recital 153 to the contested decision). That spread was positive in 2002 (recital 154 to the contested decision). However, as the positive spread was insufficient to cover the applicant's product-specific costs

linked to the provision of retail services, there was a margin squeeze in 2002 (recitals 154 and 160 to the contested decision). That margin squeeze still existed at the time of the adoption of the contested decision (recital 161 to the contested decision).

43. The Commission goes on to find that the applicant's wholesale and retail charges are subject to sector-specific regulation. Nevertheless, the applicant has sufficient discretion to restructure its charges so as to reduce or indeed put an end to the margin squeeze (recitals 57, 105, and 163 to 175 to the contested decision). The Commission concedes that, from 1 January 2002, the applicant no longer had discretion to increase retail prices for analogue or ISDN lines. However, it could have reduced the margin squeeze by increasing its charges for ADSL lines (recitals 171 to 175 and 206 to the contested decision).

44. The Commission concludes in recital 199 to the contested decision:

[The applicant] is abusing its dominant position on the relevant markets for direct access to its fixed telephone network. Such abuse consists in charging unfair prices for wholesale access services to competitors and retail access services in the local network, and is thus caught by Article 82(a) of the EC Treaty. In the period from the beginning of 1998 to the end of 2001, [the applicant] was in a position to end the margin squeeze entirely by adjusting its retail charges. Since the beginning of 2002, [the applicant] could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges not subject to the price cap system.'

45. Having assessed the infringement as a serious infringement for the period from the beginning of 1998 to the end of 2001, and a minor infringement for the period since the beginning of 2002, the Commission imposed a fine of EUR 12.6 million (recitals 207 and 212 to the contested decision).

46. The operative part of the contested decision reads as follows:

Article 1

[The applicant] has since 1998 infringed Article 82(a) of the EC Treaty by charging its competitors and end-users unfair monthly and one-off charges for access to the local network, thus significantly impeding competition on the market for access to the local network.

Article 2

[The applicant] shall immediately bring to an end the infringement referred to in Article 1 and shall refrain from repeating any act or conduct described in Article 1.

Article 3

For the infringement referred to in Article 1, a fine of EUR 12.6 million is hereby imposed on [the applicant].

...'

Procedure

47. By application lodged at the Registry of the Court of First Instance on 30 July 2003, the

applicant brought the present action.

48. By documents lodged at the Registry of the Court of First Instance on 12 December 2003, Arcor AG & Co. KG (the first intervener'), and CityKom Münster GmbH Telekommunikationsservice, subsequently known as Tropolys NRW GmbH, then Versatel NRW GmbH; EWE TEL GmbH; HanseNet Telekommunikation GmbH; ISIS Multimedia Net GmbH & Co. KG, subsequently known as Arcor AG & Co. KG; KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, subsequently known as Versatel Nord-Deutschland GmbH; NetCologne Gesellschaft für Telekommunikation mbH; TeleBeL Gesellschaft für Telekommunikation Bergisches Land mbH, subsequently known as Tropolys NRW GmbH, then Versatel NRW GmbH; tesion Telekommunikation GmbH, subsequently known as Versatel Süd-Deutschland GmbH; Versatel Deutschland GmbH & Co. KG, subsequently known as Versatel WestDeutschland GmbH (together: the second intervener'), applied for leave to intervene in support of the form of order sought by the Commission.

49. By letter of 30 January 2004, the applicant sent the Court a request for confidential treatment of certain passages in the application, the defence, the reply and certain annexes relating thereto.

50. By letter of 22 March 2004, the applicant sent the Court a request for confidential treatment of a passage in the rejoinder.

51. By order of the President of the First Chamber of the Court of First Instance of 6 May 2004, the companies mentioned in paragraph 48 above were granted leave to intervene in support of the form of order sought by the Commission. The decision on the validity of the request for confidential treatment was reserved.

52. Non-confidential versions of various procedural documents, prepared by the applicant, were sent to the first and second interveners.

53. By letters of 24 June 2004, the first and second interveners contested the confidentiality of various passages which were obscured in the non-confidential versions of the procedural documents.

54. On 14 July 2004, the second intervener lodged its statement in intervention; the first intervener did likewise on 2 August 2004. The main parties submitted their observations on the statements in intervention.

55. By letter of 20 December 2004, the applicant lodged observations on the objections of the first and second interveners concerning the request for confidentiality.

56. By order of 15 June 2006, the President of the Fifth Chamber partly granted the applicant's request for confidentiality.

57. By letter of 14 September 2006, the second intervener informed the Court that the first intervener had become the legal successor to ISIS Multimedia Net GmbH & Co. KG. By the same letter, it informed the Court, in accordance with Article 99 of the Rules of Procedure of the Court of First Instance, that, to avoid duplication of interveners, it was withdrawing the intervention of ISIS Multimedia Net GmbH & Co. KG, which had become Arcor AG & Co. KG.

58. By order of the President of the Fifth Chamber of the Court of First Instance of 30 November 2006, Arcor AG & Co. KG, formerly ISIS Multimedia Net GmbH & Co. KG, was removed from the case as second intervener.

59. On 11 December 2006, after hearing the parties, the Court decided to refer the present case to the Fifth Chamber, Extended Composition, of the Court of First Instance.

60. Upon hearing the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, put written questions to the applicant and to the Commission and requested

them to produce certain documents. The main parties complied with those requests within the prescribed period.

61. By letter of 21 March 2007, the applicant sent the Court a request for confidential treatment of various matters in the Commission's statement of 5 March 2007 containing the replies to the Court's written questions. The first and second interveners did not raise any objections to that request for confidentiality, and a non-confidential version of the Commission's statement, which was prepared by the applicant, was sent to the first and second interveners.

62. As Judge Dehousse was unable to sit in the present case, the President of the Court of First Instance designated Judge Wahl to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure on 29 March 2007.

63. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 3 May 2007.

Forms of order sought by the parties

64. The applicant claims that the Court of First Instance should:

- annul the contested decision or, in the alternative, reduce the fine imposed by the Commission in Article 3 of the contested decision at the Court's discretion;

- order the Commission to pay the costs, including extra-judicial costs.

65. The Commission contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

66. The first intervener contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs, including those of the first intervener.

67. The second intervener contends that the Court should:

- dismiss the applicant's application;

- order the applicant to pay the costs, and to pay the extra-judicial costs of the second intervener.

Law

I - Principal form of order sought: annulment of the contested decision

68. The applicant raises three pleas in law alleging, first, an infringement of Article 82 EC; second, that the operative part of the contested decision is defective; and third, misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations.

A - First plea in law: infringement of Article 82 EC

69. The first plea in law is in four parts. The first part alleges the absence of an abuse as the applicant did not have sufficient scope to avoid a margin squeeze. The second complains of the unlawfulness of the method used by the Commission to establish the margin squeeze. The third alleges an error by the Commission in calculating the margin squeeze, and the fourth alleges the lack of any effect on the market of the margin squeeze identified.

1. First part: absence of an abuse as the applicant did not have sufficient scope to avoid a margin squeeze

(a) Arguments of the parties

70. The applicant submits that it did not have sufficient scope to avoid the margin squeeze alleged in the contested decision. First, it notes that the Commission itself found that the applicant did not have scope to fix charges for wholesale access. Charges for wholesale access, which are fixed by RegTP, ought to correspond to the cost of efficient service provision. Therefore, they do not necessarily correspond to the applicant's costs.

71. Second, the applicant did not have scope to fix its charges for retail access either. As regards the period from 1998 to 2001, any abuse by the applicant is precluded by the fact that RegTP alone - and previously the BMPT - is responsible for the applicant's charges for narrowband connections (see paragraphs 73 to 79 below).

72. As to the period after January 2002, it is only the applicant's conduct in fixing charges for broadband connections that could be abusive, since the Commission itself acknowledged in the contested decision that the applicant has not had any scope to fix charges for narrowband connections since 2002. However, as regards the period after January 2002, any scope the applicant may have had to fix charges for broadband connections (assuming that was established), would in any event have no bearing on the margin squeeze alleged (see paragraphs 80 to 83 below).

73. First, as far as narrowband connections are concerned (analogue and ISDN lines), the applicant explains that, under German law, all its retail prices had to be examined and approved in advance by RegTP or, before 1998, by the BMPT. The applicant - who, under Paragraph 29(1) of the TKG, could not depart from the charges thus authorised without incurring a fine - cannot therefore be regarded as having infringed Article 82 EC by applying those charges.

74. As to the setting of charges, the applicant observes that, under the price cap system, RegTP initially defines the basket of services and the targets for the movement of prices which limit basket price adjustments (price indices' or price caps'). Next, RegTP examines the individual price adjustments proposed by the applicant. Accordingly, under Paragraphs 24 and 27 of the TKG, RegTP should ascertain - irrespective of compliance with the ceiling fixed for the basket in question - whether the charges requested have been set (without any justification) below the cost of efficient service provision or whether they contravene other legal provisions, particularly Article 82 EC. RegTP should therefore refuse a retail price adjustment sought by the applicant if the prices contravene Article 82 EC, particularly because of an anti-competitive margin squeeze.

75. The applicant maintains that, before 1 May 2002 - in accordance with Paragraph 97(3) of the TKG, under which authorisations for the applicant's charges granted before 1 January 1998... remain[ed] in force until 31 December 2002 at the latest' - it was bound by the mandatory tariffs for analogue lines which were based on an authorisation that was granted by the BMPT without any time-limit.

76. The applicant also notes that its application of 31 October 2002 for an increase in its retail access charges was only partly accepted by RegTP, within the limit of the price cap, by decision of 19 December 2002. Moreover, since 1 January 2002, charges for end-user lines are in a separate basket for which a specific reference value has been set. Telephone call charges have no bearing on compliance with those values. The Commission itself recognises that the applicant has not had any opportunity to increase its charges for narrowband access since 2002. The fact that the applicant did not make any further applications to increase authorised charges between 1998 and 2001 does not mean that the applicant can be held responsible for the level of charges set by RegTP and, therefore, for an alleged margin squeeze. The mere right to submit applications for price adjustment cannot be regarded as an autonomous price-fixing power. RegTP's procedure for examining and authorising charges on a case by case basis was put in place precisely to ensure through advance regulation that the incumbent operator does not apply abusive pricing, in accordance with the obligation imposed

on the Member States by Article 17 of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24). Where an application is examined and determined in accordance with that procedure and satisfies the procedural requirements of the Community legal framework for telecommunications law, an undertaking which applies charges set after such an examination cannot be accused of any abuse. Charges which are checked and authorised cannot be described as an abuse on the part of the undertaking which applies them.

77. Furthermore, the applicant explains that the advance regulation exercised by RegTP serves to establish the structure of the market through administrative intervention and - in the areas subject to advance regulation - transfers responsibility for maintaining the structure of the market from the regulated undertaking to the regulatory authority. Accordingly, the applicant is obliged to request price adjustments from RegTP only in the event of a change in the underlying circumstances.

78. In any event, even on the assumption that the applicant can be held responsible for a certain tariff level on the basis of its right to request a price adjustment, there was no change of circumstances such as to require the applicant to make further applications to increase its retail prices. On the contrary, since 1998, the costs of providing connections have remained almost unchanged, and wholesale access charges have even been considerably reduced. Furthermore, in the same period, RegTP concluded in its decisions of 8 February 1999, 23 December 1999, 30 March 2001, 21 December 2001, 11 April 2002 and 29 April 2003 that no margin squeeze existed to the detriment of competitors. In addition, by judgment of 16 January 2002, the Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf, Germany) held that the applicant's authorised charges did not contravene Article 82 EC.

79. As regards the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 10 February 2004, setting aside the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002, the applicant submits that that judgment confirms that RegTP checks whether a charge to which a request for authorisation relates is compatible with Article 82 EC and that responsibility for any infringement of Article 82 EC can only exceptionally be ascribed to the undertaking which applied for the charge to be authorised. The applicant observes that RegTP itself has concluded on several occasions since 1998 that there is no margin squeeze to the detriment of the applicant's competitors. Furthermore, the Bundesgerichtshof expressly left open the question of the applicant's responsibility under competition law on account of the regulated charges.

80. Second, the applicant submits that any abuse in the period beginning in 2002 which is based solely on the alleged scope for increases in TDSL (ADSL) charges cannot be ascribed to the applicant. The Commission cannot consider that discretion in isolation, since the margin squeeze was not calculated on the basis of the TDSL (ADSL) charges alone, but on the basis of all the retail prices. Moreover, contrary to the Commission's contention, the applicant could not increase its charges indefinitely. Thus, the applicant claims that the basic component of the charge, namely the price of the basic subscription (analogue or ISDN connection), requires the prior authorisation of RegTP. In addition, the surcharge for switching from an analogue or ISDN connection to an ADSL connection is subject to subsequent review by RegTP. The applicant refers in that regard to the decisions of RegTP of 30 March 2001 and 25 January 2002. In those circumstances, the applicant - whose charges had to be fixed, in accordance with Paragraph 24 of the TKG, on the basis of the cost of efficient service provision - certainly did not have unlimited scope to increase its ADSL charges. In its decision of 25 January 2002, RegTP closed the proceeding initiated against the applicant concerning predatory pricing in relation to ADSL. The applicant observes further that the Commission refers only to the figures taken from RegTP's decision of 30 March 2001 in order to show that the applicant has had scope to increase its ADSL charges since 2002.

81. In addition, the applicant submits that, on the basis of the Commission's calculations, with the exception of the start-up phase, its retail prices for ADSL services (analogue lines since 2001 and ISDN lines since 2002) were higher than those of its wholesale access, having been increased by specific costs associated with retail access. There was therefore no margin squeeze on that market. Moreover, the real cause of the alleged margin squeeze was RegTP's setting of low charges for analogue lines. Therefore since, according to the Commission itself, there are separate markets for broadband connections (ADSL) and narrowband connections (analogue and ISDN lines), the applicant maintains that even if it had any scope on the broadband connections market to enable it to increase its charges for ADSL lines, neither an increase in or a reduction of ADSL charges would have any repercussions on the continued existence of an anti-competitive margin squeeze on the narrowband connections market. Correction of ADSL charges could not eliminate the alleged dysfunctioning of the narrowband connections market, any more than fixing ADSL charges would provoke that dysfunctioning. In its reply, the applicant submits further that, although a single wholesale service provides access to a number of downstream markets, each of those downstream markets must be investigated as to the existence of a margin squeeze.

82. The applicant also challenges the Commission's argument that the wholesale market for local network access is a unified market. Full access to the local network can provide end-users only with either broadband connections or narrowband connections. Moreover, broadband connections can be marketed separately from narrowband connections on the basis of line sharing. Full access to the local network is therefore not necessary for ADSL services. If the Commission had taken account of the charges for line sharing - which are significantly lower than the charges for wholesale access - in assessing the margin squeeze, the result would have been more favourable for the applicant.

83. Lastly, the applicant submits that the Commission failed to show in the contested decision how the applicant could have reduced the alleged margin squeeze by increasing ADSL charges. In view of the cross-price elasticity between ADSL and traditional connections and between the different ADSL variants (over analogue connections and ISDN), which the Commission accepts, a more thorough investigation would have been appropriate to determine whether an increase in ADSL charges would actually have resulted in an increase in weighted retail prices. The applicant notes in that regard that there is cross-price elasticity between ADSL and narrowband connections. If it had demanded higher ADSL charges in the past than those which it applies, the number of ADSL customers would have been lower. There is also considerable cross-price elasticity even within the ADSL sector. The applicant explains in that regard that ADSL connections are offered over both analogue and ISDN lines. An increase in ADSL charges on the basis of ISDN connections would shift demand towards the analogue variant.

84. The Commission and the first and second interveners contend that the first part of the first plea in law should be dismissed.

(b) Findings of the Court

(i) Preliminary observations

85. It follows from the case-law that Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see Joined Cases C359/95 P and C379/95 P Commission and France v Ladbroke Racing [1997] ECR I6265, paragraph 33, and the case-law cited).

86. In that regard it must nevertheless be observed that the possibility of excluding particular anti-competitive conduct from the scope of Articles 81 EC and 82 EC, on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has eliminated any possibility of competitive conduct on their part, has been only partially accepted by the Court of Justice (Joined Cases 209/78 to 215/78 and 218/78 van Landewyck and Others v Commission [1980] ECR 3125, paragraphs 130 to 134; Case 41/83 Italy v Commission [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831, paragraphs 27 to 29; and Case C198/01 CIF [2003] ECR I8055, paragraph 67).

87. For the national legal framework to have the effect of making Articles 81 EC and 82 EC inapplicable to the anti-competitive activities of undertakings, the restrictive effects on competition must originate solely in the national law (Case T513/93 Consiglio nazionale degli spedizionieri doganali v Commission [2000] ECR II1807, paragraph 61).

88. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (van Landewyck and Others v Commission , cited in paragraph 86 above, paragraphs 126 and 130 to 134; Stichting Sigarettenindustrie and Others v Commission , cited in paragraph 86 above, paragraphs 12 to 37; Case C219/95 P Ferriere Nord v Commission [1997] ECR I4411, paragraphs 23 to 25; and Commission and France v Ladbroke Racing , cited in paragraph 85 above, paragraph 34).

89. Thus, if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC (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, paragraphs 36 to 73, and CIF , cited in paragraph 86 above, paragraph 56; see, to that effect, Case T387/94 Asia Motor France and Others v Commission [1996] ECR II961, paragraph 60).

90. It is in the light of the principles set out above that the Court must examine the German legal framework - in particular the TKG, the Charges Order and the decisions taken by RegTP during the period covered by the contested decision - in order to establish whether it eliminated any possibility of competitive activity by the applicant or whether it allowed the applicant sufficient scope to fix its charges at a level which would have enabled it to end or reduce the margin squeeze identified in the contested decision.

(ii) The contested decision

91. In the contested decision, the Commission examines the charges for wholesale access and the retail charges and finds an abuse by [the applicant] in the form of a margin squeeze generated by a disproportion between [those two charges]' (recital 57).

92. The Commission goes on to indicate in the contested decision that there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107).

93. Although the Commission does not, in the contested decision, exclude the possibility of the applicant reducing its charges for wholesale access (recitals 17, 163 and 206), it confines its analysis in that decision to the question whether the applicant had genuine scope to increase its retail prices (recitals 164 to 175). To that end it distinguishes between two periods.

94. The Commission takes the view first of all that, [i]n the period from the beginning of 1998 to the end of 2001, [the applicant] was in a position to end the margin squeeze entirely by adjusting its retail charges' (recital 199). The Commission explains that the applicant could have avoided the margin squeeze by increasing retail charges for analogue and ISDN connections' (recital 164).

95. Next, for the period from 1 January 2002 to the adoption of the contested decision, the Commission also finds that the applicant had scope to increase its retail charges. However, that scope applies only to retail prices for ADSL access. The Commission observes in the contested decision that, [s]ince the beginning of 2002, [the applicant] could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges' (recital 199). It explains that, since 1 January 2002, [the applicant's] only legal means of reducing the margin squeeze has been limited to increases in the TDSL charges' (recital 206).

96. In those circumstances, it is necessary to consider whether the Commission was correct to find in the contested decision that the applicant had sufficient scope during the two periods identified in paragraphs 94 and 95 above to increase its retail prices, so as to end or reduce the margin squeeze identified in the contested decision.

(iii) Absence of an abuse because the applicant had insufficient scope to avoid a margin squeeze by increasing its retail prices in the period from 1 January 1998 to 31 December 2001

97. According to the contested decision (recitals 164 and 199), the applicant had sufficient scope to end the margin squeeze in the period from 1 January 1998 to 31 December 2001 by increasing its retail charges for access to analogue and ISDN lines.

98. In order to assess the merits of that finding it is necessary, in the first place, to consider the German legislative framework applicable.

99. In that respect, it must be observed that, under the second sentence of Paragraph 27(1) and Paragraph 25(1) of the TKG, and Paragraphs 4 and 5 of the Charges Order, the applicant's retail prices for access to analogue and ISDN lines had to be approved by RegTP in the context of a price cap system. The price cap applied to two baskets (residential services and business services) which, for the period from 1 January 1998 to 31 December 2001, consisted of both access services and telephone calls, in particular, local, regional, long-distance and international calls. In view of the cap imposed by the decision of the BMPT of 17 December 1997, the applicant had to reduce the aggregate price for each of the two baskets by 4.3% in the period from 1 January 1998 to 31 December 1999 and, following the decision of RegTP of 23 December 1999, by 5.6% in the period from 1 January 2000 to 31 December 2001.

100. However, it must be held that, within that framework, the applicant was able to adjust its prices after obtaining the prior authorisation of RegTP. The applicant does not dispute the statement in recitals 37 and 166 to the contested decision that, in the period from 1 January 1998 to 31 December 2001, it lowered its telephone call charges by much more than the 4.3% and 5.6% reductions required by RegTP for the baskets as a whole. RegTP's reply of 3 April 2002 to the request for information of 23 March 2002 referred to in recital 37 to the contested decision thus confirms that the charges for telephone services regulated under the price cap system were reduced by DEM [confidential] (1) [or approximately EUR [confidential]] over and above the price cap requirements'.

101. That tariff reduction gave the applicant scope to increase its retail prices for access to its analogue and ISDN lines.

102. As stated in recital 167 to the contested decision, the applicant also admitted in its reply to the statement of objections that there was scope for it to be able to increase the monthly charge per residential line by EUR [confidential] during the 1998 and 1999 price cap period.

103. The fact that the applicant did have scope to increase its retail charges is also apparent from remarks made by the German Government in its communication to the Commission of 8 June 2000, in which the German Government stated:

The ... complaint that, by its retail price cap decisions, RegTP limited the [applicant's] discretion to such an extent that an increase in the basic charge would not have been possible is unfounded. ... [In fact the applicant] had the scope to raise the basic charge for analogue connections (DEM 21.39) so as better to align the basic charge with the charge of DEM 25.40 authorised on 8 February 1999 for local network access.'

104. Furthermore, RegTP's decision of 8 February 1999 - to which the applicant refers in its application and in its reply to support its argument that it cannot be held responsible for an infringement of Article 82 EC - confirms that the applicant retains a discretion as regards the adjustment of the various retail prices, subject to the limits applicable to the basket established in the price cap procedure'.

105. The Commission was correct therefore to find in recitals 166 and 167 to the contested decision that, having regard to the six applications for reductions in call charges between 1 January 1998 and 31 December 2001, the applicant had scope during that period to apply for increases in the prices of its access services for analogue and ISDN lines, while respecting the overall ceilings for baskets of residential and business services. Moreover, the applicant admitted at the hearing that it had such scope.

106. In the second place, it is necessary to consider whether, notwithstanding the discretion noted in paragraph 105 above, the applicant is no longer subject to Article 82 EC as a result of RegTP's intervention in fixing the applicant's charges.

107. In that respect, it must be borne in mind at the outset that the fact that the applicant's charges had to be approved by RegTP does not absolve it from responsibility under Article 82 EC (see, to that effect, Case 123/83 BNIC [1985] ECR 391, paragraphs 21 to 23). Since the applicant (as it also admits in its reply) influences the level of its retail charges through applications to RegTP for authorisation pursuant to Paragraph 28(1) of the TKG, the restrictive effects on competition associated with the margin squeeze found in the contested decision did not originate solely in the applicable national legal framework (Consiglio nazionale degli spedizionieri doganali v Commission , cited in paragraph 87 above, paragraph 61).

108. The applicant nevertheless maintains that it did not have any responsibility under Article 82 EC, as RegTP had checked the compatibility of its charges with Article 82 EC beforehand.

109. In that respect, first, it must be noted that the retail charges for access to analogue lines which applied throughout the period from 1 January 1998 to 31 December 2001 had not been authorised by RegTP, but were based on decisions taken under the legislation in force before the adoption of the TKG. In response to a written question of the Court, the applicant thus confirmed that its retail charges for analogue lines in relation to the period from 1 January 1998 to 31 December 2001 were based on an open-ended authorisation granted by the Federal Ministry of Post and Telecommunications in 1990 on the basis of the Telecommunications Code (Telekommunikationsordnung).

110. However, neither in its application nor in its reply did the applicant claim that the charges fixed under the legislation in force in 1990 had been authorised after the competent authority had considered them as to their conformity with Article 82 EC.

111. Second, it must be noted that the provisions of the TKG in force since 1 August 1996 do not indicate that RegTP considers whether applications for the adjustment of retail charges for access to analogue or ISDN lines are compatible with Article 82 EC.

112. In support of its argument, the applicant refers however to Paragraph 27(3) of the TKG, under which RegTP is to examine the conformity of the requested adjustment of charges with... other legal provisions' (said by the applicant to include Article 82 EC) and to the various decisions of RegTP mentioned in paragraph 78 above in which the existence of a margin squeeze was investigated.

113. In that respect it must be stated, first, that even though RegTP is obliged, like all organs of the State, to respect the provisions of the EC Treaty (see, to that effect, CIF , cited in paragraph 86 above, paragraph 49), it was, at the material time, the German body responsible for regulating the telecommunications sector, rather than the competition authority of the Member State concerned. However, the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition policy (see the Commission's Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles (OJ 1998 C 265, p. 2), paragraph 13).

114. Next, it must be noted that the various decisions of RegTP to which the applicant refers in support of its case do not include any reference to Article 82 EC.

115. It is true that RegTP examined the issue of the margin squeeze in a number of its decisions, particularly those of 8 February 1999, 30 March 2001, 21 December 2001, 11 April 2002 and 29 April 2003.

116. However, in those decisions, having found a negative spread between the applicant's wholesale and retail prices, RegTP took the view in each case that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidised charges for access services and call charges.

117. Thus, RegTP finds in its decision of 29 April 2003 that:

[C]ompetitors are not so prejudiced with regard to their competitive opportunities in the local network by the slight difference between retail and wholesale prices as to make it economically impossible for them to enter the market successfully or even to remain in the market. ... [That difference] was not so significant as to deprive competitors of any opportunity themselves to cross-subsidise their retail prices in order to be able to offer their end-users connections at a price as attractive as that offered by the applicant, or even at a lower price. That applies particularly to the higher-value and costlier ISDN and ADSL connections, which have increased markedly in number on account of the significant expansion of internet penetration, as well as of the marketing of faster and better access to the internet.'

118. RegTP follows a similar reasoning in its decisions of 8 February 1999, 30 March 2001, 21 December 2001 and 11 April 2002.

119. However, the fact that RegTP does not object to the charges requested by the applicant, after finding that the applicant's competitors must resort to cross-subsidisation in order to be able to offer their end-users competitive prices for access, shows that RegTP did not consider the compatibility of the charges in question with Article 82 EC or, at any rate, that it applied Article 82 EC incorrectly (see paragraphs 198 to 202 and 238 below).

120. In any event, even on the assumption that RegTP is obliged to consider whether retail charges proposed by the applicant are compatible with Article 82 EC, the Commission would not thereby be precluded from finding that the applicant was responsible for an infringement. The Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC (see, to that effect, Case C344/98 Masterfoods and HB [2000] ECR I11369, paragraph 48).

121. Third, it must be noted that attribution of any infringement to the applicant in the present

case depends on whether the applicant had sufficient scope at the material time to fix its charges at a level that would have enabled it to end or reduce the margin squeeze at issue.

122. It has already been held that the applicant was able to influence the level of its retail charges through applications to RegTP for authorisation (see paragraphs 98 to 105 above). In the context of the applicant's special responsibility as an undertaking in a dominant position (Case 322/81 NBIM v Commission [1983] ECR 3461, paragraph 57; Case T228/97 Irish Sugar v Commission [1999] ECR II2969, paragraph 112; and Case T203/01 Michelin v Commission [2003] ECR II4071, paragraph 97), the applicant was therefore obliged to submit applications for adjustment of its charges at a time when those charges had the effect of impairing genuine undistorted competition on the common market.

123. Furthermore, in its judgment of 10 February 2004 (paragraph 79 above), the Bundesgerichtshof expressly confirmed the applicant's responsibility to make applications for the adjustment of its charges. In addition, it noted that the German legal framework did not preclude RegTP from authorising proposed charges which are contrary to Article 82 EC. The Bundesgerichtshof held, in fact, that, [u]nlike those cases in which the conduct of the undertaking in a dominant position is directly determined by national legal provisions, the authorisation of charges that is prescribed by telecommunications law is nevertheless based on the application for authorisation made by the provider', and that, [e]ven if the administrative examination procedure is intended not to authorise tariffs which prove to constitute an abuse of a dominant position..., that does not preclude the possibility in practice of an undertaking submitting a charge by which it abuses its dominant position and obtains authorisation for it because the abuse is not revealed during the examination procedure'.

124. It follows from all the foregoing that, notwithstanding RegTP's intervention in the setting of the applicant's charges, the applicant had sufficient discretion during the period from 1 January 1998 to 31 December 2001 for its pricing policy to fall within the scope of Article 82 EC.

125. In the third place, it is necessary to consider whether the applicant used the discretion which it had in relation to its retail prices in order to avoid the margin squeeze identified in the contested decision in the period from 1 January 1998 to 31 December 2001.

126. In the present case, first of all, as regards retail prices for analogue lines, the applicant does not deny that it made no application to RegTP for authorisation for an increase in one-off charges and/or monthly charges. Thus, it is common ground that the monthly and one-off access charges for standard analogue telephone connections remained unchanged throughout the entire time from 1998 to the end of 2001' (recital 38 to the contested decision).

127. The applicant nevertheless maintains that, before 1 May 2002, it was bound in accordance with Paragraph 97(3) of the TKG by the mandatory charges for analogue lines that had been set in 1990 by the Federal Minister for Post and Telecommunications.

128. However, Paragraph 97(3) of the TKG, containing a transitional provision, provided only that the applicant's charges approved before the entry into force of the TKG would remain in effect until 31 December 2002 at the latest. That provision in no way therefore prevented the applicant from intervening in retail prices by making applications for price changes to RegTP before that date or, in particular, during the entire period from 1 January 1998 to 31 December 2001.

129. Second, as regards retail prices for ISDN lines, it is undisputed that, following the applicant's application, RegTP authorised a reduction in the basic monthly charges by decision of 16 February 2000 (recital 40 to the contested decision).

130. Furthermore, throughout the period from 1 January 1998 to 31 December 2001, the applicant made no application for price adjustment in respect of its one-off charges for the provision of

ISDN lines. Those charges, which, according to the applicant, are based on a 1996 decision of the BMPT and which remained valid in accordance with Paragraph 97(3) of the TKG after the entry into force of the TKG, were not therefore adjusted during the period from 1 January 1998 to 31 December 2001 (recital 41 to the contested decision).

131. It follows that the applicant did not use the discretion available to it in order to secure an increase in its retail prices, which would have helped to reduce the margin squeeze in the period from 1 January 1998 to 31 December 2001. On the contrary, it even used that discretion to lower its retail prices in respect of ISDN lines during that period.

132. Finally, in the fourth place, it is necessary to consider whether the Commission has established to the requisite legal standard in the contested decision that the applicant had sufficient scope in the period from 1 January 1998 to 31 December 2001 to [avoid] the margin squeeze' (recital 164). In that respect, the Commission states in the contested decision that the applicant was in a position [during that period] to end the margin squeeze entirely by adjusting its retail charges' (recital 199).

133. It must be noted in that regard that the margin squeeze identified in the contested decision for that period amounted to EUR [confidential] up to 31 December 1998, EUR [confidential] up to 31 December 1999, EUR [confidential] up to 31 December 2000 and EUR [confidential] up to 31 December 2001 (recitals 152 and 153 to the contested decision, and Table 10).

134. However, as the Commission contends in its reply to a written question of the Court, it follows from the findings in recital 167 to the contested decision, which have not been challenged by the applicant, that the applicant actually lowered its call charges by a total of EUR [confidential] during the period 1998 and 1999. However, that amount - distributed over [confidential] lines (Table 7 of the contested decision) and 24 months - would have enabled the applicant to raise the average price of its retail charges to EUR [confidential] per month.

135. It follows that the reduction in call charges would have created sufficient scope to end entirely the margin squeeze identified in the contested decision. For if, by exercising its discretion, the applicant had ended the margin squeeze as from 1998, it would have sufficed for the applicant to maintain the balance between its charges for wholesale access and its retail charges in order to avoid the margin squeeze identified in the contested decision throughout the period from 1 January 1998 to 31 December 2001. In addition, as the Commission also points out in the contested decision (recital 167), it is common ground that the applicant reduced its call charges further during the 2000 and 2001 period to EUR [confidential], and that the effect of that reduction was to increase further the applicant's scope to raise its retail prices.

136. At the hearing the applicant pointed out that, during the period from 1 January 1998 to 31 December 2001, RegTP had to investigate compliance with the price ceilings separately in respect of business and private customers. The applicant maintains that it had little scope to increase retail prices for individuals, and that it could not use its greater discretion to increase retail access prices for its business customers because that would have resulted in discrimination against those customers, contrary to point 3 of Paragraph 24(2) of the TKG.

137. However, in its application, the applicant has not disputed the finding in recital 167 to the contested decision that the amount released by the reductions in call charges could have been redirected to connections for residential and business customers' and could have been used entirely to increase retail access charges. Nor, in its application, has the applicant disputed the Commission's statement in recital 132 to the contested decision that no distinction [should be made] between residential and business customers... because no sufficiently precise demarcation between them is possible'.

138. The line of argument referred to in paragraph 136, which was raised for the first time at the hearing, must therefore be declared inadmissible, in accordance with Article 48(2) of the Rules of Procedure.

139. Finally, it must be noted that the applicant does not dispute the finding in recital 168 to the contested decision that, during the period from 1 January 1998 to 31 December 2001, it could have [undertaken] further reductions in call charges... and thereby... [obtained additional] leeway for price increases in the monthly and one-off charges for analogue and ISDN connections'.

140. It follows from all the foregoing that the Commission was entitled to find in the contested decision (recitals 164 and 199) that the applicant had sufficient scope during the period from 1 January 1998 to 31 December 2001 to end entirely the margin squeeze complained of in that decision.

(iv) Absence of an abuse because the applicant had insufficient scope to reduce the margin squeeze by increasing its ADSL retail access charges from 1 January 2002

141. It must be borne in mind that a new price cap system in Germany, approved by RegTP by decision of 21 December 2001, has been in force since 1 January 2002. Under the terms of that decision, end-user lines' are in a separate basket. Within that basket, the increase in retail prices for analogue and ISDN connections was capped at 4.1% per annum.

142. It is not disputed that, following an application to RegTP on 15 January 2002, the applicant was authorised to increase its monthly charges for analogue and ISDN lines by EUR 0.56, which represented an increase in the average level of charges for all the services in the basket concerned of 4.04% (recital 44 to the contested decision). Nor is it disputed that the applicant's application of 31 October 2002 for an increase in its retail prices - in relation to the monthly rental charge for a TNet analogue telephone line and the one-off takeover charges for TNet and TISDN lines - was largely rejected by RegTP, because the increase would no longer have been consistent with the current price cap index figures (recital 45 to the contested decision).

143. Accordingly, the Commission finds in the contested decision (recital 206) that since 1 January 2002, [the applicant's] only legal means of reducing the margin squeeze has been limited to increases in the TDSL charges'. According to the Commission, from that date, the applicant's discretion covered only ADSL retail access charges (see also recitals 174 and 199 to the contested decision).

144. In the first place, it must be noted in that regard that the applicant does not deny that it could have increased its ADSL charges from 1 January 2002. It maintains, however, that it did not have unlimited leeway because its charges had to be set on the basis of the cost of efficient service provision and could be reviewed subsequently by RegTP.

145. However, since the applicant fixes its ADSL charges at its own discretion, within the limits imposed under German law, its pricing practices in that area are capable of being caught by Article 82 EC (see paragraphs 87 and 88 above).

146. The fact that the Commission referred in the contested decision only to charges deriving from a decision of RegTP of 30 March 2001 in order to assess the extent of the applicant's discretion from 1 January 2002 alters nothing in that respect. The applicant does not deny that it had a limited discretion to increase its charges for ADSL access services from 1 January 2002.

147. In the second place, it is necessary to consider whether, as the Commission contends in the contested decision (recital 199), the applicant could have reduced the margin squeeze' by increasing its charges for ADSL access services from 1 January 2002. The applicant submits in that respect that, for end-users, the markets for narrowband and ADSL access services are separate markets. In those circumstances, an increase by the applicant in ADSL retail charges would have had no effect on the alleged margin squeeze identified in the markets for analogue and ISDN access services.

148. It must be noted in that regard that since wholesale access services can provide end-users with the whole range of analogue, ISDN and ADSL access services, the applicant's scope to increase its ADSL charges is capable of reducing the margin squeeze between wholesale prices, on the one hand, and retail prices for the whole range of analogue, ISDN and ADSL access services, on the other. A combined analysis, at end-user level, of analogue, ISDN and ADSL access services is required not only because they amount to a single supply of services at wholesale level, but also because, as the Commission explained in the contested decision (recital 26) without having been challenged by the applicant on that point, ADSL cannot be offered to end-users on its own because, for technical reasons, it always involves an upgrading of analogue or ISDN narrowband connections.

149. The applicant's observations concerning the purported cross-price elasticity between ADSL and narrowband connections and between the different ADSL variants must be rejected. First, those observations do not preclude the existence of scope for the applicant to increase its ADSL charges. Second, a limited increase in ADSL charges would have led to a higher average retail price for narrowband and associated broadband access services, and would thus have reduced the margin squeeze identified. In view, in particular, of the advantages of broadband as regards data transmission, end-users of broadband access services would not automatically choose to revert to a narrowband connection when ADSL retail access charges are increased.

150. The applicant's argument that broadband connections can be marketed separately from narrowband connections on the basis of line sharing at the wholesale level cannot be accepted either. If, by that argument, the applicant seeks to distinguish two separate wholesale markets relating to narrowband services and broadband services respectively, that argument must be declared inadmissible in accordance with Article 48(2) of the Rules of Procedure because, in its application, the applicant has not challenged the definition of the relevant markets that was applied in the contested decision, which identifies a single wholesale market, namely the market for fully unbundled access to the local network (recitals 64 to 67 to the contested decision). If, by that argument, the applicant claims that the Commission should have taken account of the line sharing charges for the purpose of calculating charges for wholesale access, that argument cannot be accepted either. The applicant has failed to show that, if the Commission had taken the line sharing charges into account, that would have affected its findings as to the existence of a margin squeeze or of the applicant's scope to reduce the margin squeeze by increasing its ADSL retail access charges.

151. It follows from all the foregoing that the Commission was entitled to find in the contested decision that the applicant had sufficient scope from 1 January 2002 to reduce the margin squeeze identified in that decision by increasing its charges for ADSL access services.

152. Accordingly, the first part of the plea in law must be rejected.

2. Second part: unlawfulness of the method used by the Commission to establish a margin squeeze

(a) Arguments of the parties

153. The applicant submits that the abusive nature of a margin squeeze can arise only from the abusive nature of retail prices alone, since the Commission does not deny that the prices of wholesale access are mandatorily set by the official authorities. However, the Commission has not demonstrated that the applicant's retail prices would lead to price dumping and as such are abusive. The applicant refers in that regard to Lexecon's expert opinion. The contested decision is thus erroneous because the Commission applied a test which does not relate to the abusive nature of the retail prices as such, but to the relationship between those prices and the prices of wholesale access.

154. The applicant also claims that the finding of a margin squeeze is based on a number of errors relating to the method used.

155. In the first place, the applicant observes that, as far as retail prices are concerned, the Commission took account only of revenue from the provision of telephone lines to end-users. In order to be able to find a margin squeeze and in view of the narrow definition of the market used in the contested decision, the Commission should have taken account of additional revenue from the applicant's competitors for connection and higher-value services (see, to that effect, Case T342/99 Airtours v Commission [2002] ECR II2585, paragraph 276). The revenue in question is generated by local or long-distance calls, call termination and call sending, as well as other higher-value services. Although the Commission found that [t]he fixed-network connections are in reality a prerequisite for the provision of a variety of telecommunications services to end-users', and that those services enable considerable additional revenue to be generated (recital 205 to the contested decision), it nevertheless contradicted itself in refusing to take the charges for those telecommunications services into account in its analysis of the margin squeeze. From an economic standpoint, however, it would be necessary to take those charges into account in order to assess the actual opportunities for a competitor of the applicant to enter the market.

156. Thus, first, the applicant submits that its competitors are not obliged to offer their customers preselection and call-by-call services in respect of local, long-distance or international calls. Its competitors are therefore able to predict their revenue from telephone calls with far greater certainty than the applicant. As far as long-distance calls are concerned, the applicant maintains in its reply that it has been required to provide preselection and call-by-call (together: (pre)selection') services since 1998.

157. In addition the applicant submits in its reply that carrier (pre)selection is not automatically excluded for its competitors' customers. However, almost all of the applicant's competitors avail themselves of the possibility (which is not open to the applicant) of excluding (pre)selection where it is to their advantage to do so. The applicant's competitors are thus assured of receiving the revenue connected with telephone calls by virtue of the voluntary exclusion of carrier (pre)selection. None of the complainants in the administrative procedure took the view, moreover, that the exclusion of (pre)selection rendered its service provision less attractive or that a lower initial connection charge should have been offered by way of compensation. Furthermore, their call charges are almost all higher than the costs of establishing the call.

158. Second, the applicant submits that its competitors could offer innovative products on the basis of unbundled access to the local network, which are not offered by the applicant itself. In calculating the margin squeeze, the Commission should therefore also have taken into account the additional revenue generated by such products.

159. Third, the applicant maintains that its charges for retail access services (one-off and monthly charges) cannot be isolated from call charges. Competition for telecommunications services is for bundles of services. The applicant refers in that regard to a market study. Accordingly, the telecommunications companies offer a choice of connection variants and call options which are marketed as a combined product: mixed price packages in which rising monthly charges are set against falling call charges. In considering in its decision of 29 April 2003 whether the applicant's charges were leading to a margin squeeze that would distort competition, RegTP also regarded as decisive the fact that the applicant's competitors are in a position to obtain additional revenue from call services. The same or similar explanations are also given in the other decisions taken by RegTP between 1999 and 2003, cited in paragraph 78 above. The applicant refers moreover to the practice of the United States' Federal Communications Commission (FCC) and the British Office of Telecommunications (Oftel), and to the opinion expressed by the German Government in its observations of 8 June 2000 in proceedings for failure to fulfil obligations, which confirm that other revenue available to competitors must be taken into account in the analysis of a margin squeeze.

160. In its reply, the applicant submits further that an analysis of the margin squeeze must be undertaken from the point of view of different levels of aggregation where wholesale access serves as the basis for a variety of services to end-users. Thus, at each level, only those costs of wholesale access which are exclusively linked to the corresponding final product or group of final products concerned should be taken into account. Consequently, if wholesale products WP1 and WP2 are required for the production of final product FP1, but if, at the same time, final product FP2 is produced on the basis of WP2 and WP3, a margin squeeze occurs either where the price of FP1 or of FP2 is lower than the price of WP1 or of WP3, or where the aggregate price of FP1 and FP2 is lower than the aggregate price of WP1, WP2 and WP3. However, the price of WP2 should not be taken into account for the purpose of determining whether there is a margin squeeze at the first level of aggregation. The analysis should be conducted at a higher level of aggregation where products FP1 and FP2 constitute a whole from the customer's point of view, or where products FP1 and FP2 are bundled for technical or legal reasons (by wholesale product WP2), with the result that the dominant undertaking would necessarily lose the revenues from the two final products FP1 and FP2 when transferring wholesale product WP2. Unbundled access to the local network is a wholesale product in respect of at least two final products, namely calls and connections, which constitute a cluster' for customers. The costs of the wholesale product should not be attributed to just one of the two final products but to both of them. It follows that charges for retail line-rental and for calls and higher-value services should be compared with the charges relating to that combined offer of services when analysing the margin squeeze.

161. Furthermore, the applicant challenges the Commission's arguments concerning the principle of tariff rebalancing (recitals 120 to 123 to the contested decision). Thus, according to the applicant, tariff rebalancing - the purpose of which is to reduce the connection deficit which traditionally exists in the majority of the Member States, by means of an increase in connection charges and a parallel decrease in call charges - concerns incumbent operators only. By contrast, the analysis of the margin squeeze concerns the entry to the market of the applicant's competitors. In the context of Article 82 EC, it is important to establish only whether, taking into account the actual situation on the market, it is possible for competitors to provide retail services without impediment on the basis of the applicant's charges for wholesale access. In that respect, the applicant observes that its competitors are not obliged to offer (pre)selection. The legal framework thus allows the applicant's competitors to enjoy legally guaranteed revenues from call services, completely independently of any tariff rebalancing. The applicant submits further that it is subject to regulation by RegTP, which aims to achieve progressive tariff rebalancing.

162. In the second place, the applicant claims that the method used by the Commission to identify a margin squeeze is defective, because it relies on the proposition that it should be possible for the applicant's competitors to replicate its customer pattern entirely (recitals 120 to 127 to the contested decision). However, no competitor would have an interest in replicating a customer pattern which, owing to the obligation to provide universal services, is characterised by a disporportionately high and unprofitable share of low-income end-users with analogue lines, who generate only a small turnover and who are not prepared to switch to higher-value connections. The fall in the applicant's competitors' share of analogue connections from 21% to 10% between 1999 and 2002 (recital 182 to the contested decision) is explained by the fact that customers of the applicant's competitors have increasingly been switching to higher-value connections.

163. The applicant claims that, contrary to the Commission's contention (recital 133 to the contested decision), there is no margin squeeze in the highest-value market sectors which are of interest to the applicant's competitors (ISDN connections and ADSL connections over analogue or ISDN lines). Both the applicant's own charges and those of its competitors in respect of lines in the highest-value segments are sufficient to cover costs.

164. In the third place, the applicant is critical of the fact that the Commission takes the discontinuance charge into account when calculating the prices of wholesale services. The discontinuance of an end-user's connection by a competitor of the applicant involves both connection work to restore to the applicant the local loop rented, and administrative tasks, which are not necessary in the case of an end-user's discontinuance where the applicant uses the local loop itself. These costs are specific inefficiency costs which arise as a result of entry to the market, which the incumbent operator in a dominant position necessarily does not incur. Any such costs which are generated solely as a result of technical or administrative measures associated with entry to a market should be disregarded in the analysis of a margin squeeze. In fact, Article 82 EC does not require a dominant undertaking to remove all barriers to entry, but prohibits the creation of artificial barriers to entry.

165. The Commission and the first and second interveners contend that the second part of the first plea in law should be rejected.

(b) Findings of the Court

(i) Whether the Commission should have demonstrated in the contested decision that the applicant's retail prices were, as such, abusive

166. In the present case, according to the contested decision (recital 201), [t]he abuse committed by [the applicant] consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of [the applicant's] competitors'. The Commission takes the view that there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision).

167. It is true that, in the contested decision, the Commission establishes only that the applicant has scope to adjust its retail prices. However, the abusive nature of the applicant's conduct is connected with the unfairness of the spread between its prices for wholesale access and its retail prices, which takes the form of a margin squeeze. Therefore, in view of the abuse found in the contested decision, the Commission was not required to demonstrate in that decision that the applicant's retail prices were, as such, abusive.

168. The applicant's argument that the abusive nature of a margin squeeze can arise only from the abusive nature of its retail prices must therefore be rejected.

(ii) The method used by the Commission to calculate the margin squeeze

Contested decision

169. In recitals 106 to 139 to the contested decision, the Commission sets out the method which it used to calculate the margin squeeze.

170. It submits first of all that the basis for establishing an abusive margin squeeze is the comparison between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services' (recital 107 to the contested decision).

171. The Commission adds that [i]n order to establish the existence of a margin squeeze it is essential that the wholesale and retail access services be comparable' (recital 109 to the contested decision). According to the Commission, [the] established operator and its competitors as a rule provide retail services of all kinds. It has therefore to be considered whether the etablished operator's retail and wholesale services are comparable, in the sense that their technical features are the same or at least similar and that they allow the same or at least similar services to be provided' (recital 109 to the contested decision).

172. The Commission finds that the wholesale charges for unbundled access to local loops can indeed be compared with retail access charges, and that wholesale access enables the applicant's competitors to offer their end-users a range of different retail access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services (recitals 110 and 112 to the contested decision).

173. According to the Commission, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision). The Commission therefore relies on the applicant's charges and costs as a basis for assessing whether the applicant's pricing practices are abusive.

174. In order to determine whether the difference between the applicant's retail prices and the prices of its wholesale access leads to an abusive margin squeeze, the Commission compares the price of a single wholesale service (local loop access) with the price of a plurality of retail services (access to analogue, ISDN and ADSL connections) (recital 113 to the contested decision).

175. The Commission does not take revenues from telephone calls into account at the retail price level. It only examines the charges for access to the network, which it compares to the charges of wholesale access (recital 119 to the contested decision).

176. Since RegTP has applied single wholesale tariffs, irrespective of the downstream services which competitors provide over the line supplied to them by the applicant (recital 113 to the contested decision), it is necessary, according to the Commission, to compare charges for wholesale access with average prices for all retail access services, taking account of each variant of retail access service actually marketed by the applicant and the respective prices of those lines (recital 116 to the contested decision).

177. It must therefore be borne in mind that the retail prices (for each variant offered by the applicant) and the prices for wholesale access are composed of two items, namely an initial one-off charge and a monthly subscription charge (recitals 142 and 149 to the contested decision).

178. To calculate the monthly price' of the one-off charges, these were divided by [confidential], representing the average period (in months) for which end-users keep a telephone subscription (recitals 148 and 151 to the contested decision).

179. Thus, the average total monthly retail price is the sum of the price of the average monthly charge (taking into account all retail access services) and the average one-off charges (taking into account all retail access services and the average duration of a subscription) (recital 148 to the contested decision).

180. The average total monthly price of wholesale services is the sum of the price of the monthly charge and the price of the average one-off charges (taking into account the average duration of a subscription) (recital 151 to the contested decision). According to the Commission, the one-off charges for wholesale access also include discontinuance charges. The Commission notes that [t]he discontinuance charge is payable for re-connecting an unbundled line to [the applicant's] network and is imposed only on competitors at wholesale level', and adds that [t]he discontinuance charge and the charge for access provision are the only one-off wholesale charges which competitors must pay to [the applicant]' (recital 151 to the contested decision).

181. On the basis of that calculation of monthly prices, the Commission finds that the spread between the applicant's wholesale and retail prices was negative between 1998 and 2001 (recital 153 to the contested decision). In view of that finding, it is not necessary, according to the Commission,

to determine whether this spread was sufficient to cover [the applicant's] downstream costs for customer relations' (recital 153 to the contested decision). By contrast, since the spread was positive from 2002 onwards, the Commission calculated [the applicant's] product-specific costs [for providing retail services], in order to assess whether this positive spread [was] sufficient [for the applicant] to cover [those] product-specific costs' (recital 154 to the contested decision).

182. The Commission concludes that the margin squeeze in access to the local network still existed at the time of the adoption of the contested decision (recital 161 to the contested decision), since the applicant's product-specific costs for providing retail services still exceeded the positive spread between retail and wholesale prices (recital 160 to the contested decision).

Lawfulness of the method used by the Commission

- Preliminary observations

183. It must be noted that the applicant puts forward three complaints concerning the method used to calculate the margin squeeze. First of all, the applicant submits that, as far as retail prices are concerned, the Commission should not have taken into consideration only revenues from the provision of telephone lines to end-users, but also revenues from other services such as call services. Second, the applicant criticises the method used by the Commission to demonstrate the existence of a margin squeeze based on the proposition that the applicant's competitors would have an interest in entirely replicating its customer pattern. Third, the method used is defective because the Commission inflates the prices of wholesale access by taking discontinuance charges into account in the calculation of those prices.

184. The various arguments put forward in relation to the first two complaints all relate to one or other of the two essential features of the method used by the Commission. The first concerns the margin squeeze calculation based on the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market. The second concerns the taking into account of revenues from all access services, excluding revenues from other services which may be supplied via access to a fixed network.

185. Before considering those various complaints and arguments, it must be borne in mind that, although as a general rule the Community judicature undertakes a comprehensive review of the question whether the conditions for applying the competition provisions of the EC Treaty are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 34; Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62; and Case C194/99 P Thyssen Stahl v Commission [2003] ECR I10821, paragraph 78).

- The alleged unlawfulness of the method of calculating the margin squeeze on the basis of the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market

186. It must be observed first of all that the Commission considered in the contested decision whether the pricing practices of the dominant undertaking could have the effect of removing from the market an economic operator that was just as efficient as the dominant undertaking. The Commission therefore relied exclusively on the applicant's charges and costs, instead of on the particular situation of the applicant's actual or potential competitors, in order to assess whether the applicant's pricing practices were abusive.

187. According to the Commission, there is an abusive margin squeeze if the difference between

the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (recital 107 to the contested decision). In the present case, the margin squeeze is said to be abusive because the applicant itself would have been unable to offer its own retail services without incurring a loss if... it had had to pay the wholesale access price as an internal transfer price for its own retail operations' (recital 140 to the contested decision). In those circumstances, competitors [who] are just as efficient' as the applicant cannot offer retail access services at a competitive price unless they find additional efficiency gains' (recital 141 to the contested decision; see also recital 108 to the contested decision).

188. Next, it must be noted that, although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors.

189. Thus, in its judgment in Case C62/86 AKZO v Commission [1991] ECR I3359, paragraph 74, the Court of Justice took into consideration only the charges and costs of the dominant undertaking, AKZO, in order to assess whether AKZO's pricing practices were abusive. The approach suggested by Advocate General Lenz, according to which it was necessary to analyse the cost structure of all three oligopolists [namely AKZO and its two competitors], so that a reliable picture [could] be obtained of the price level that was in fact economically justified' (point 34 of his Opinion), was not therefore followed by the Court.

190. Similarly, the Court of First Instance held in Case T5/97 Industrie des poudres sphériques v Commission [2000] ECR II3755 that the fact that the applicant, which had complained of an alleged practice of margin squeezing, cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising [the dominant undertaking's] pricing policy as abusive' (paragraph 179).

191. Finally, in its Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82 EC] (Case No IV/30.178 Napier Brown - British Sugar) (OJ 1988 L 284, p. 41; the Napier Brown/British Sugar decision'), the Commission also took the view that a margin squeeze should be calculated on the basis of the charges and costs of the vertically integrated dominant operator (recital 66). It finds in that decision that [t]he maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for a raw material to the companies which compete with the dominant company in the production of the derived product [on the one hand] and the price which it charges for the derived product [on the other], which is insufficient to reflect that dominant company's own costs of transformation (in this case the margin maintained by British Sugar between its industrial and retail sugar prices compared to its own repackaging costs) with the result that competition in the derived product is restricted, is an abuse of dominant position' (recital 66).

192. It must be added that any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure - information which is generally not known to the dominant undertaking - the latter would not be in a position to assess the lawfulness of its own activities.

193. The Commission was therefore correct to analyse the abusive nature of the applicant's pricing practices solely on the basis of the applicant's particular situation and therefore on the basis of the applicant's charges and costs.

194. Since it is necessary to consider whether the applicant itself, or an undertaking just as efficient as the applicant, would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access charges as an internal transfer price, the applicant's argument that its competitors are not seeking to replicate its own customer pattern and can acquire additional revenue from innovative products which they alone supply on the market (as to which the applicant provides no details however) is ineffective. For the same reasons, the argument that competitors can exclude the possibility of (pre)selection cannot succeed.

- Complaint that the Commission took into account only revenues from all access services and excluded revenues from other services, particularly those from call services

195. First, it is necessary to consider whether, for the purposes of calculating the margin squeeze, the Commission was entitled to take into account only revenues from the applicant's access services, and to exclude revenues from other services, such as call services.

196. It must be borne in mind first of all that the Community legal framework in place since 1990 aims to create the conditions for effective competition in telecommunications markets. Thus, Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13), which, as regards the tariff structure of incumbent operators, makes a distinction between the initial connection, the monthly rental, local calls, regional calls and long-distance calls, aims to effect tariff rebalancing between those different elements on the basis of actual costs, in order to ensure full competition in telecommunications markets. Specifically, that operation had to take the form of a reduction in the charges for regional and international calls and an increase in connection charges, the monthly rental and local call rates (Opinion of Advocate General Léger in Case C500/01 Commission v Spain [2004] ECR I583, point 7). The Member States were bound to phase out the restrictions on tariff rebalancing as soon as possible after the entry into force of Directive 96/19 and at the latest by 1 January 1998 (Commission v Spain , paragraph 32).

197. As the Commission correctly observes in recital 120 to the contested decision, [s]eparate consideration of access charges and call charges is in fact [therefore] required by the Community-law principle of tariff rebalancing'.

198. Next, it must be noted that, by decision No 223a of the BMPT, the applicant was obliged to offer its competitors fully unbundled access to the local loop with effect from June 1997. However, a system of undistorted competition between the applicant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C462/99 Connect Austria [2003] ECR I5197, paragraph 83, and Joined Cases C327/03 and C328/03 ISIS Multimedia and Firma O2 [2005] ECR I8877, paragraph 39).

199. While it is true that, from the point of view of the end-user, access services and call services constitute a whole, the fact remains that, as far as the applicant's competitors are concerned, the provision of call services to end-users via the applicant's fixed network requires access to the local loop. Equality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors - presumed to be just as efficient as the incumbent operator - to reflect all the wholesale costs in their retail prices. However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to local network access by higher call charges, which would also distort competition in telecommunications markets.

200. Therefore it follows that, even if, as the applicant claims, it were true that access services and telephone calls constitute a cluster' as far as the end-user is concerned, the Commission was entitled to conclude in recital 119 to the contested decision that, in order to assess whether the applicant's pricing practices distort competition, it was necessary to consider the existence of a margin squeeze in relation to access services alone, and thus without including telephone call charges in its calculation.

201. Furthermore, the calculation offsetting access charges and call charges to which the applicant refers itself confirms that the applicant and its competitors are not on an equal footing as regards local network access, which is, however, a prerequisite for undistorted competition in the telephone calls market.

202. In any event, since the applicant significantly lowered its telephone call charges in the period covered by the contested decision (see paragraph 19 above), it is conceivable that competitors did not even have the economic opportunity to offset charges suggested by the a pplicant. In fact, the competitors, already at a competitive disadvantage by comparison with the applicant in relation to local network access, had to apply even lower call charges than the applicant in order to encourage potential customers to discontinue their subscription to the applicant and to subscribe to them instead.

203. It follows from the foregoing that, for the purposes of calculating the margin squeeze, the Commission was entitled to take account only of revenues from access services and to exclude revenues from other services, such as call services.

204. Second, as regards the applicant's argument that its competitors are interested only in higher-value markets, namely (in the present case) the broadband market in which there is no margin squeeze and therefore no need to take account of analogue access services for end-users, it must be borne in mind for the purposes of calculating the margin squeeze that, for the applicant's competitors, broadband access necessarily involves access to analogue or ISDN lines (see paragraph 148 above). Moreover, the first intervener, a competitor of the applicant, claims that its absence from the analogue access services market is the result of the abuse of the applicant's dominant position and not of its own free choice. In any event, as has been noted in paragraphs 186 to 193 above, the abusive nature of the applicant's pricing practices must be assessed on the basis of the applicant's particular situation and therefore on the basis of its charges and costs. The assessment of the abusive nature of the applicant's pricing practices cannot therefore be influenced by any preferences which the applicant's competitors may have for one or other market.

205. The Court notes that, at the retail level, the applicant offers analogue, ISDN and ADSL access services, all of which constitute a single service at wholesale level.

206. In those circumstances, the Commission was entitled to take the view in the contested decision (recital 111) that, in order to calculate the margin squeeze, the price of wholesale access had to be compared to the weighted average of retail prices for all access services, namely analogue narrowband access, digital narrowband access (ISDN) and broadband access in the form of ADSL services.

207. This complaint cannot therefore be upheld.

- Complaint that the discontinuance charge for wholesale access was included in the margin squeeze calculation

208. As the contested decision shows (recitals 18, 149 and 151), the charge for discontinuing a connection was taken into account by the Commission in its calculation of the total cost of the applicant's wholesale access. The Commission explains in the contested decision (recital 151) that

[t]he discontinuance charge is payable for re-connecting an unbundled line to [the applicant's] network and is imposed only on competitors at wholesale level', and that [t]he discontinuance charge and the charge for access provision are the only one-off wholesale charges which competitors must pay to [the applicant]'.

209. As regards the applicant's argument that the discontinuance charge cannot be regarded as part of the one-off charge for wholesale access, it must be pointed out that, until 10 February 1999, the applicant itself included the discontinuance charge in the cost of taking over a connection which it charged its competitors. It follows from recitals 18 and 22 and Table 9 of the contested decision - which have not been challenged by the applicant - that a separate discontinuance charge was imposed only from 10 February 1999, giving rise to a concomitant reduction in the takeover charge.

210. It must also be noted that there is no dispute about the fact that the average end-user keeps his telephone subscription for a period of [confidential] months (recital 148 to the contested decision). Since the discontinuance charge is payable to the applicant by the competing recipient of wholesale access, when one of that recipient's end-users discontinues his subscription for access services, the discontinuance charge forms part of the total cost of the wholesale service which must be reflected in the retail prices of the applicant's competitors.

211. Accordingly, the Commission was correct to include the discontinuance charge in the calculation of the total cost of wholesale access for the purpose of calculating the margin squeeze.

212. Therefore, this complaint too is unfounded.

213. It follows from all the foregoing that the second part of the first plea in law must be rejected.

3. Third part: alleged calculation error in the finding of a margin squeeze

(a) Arguments of the parties

214. The applicant submits that the Commission made a mistake in calculating the margin squeeze in Table 11 of the contested decision. The table, which relates to the applicant's product-specific costs in 2001, includes in respect of ISDN narrowband connections (TISDN) - with the exception of data relating to TISDN multi-device mode, standard and comfort - data from Table 3 of the contested decision relating to 2002. In addition, the data relating to TISDN multi-device mode, standard and comfort in Table 11 of the contested decision do not correspond to any of the data in Tables 3 to 7 of the contested decision. In order for it to be correct, the weighting of product-specific costs for 2001 should have been based solely on the numbers of connections referred to in Table 4 of the contested decision for 2001. On the basis of those data, the weighted product-specific costs amount to only EUR [confidential], or EUR [confidential] less than the figure calculated by the Commission. The margin squeeze found by the Commission should be reduced by the same amount.

215. The Commission acknowledges the calculation error identified by the applicant but contends that the error does not affect the lawfulness of the contested decision.

(b) Findings of the Court

216. The calculation error, which has been admitted by the Commission in its defence, concerns the calculation of the applicant's product-specific costs in 2001.

217. That error does not, however, affect the lawfulness of the contested decision.

218. As regards the period from 1998 to 2001, the Commission did not take the applicant's product-specific costs into account in classifying the applicant's pricing policy as abusive. In the contested decision (recital 153), the Commission concluded from the existence of a negative spread between the applicant's wholesale and retail prices that the applicant's pricing policy constituted an infringement. The

finding as to the applicant's infringement during that period is therefore not at all affected by the error in calculating the applicant's product-specific costs in 2001.

219. By contrast, from 2002 onwards, the Commission classified the applicant's pricing practices as an infringement because the applicant's product-specific costs associated with retail access services exceeded the positive spread between the applicant's wholesale and retail prices. In order to make that calculation, the Commission relied in the contested decision on the applicant's product-specific costs in 2001 (recitals 159 and 160).

220. Thus, the Commission reached the following conclusions concerning the margin squeeze calculation in Table 12 of the contested decision:

Table 12

(in euros)

>lt>12

221. It must be observed that, so far as this part of the plea is concerned, the applicant does not object to the reference to its product-specific costs in 2001 (recital 159 to the contested decision) for the purposes of calculating the margin squeeze from 1 January 2002. It merely claims that its product-specific costs for 2001 were calculated incorrectly.

222. If the Commission had not made the calculation error complained of, the product-specific costs for 2001 should, as the applicant points out, have been fixed at EUR [confidential] (see paragraph 214 above). However, even if those product-specific costs were taken into account without the calculation error, there would still be a margin squeeze throughout the period of the infringement covered by the contested decision.

223. Owing to the fact that the unfair - within the meaning of Article 82 EC - nature of the applicant's pricing practices is linked in the contested decision (recitals 163 and 201) to the very existence of the margin squeeze rather than to its precise spread, the Commission's calculation error does not affect the lawfulness of the contested decision.

224. It therefore follows that the third part of this plea is ineffective.

4. Fourth part: the margin squeeze identified had no effect on the market

(a) Arguments of the parties

225. First, the applicant submits that the finding of a margin squeeze resulting from the pricing practice of a dominant undertaking does not constitute an abuse per se. The Commission should therefore have considered the actual effects of the conduct in question but failed to do so in the contested decision. In view of the fact that RegTP sets wholesale charges on the basis of the applicant's costs, the evidence of actual restriction of competition should be substantiated.

226. The applicant notes the two aspects of the concept of abuse, namely that the activities complained of (i) are characterised by the recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators and (ii) actually hinder competition (Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 91). The Community judicature thus requires evidence that the conduct complained of constitutes a barrier to the entry of other competitors or helps to remove competitors already in the market. In support of its case, the applicant refers to the case-law of the Court of Justice (AKZO v Commission , cited in paragraph 189 above, paragraph 72; Case C333/94 P Tetra Pak v Commission [1996] ECR I5951, paragraph 41; and Joined Cases C395/96 P and C396/96 P Compagnie maritime belge transports and Others v Commission [2000] ECR I1365, paragraphs 111 and 119), and also to the Commission's practice in taking decisions (recital 66 to the Napier Brown/British Sugar

decision), and to that of RegTP and of the FCC. It is only in the exceptional case of a sale at a price below the average variable costs that the Community judicature has deemed a pricing practice to be intrinsically abusive.

227. In its reply, the applicant explains that the principles developed by the Court in relation to predatory pricing should be applied to a margin squeeze in a case where wholesale prices are fixed by a regulatory authority. The Commission should therefore produce evidence that the margin squeeze in question actually impairs competition. Since wholesale charges are fixed by RegTP on the basis of costs, that evidence is available only where - after excluding competitors from the market - the dominant undertaking would be in a position, by increasing its retail prices, to offset the losses incurred during that exclusionary stage as a result of its low-price policy. However, in the present case, any such attempt by the applicant would immediately entail its competitors' return to the market.

228. Second, the applicant denies that its charges were a barrier to entry to the market or that they excluded its competitors from the market.

229. There are genuine opportunities for the applicant's competitors to enter the market. The applicant notes in that regard that its competitors can cross-subsidise call charges and connection charges, or variable and fixed charges, in order to make up any deficit in relation to connections. The option of excluding (pre)selection for all connections, which is available to the applicant's competitors but not to the applicant itself (see paragraph 156 above), enables competitors to calculate their revenues from call charges much more accurately than the applicant is able to. The applicant's competitors thus have a turnover on call charges by connection that is significantly higher than that of the applicant, and moreover highly predictable. The replies of the applicant's competitors to the request for information of 19 January 2000 and RegTP's decision of 29 April 2003 confirm that those competitors can cross-subsidise connection and call charges. The applicant refers also to its observations of 29 July 2002 on the statement of objections and to the documents cited in those observations. Finally, according to research carried out by the applicant, all its competitors have been able to achieve positive margins on direct costs by cross-subsidising their fixed and variable charges for each type of connection and therefore also for analogue lines.

230. In addition, since the liberalisation of the German telecommunications market, a number of competitors have been able to gain significant market shares in urban areas. The applicant refers in that regard to KomTel, a company which, according to its own statements in a press release of 31 May 2002, achieved a 43% market share of connections in Flensburg. According to the applicant's calculations based on lines rented to its competitors, in other local areas served, the market shares of other suppliers are, for example, [confidential]. Thus, since 1998, the applicant has lost [confidential] end-users to its competitors. Once a competitor has entered a local market, it becomes economically viable for that competitor to create its own infrastructure. Entry to the market should naturally begin with lucrative customers, so that new groups of customers can be acquired with the profits thus made (letter of 15 October 2002 from Colt, one of the applicant's competitors, to the applicant). The same applies in respect of highly-urbanised areas being taken as a springboard for competition at a regional level. In any event, competition in Germany has developed more favourably than in the other Member States. Thus, in the Community as a whole, the applicant is responsible for more than 81% of rentals of unbundled local network access.

231. In its reply, the applicant states that Colt and Arcor are now active on the national market, and EWE TEL in large areas of northern Germany, as suppliers of telephone lines. The Commission failed to produce evidence of the causal link between the alleged margin squeeze and the allegedly sluggish development of competition. The applicant's market position in the broadband sector cannot be attributed to the margin squeeze, as there was no margin squeeze in that sector of the market.

232. The Commission and the first and second interveners contend that this part of the plea should be rejected.

(b) Findings of the Court

233. It must be borne in mind that an abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Hoffmann-La Roche v Commission , cited in paragraph 226 above, paragraph 91; AKZO v Commission , cited in paragraph 189 above, paragraph 69; order of the Court of 23 February 2006 in Case C171/05 P Piau v Commission , not published in the ECR, paragraph 37; Irish Sugar v Commission , cited in paragraph 122 above, paragraph 111).

234. According to the Commission, the applicant's pricing practices restricted competition in the market for retail access services. It reaches that conclusion in the contested decision (recitals 179 and 180) on the basis of the very existence of the margin squeeze. It maintains that it is not necessary to demonstrate an anti-competitive effect, although, in the alternative, it examines that effect in recitals 181 to 183 to the contested decision.

235. Given that, until the entry of a first competitor on the market for retail access services, in 1998, the applicant had a monopoly on that retail market, the anti-competitive effect which the Commission is required to demonstrate relates to the possible barriers which the applicant's pricing practices could have created for the growth of competition in that market.

236. In that respect it must be borne in mind that the applicant owns the fixed telephone network in Germany and, moreover, that it is not disputed that, as the Commission notes in recitals 83 to 91 to the contested decision, there was no other infrastructure in Germany at the time of the adoption of the decision that would have enabled competitors of the applicant to make a viable entry onto the market in retail access services.

237. Having regard to the fact that the applicant's wholesale services are thus indispensible to enabling a competitor to enter into competition with the applicant on the downstream market in retail access services, a margin squeeze between the applicant's wholesale and retail charges will in principle hinder the growth of competition in the downstream markets. If the applicant's retail prices are lower than its wholesale charges, or if the spread between the applicant's wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as the applicant would not be able to enter the retail access services market without suffering losses.

238. Admittedly, as the applicant maintains, its competitors will normally resort to cross-subsidisation, in that they will offset the losses suffered on the retail access market with the profits made on other markets, such as the telephone calls markets. However, in view of the fact that, as the owner of the fixed network, the applicant does not need to rely on wholesale services in order to be able to offer retail access services and therefore, unlike its competitors, does not have to try to offset losses suffered on the retail access market on account of the pricing practices of a dominant undertaking, the margin squeeze identified in the contested decision distorts competition not only on the retail access market but also on the telephone calls market (see paragraphs 197 to 202 above).

239. Furthermore, the small market shares acquired by the applicant's competitors in the retail access market since the market was liberalised by the entry into force of the TKG on 1 August 1996 are evidence of the restrictions which the applicant's pricing practices have imposed on the

growth of competition in those markets. Thus, the applicant explained at the hearing that it did not dispute the findings in the contested decision (recital 181) that, at the time of the adoption of the contested decision, all of its competitors in Germany held market shares of only 4.4% in narrowband access and 10% in [broadband] access' and that, at the end of 2002 all 64 competitors together held only 2.35 million of the total of 53.72 million telephone channels in Germany'.

240. In addition, it is not disputed that, taking only analogue connections into consideration - which, at the time of adoption of the contested decision, accounted for 75% of all connections in Germany - the applicant's competitors' share fell from 21% in 1999 to 10% in 2002 (recital 182 to the contested decision).

241. The applicant nevertheless maintained that numerous competitors have been able to gain significant market shares in urban areas.

242. In that respect, it must be noted that the applicant does not challenge the definition of the market contained in the contested decision (recitals 92 to 95), according to which the relevant geographic market is the German market. The progress made by some of the applicant's competitors in certain urban areas does not therefore affect the finding that the applicant's competitors have, overall, acquired only small market shares in the relevant geographic market in retail access services.

243. Moreover, the fact that competition has developed less favourably in the other Member States does not show that the applicant's pricing practices had no anti-competitive effect in Germany, which is the relevant geographic market. The purportedly less favourable situation in the other Member States could be linked to the fact that the markets in the services concerned were liberalised later, after 1 June 1997, the date on which the applicant was obliged under the relevant German law to offer its competitors fully unbundled access to the local loop (see paragraph 198 above). It must be noted in that regard that Article 3 of Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) imposes such an obligation on incumbent operators only from 31 December 2000. The purportedly less favourable situation in the other Member States could also be linked to the existence of other infringements of Community competition law. In any event, even on the assumption that the Commission failed to fulfil certain of its obligations under Article 211 EC by failing to ensure that Community law on competition in the telecommunications sector is applied in other Member States, that fact cannot justify the applicant's infringement of Article 82 EC in this case in the same sector (van Landewyck and Others v Commission , cited in paragraph 86 above, paragraph 84; Case T148/89 Tréfilunion v Commission [1995] ECR II1063, paragraph 127; and Joined Cases T25/95, T26/95, T30/95 to T32/95, T34/95 to T39/95, T42/95 to T46/95, T48/95, T50/95 to T65/95, T68/95 to T71/95, T87/95, T88/95, T103/95 and T104/95 Cimenteries CBR and Others v Commission [2000] ECR II491, paragraph 2559).

244. Finally, as regards the argument put forward in the reply that two of the applicant's competitors are now' active on the national market, it must be borne in mind that, in the context of an action for annulment under Article 230 EC, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 France v Commission [1979] ECR 321, paragraph 7, and Case T395/94 Atlantic Container Line and Others v Commission [2002] ECR II875, paragraph 252). In any event, the applicant, which fails to quantify the extent to which competitors are present on the national market, does not produce any evidence to rebut the findings in recitals 180 to 183 to the contested decision that its pricing practices actually restrict competition on the German retail access market.

245. It follows that the final part of the first plea in law must be rejected.

B - Second plea in law: the defective nature of the operative part of the contested decision

1. Arguments of the parties

246. The applicant notes first of all that Article 1 of the contested decision concludes that the applicant has infringed Article 82(a) EC by charging its competitors and end-users unfair monthly and one-off charges for access to the local network'. According to the operative part, the applicant's wholesale charges and retail prices are therefore unfair. However, the applicant's charges as such have not been described as unfair in the grounds of the contested decision. It is only the relationship between wholesale charges and retail prices that has been deemed to be abusive as a result of the alleged margin squeeze. The operative part of the contested decision is therefore not supported by the grounds of the decision.

247. Next, the applicant notes that Article 2 of the operative part of the contested decision orders it to bring to an end the infringement referred to in Article 1 and to refrain from repeating any act or conduct described in that article. However, besides the fact that the order in Article 2 is at odds with the grounds of the contested decision, it cannot be complied with because the applicant is not in a position to influence the price of wholesale access.

248. Finally, in its reply, the applicant further submits that Article 1 of the operative part is also defective because the Commission finds there that the applicant has infringed Article 82 EC by charging unfair charges. However, the applicant has no leeway in the charging of those charges (see paragraph 73 above).

249. The Commission contends that this plea should be rejected.

2. Findings of the Court

250. Article 1 of the contested decision finds that the applicant has infringed Article 82(a) [EC] by charging its competitors and end-users unfair monthly and one-off charges for access to the local network, thus significantly impeding competition on the market for access to the local network'.

251. Contrary to the applicant's claim, Article 1 of the contested decision does not state that both the applicant's charges for wholesale services and its retail prices must be regarded as being unfair.

252. The operative part of the contested decision must be read in the light of the grounds of that decision (Joined Cases T5/00 and T6/00 Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission [2003] ECR II5761, paragraph 374). Thus it is clear that [t]he abuse committed by [the applicant] consists in the imposition of unfair prices in the form of a margin squeeze to the detriment of its competitors' (recital 201 to the contested decision). The abuse committed takes the form of a margin squeeze generated by a disproportion between wholesale charges and retail charges for access to the local network' (recital 57 to the contested decision) and is described as the unfair pricing' abuse (recital 163 to the contested decision).

253. It follows from the foregoing that Article 1 of the contested decision, read in the light of the grounds of that decision, must be interpreted as meaning that where the Commission describes the charges for opening a new connection and the monthly charge for access to the local network as being unfair, it is referring to the relationship between the applicant's wholesale charges and retail charges. There is no contradiction therefore between the grounds and the operative part of the contested decision.

254. In view of the foregoing, the order in Article 2 of the contested decision is not vitiated by illegality either. Although the applicant could not influence the charges for wholesale services, it did in any event have scope to increase its retail prices for ADSL access services (see paragraphs 141 to 151 above).

255. Finally, the distinction between charging and fixing charges, which the applicant made for the first time in its reply, must be rejected as being inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance.

256. It follows from all the foregoing that the second plea in law must be rejected.

C - Third plea in law: misuse of powers and infringement of the principles of proportionality, legal certainty and protection of legitimate expectations

1. Arguments of the parties

257. The applicant submits that, by encroaching on the powers of RegTP, the Commission misused its powers and infringed the principles of proportionality, legal certainty and protection of legitimate expectations.

258. It recalls that, under Community law, principal responsibility for telecommunications price-control is vested in the national authorities, such as RegTP. It refers in that regard to the recitals of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), Article 17 of Directive 98/10, Article 4(1) of Regulation No 2887/2000, Article 13(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ 2002 L 108, p. 7), paragraphs 19 and 22 of the Commission's Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector, entitled Framework, relevant markets and principles', and page 61 et seq. of the Communication from the Commission entitled Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia and high-speed internet communication' (OJ 2000 C 272, p. 55). In that context, the national regulatory authorities are required to take account of Community law objectives, including that underlying Article 82 EC. According to the applicant, it follows that if the Commission considered RegTP's pricing decisions to have infringed Community law, it should have initiated proceedings against Germany for failure to fulfil obligations.

259. The applicant submits furthermore that, both in the regulation of the indices of retail price ceilings and in the setting of wholesale access charges, RegTP analysed whether there was a margin squeeze between wholesale and retail prices that would actually restrict competition, and concluded that there was no such margin squeeze. The applicant refers in that regard to the decisions of RegTP of 8 February 1999, 23 December 1999, 30 March 2001, 21 December 2001, 11 April 2002, and in particular to that of 29 April 2003. The decisions of RegTP gave rise to a legitimate expectation on the part of the applicant which deserves protection (Joined Cases 205/82 to 215/82 Deutsche Milchkontor and Others [1983] ECR 2633, paragraphs 30 and 31).

260. RegTP has opted in its pricing policy for a slight rebalancing of connection charges and call charges (decisions of RegTP of 21 December 2001 and of 11 April 2002). The applicant explains that, for socio-political reasons, the connection charges applied by Deutsche Bundespost were low - and thus advantageous for end-users - and resulting losses were offset through cross-subsidisation with revenues from call charges, which were set high. As a result, by decisions of 9 December 1997 and 23 December 1999 in price cap proceedings, the BMPT and then RegTP initially combined connection and call charges for businesses and for individuals in one basket. The price indices thus fixed were valid until the end of 2001. Subsequently, by its price cap decision of 21 December 2001, RegTP itself directly organised the progressive price restructuring envisaged. It separated the baskets for connections and calls and set price indices in respect of four separate baskets of services (see paragraph 20 above). However, it is apparent from that same decision of RegTP of 21 December 2001 that RegTP deliberately declined to introduce a rule in which connection charges are fixed

in isolation on the basis of costs.

261. Accordingly, the applicant submits that RegTP alone is responsible for the margin squeeze alleged by the Commission. The alleged margin squeeze is the direct consequence of regulatory decisions of RegTP and previously of the BMPT, and of the regulatory approach underpinning them. The Commission is wrong to find that the applicant has infringed Article 82 EC, because the applicant was simply complying with the binding decisions of RegTP, which gave rise to a legitimate expectation by the applicant. Through the medium of the contested decision, the Commission is subjecting the applicant's pricing practices to double regulation, thereby infringing the principle of proportionality and the legal certainty guaranteed by the division of powers under Community law in relation to charges in the telecommunications sector. Furthermore, by adopting the contested decision, the Commission is trying to correct the German authorities' exercise of their own regulatory powers, whereas it should to that end have initiated proceedings for failure to fulfil obligations. By proceeding in this way, the Commission has misused its powers.

262. The Commission and the first and second interveners contend that this plea should be rejected.

2. Findings of the Court

263. In the first place, as regards the applicant's complaint that the Commission has subjected the applicant's pricing practices to double regulation and thereby infringed the principles of proportionality and of legal certainty, it must be held that the legal framework to which the applicant refers in paragraph 258 above does not affect the powers which the Commission derives directly from Article 3(1) of Regulation No 17 and, since 1 May 2004, from Article 7(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1) to find infringements of Articles 81 EC and 82 EC.

264. It has already been held that, between 1 January 1998 and 31 December 2001, the applicant had sufficient scope to end the margin squeeze identified in the contested decision and, from 1 January 2002, sufficient scope to reduce that margin squeeze (see paragraphs 97 to 151 above). Its conduct therefore falls within the scope of Article 82 EC.

265. While it is not inconceivable that the German authorities also infringed Community law - particularly the provisions of Directive 90/388, as amended by Directive 96/19 - by opting for a gradual rebalancing of connection and call charges, such a failure to act, if it were to be established, would not remove the scope which the applicant had to reduce the margin squeeze.

266. The first complaint cannot therefore be upheld.

267. In the second place, as regards the complaint relating to the protection of legitimate expectations, it must be borne in mind that, in a number of decisions taken in the period covered by the contested decision, RegTP did in fact consider whether a margin squeeze resulted from the applicant's charges. However, in its decisions, after finding the negative spread between the applicant's wholesale and retail prices, RegTP took the view in each case that other operators should be able to offer their end-users competitive prices by resorting to cross-subsidisation of access services and call services (see paragraphs 115 to 119 above).

268. The fact remains that RegTP's decisions do not include any reference to Article 82 EC (see paragraph 114 above). In addition, RegTP's statement that [c]ompetitors are not so prejudiced with regard to their competitive opportunities in the local network by the slight difference between retail and wholesale prices as to make it economically impossible for them to enter the market successfully or even to remain in the market' (decision of RegTP of 29 April 2003) does not imply that the applicant's pricing practices do not distort competition within the meaning of Article 82 EC. On the contrary, it follows implicitly but necessarily from RegTP's decisions that the applicant's

pricing practices have an anti-competitive effect, since the applicant's competitors have to resort to cross-subsidisation in order to be able to remain competitive on the market in access services (see paragraphs 119 and 238 above).

269. In those circumstances, RegTP's decisions could not have created for the applicant a legitimate expectation that its pricing practices were compatible with Article 82 EC. It must be observed furthermore that, in its judgment of 10 February 2004 setting aside the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002, the Bundesgerichtshof confirmed that the administrative examination procedure [undertaken by RegTP] does not preclude the possibility in practice of an undertaking submitting a charge by which it abuses its dominant position and obtains authorisation for it because the abuse is not revealed during the examination procedure'.

270. In the third place, as regards the applicant's complaint that the Commission misused its powers, it must be observed that a measure is only vitiated by misuse of powers if it is evident, on the basis of objective, relevant and consistent evidence, that it was taken with the exclusive or main purpose of achieving an end other than that stated (see Joined Cases C186/02 P and C188/02 P Ramondín and Others v Commission [2004] ECR I10653, paragraph 44, and the case-law cited).

271. In the contested decision, the Commission refers only to the applicant's pricing practices and not to the decisions of the German authorities. Even if RegTP had infringed a Community rule and even if the Commission could have initiated proceedings against the Federal Republic of Germany for failure to fulfil obligations, such possibilities cannot affect the lawfulness of the contested decision. In that decision, the Commission merely found that the applicant had committed an infringement of Article 82 EC, a provision which concerns only economic operators, not the Member States. The Commission did not therefore misuse its powers by making that finding on the basis of Article 82 EC.

272. The final plea in law therefore cannot be upheld either.

II - The alternative form of order sought, seeking a reduction of the fine imposed

273. The applicant puts forward six pleas in law in support of the alternative form of order sought. The first relates to an infringement of the rights of defence and the second to an infringement of Article 253 EC. The third plea in law is based on the applicant's lack of negligence and intentional fault and the fourth on the insufficiency of the account taken of charges legislation in calculating the level of the fine. The fifth plea in law concerns the calculation of the duration of the infringement, and the sixth, the failure to take account of attenuating circumstances.

A - First plea in law: infringement of the rights of defence

1. Arguments of the parties

274. The applicant submits that the Commission infringed Article 19(1) of Regulation No 17 in relation to the rights of defence by failing in its statement of objections of 2 May 2002 and in its supplementary letter of 21 February 2003 to carry out a factual or legal analysis as to whether the alleged infringement had been committed intentionally or negligently' (Joined Cases 100/80 to 103/80 Musique diffusion française and Others v Commission [1983] ECR 1825, paragraph 21; order in Case C137/95 P SPO and Others v Commission [1996] ECR I1611, paragraph 53; Case T9/99 HFB and Others v Commission [2002] ECR II1487, paragraph 311). In order to be reasonably able to defend itself, the applicant should have been informed during the administrative procedure of the facts on the basis of which the Commission was accusing it of such fault or negligence.

275. The Commission contends that this plea should be rejected.

2. Findings of the Court

276. It must be observed at the outset that the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions) are set out in the first subparagraph of Article 15(2) of Regulation No 17. These include the condition that the infringement was committed intentionally or negligently (order in SPO and Others v Commission , cited in paragraph 274 above, paragraph 53).

277. Next, it must be observed that the Commission is required to give a brief provisional assessment in the statement of objections as to the duration of the alleged infringement, its gravity and the question whether, in the circumstances of the case, the infringement was committed intentionally or negligently. However, the adequacy of that provisional assessment, the purpose of which is to give the addressees of the statement of objections an opportunity to defend themselves, must be evaluated in relation not only to the wording of the measure in question but also to its context and the entirety of the legal rules governing the matter concerned (Case T48/00 Corus UK v Commission [2004] ECR II2325, paragraph 146).

278. It must be held that the Commission informed the applicant in the statement of objections (paragraphs 95 to 140) that it considered the applicant's pricing practices, and in particular the margin squeeze resulting from the negative or insufficient spread between its wholesale and retail prices, to be in breach of Article 82 EC. Furthermore, in the statement of objections (paragraphs 141 to 152), the Commission examined the applicant's scope to set its charges and thus addressed the issue of the applicant's culpability with regard to the activities criticised.

279. In those circumstances, it must be concluded that the information supplied in the statement of objections concerning the initial conditions laid down by the first subparagraph of Article 15(2) of Regulation No 17 was sufficiently precise. Moreover, since infringements committed negligently are not, in competition terms, less serious than those committed intentionally (order in SPO and Others v Commission , cited in paragraph 274 above, paragraph 55), the applicant did not need to receive more detailed information about its culpability in order to be reasonably able to exercise its rights of defence.

280. In any event, it must be held that the applicant did in fact exercise its rights of defence on that point since it denied its culpability in its reply to the statement of objections, referring to the national regulation of its charges.

281. The first plea in law must therefore be rejected.

B - Second plea in law: infringement of Article 253 EC

1. Arguments of the parties

282. The applicant observes that the contested decision must set out the grounds on which the Commission considers that the conditions for the imposition of a fine are satisfied (Remia and Others v Commission , cited in paragraph 185 above, paragraph 26; Case T44/90 La Cinq v Commission [1992] ECR II1, paragraph 43; and Case T7/92 Asia Motor France and Others v Commission [1993] ECR II669, paragraph 30). The contested decision, which does not contain any grounds relating to the applicant's negligence or to its intention to commit the infringement, infringes Article 253 EC; the fine should therefore be annulled.

283. The Commission contends that this plea should be rejected.

2. Findings of the Court

284. It must be noted as a preliminary point that the obligation to state reasons laid down under Article 253 EC is an essential procedural requirement, unlike the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. From that point of view, the statement of reasons required by Article 253 EC must be appropriate to the act at

issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review (C17/99 France v Commission [2001] ECR I2481, paragraph 35).

285. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (France v Commission , cited in paragraph 284 above, paragraph 36, and Case C113/00 Spain v Commission [2002] ECR I7601, paragraph 48).

286. First, it must be held that the contested decision (second citation) contains a reference to Article 15(2) of Regulation No 17. The first subparagraph of Article 15(2) lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions). These include the condition that the infringement was committed intentionally or negligently (order in SPO and Others v Commission , cited in paragraph 274 above, paragraph 53).

287. Second, the Commission sets out in detail in recitals 102 to 162 and 176 to 183 to the contested decision the grounds on which it considers the applicant's pricing practices to be abuses within the meaning of Article 82 EC and, in recitals 163 to 175, the grounds on which the applicant must be deemed responsible for the infringement found, in spite of the fact that the German authorities have to approve the applicant's charges.

288. In those circumstances, it must be concluded that the contested decision contains sufficient reasoning regarding the application to the present case of the initial conditions laid down under the first subparagraph of Article 15(2) of Regulation No 17.

289. This plea must therefore also be rejected.

C - Third plea in law: the applicant's lack of negligence or intentional fault

1. Arguments of the parties

290. The applicant maintains that it is guilty of neither negligence nor intentional fault.

291. First of all, it observes that its wholesale and retail charges were all authorised by decisions of the BMPT, then of RegTP. The applicant could thus legitimately assume that those charges were lawful. It submits that RegTP is a neutral and independent State body. It was for RegTP, rather than the applicant, to ascertain whether the wholesale and retail prices were compatible with Article 82 EC. In addition, in its judgment of 16 January 2002, the Oberlandesgericht Düsseldorf held that responsibility for the charges set by RegTP could not be attributed to the applicant.

292. Second, the applicant was informed by agents of the Commission in a meeting on 17 April 2000 that the proceeding relating to the applicant would not be pursued because the Commission had initiated proceedings against the Federal Republic of Germany for failure to fulfil obligations. It further submits that the Commission did not carry out any measures of inquiry between January 2000 and June 2001 - a period of approximately one and a half years. The applicant was entitled to infer from the Commission's conduct that the Commission did not have sufficient grounds to accuse the applicant of an abuse of dominant position, at least in respect of the period between January 2000 and June 2001. In its reply, the applicant further submits that it inferred from the initiation of the proceedings for failure to fulfil obligations, the suspension of the abuse proceeding and the explanations given by the Commission at the meeting on 17 April 2000, that the Commission had abandoned the objection relating to the infringement of Article 82 EC.

293. Third, the applicant observes that, in the absence of Community case-law and of previous Commission practice in taking decisions on margin squeezes in the telecommunications sector, it never doubted

that RegTP's assessment was correct. Furthermore, as a result of the administrative practice of RegTP, which has considered the margin squeeze issue on many occasions, the applicant could assume that the Commission would ultimately reach the same conclusion as RegTP.

294. The Commission and the second intervener contend that this plea should be rejected.

2. Findings of the Court

295. On the question as to whether the infringements were committed intentionally or negligently and are therefore liable to be punished by a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17, it has been held that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty (Case T65/89 BPB Industries and British Gypsum v Commission [1993] ECR II389, paragraph 165, and Case T83/91 Tetra Pak v Commission [1994] ECR II755, paragraph 238).

296. In the present case, the applicant could not be unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to fix its retail prices and, consequently, to reduce the margin squeeze by increasing those prices. In addition, the applicant could not be unaware that that margin squeeze entailed serious restrictions on competition, particularly in view of its monopoly on the wholesale market and its virtual monopoly on the market in retail access services (recitals 97 to 100 to the contested decision).

297. It follows that the initial conditions enabling the Commission to impose fines are fulfilled (order in SPO and Others v Commission , cited in paragraph 274 above, paragraph 53).

298. Furthermore, it must be held that the initiation of a pre-litigation procedure against the Federal Republic of Germany does not affect the initial conditions in the first subparagraph of Article 15(2) of Regulation No 17. The applicant could not be unaware that it had genuine scope to increase its retail prices and that its pricing practices were hindering the growth of competition in the market in local network access services, a market in which the degree of competition was already weakened as a result, in particular, of its presence (see, to that effect, Hoffmann-La Roche v Commission , cited in paragraph 226 above, paragraph 91).

299. Finally, the argument relating to RegTP's examination of the margin squeeze must be rejected for the reasons set out in paragraphs 267 to 269 above.

300. The third plea must therefore also be rejected.

D - Fourth and sixth pleas: insufficient account taken of charges legislation in calculating the level of the fine, and insufficient account taken of attenuating circumstances

1. Arguments of the parties

301. The applicant submits that the Commission was wrong to characterise the alleged infringement as serious. The applicant's contribution to the infringement was slight because the charges at issue were set by RegTP. The infringement could therefore at best be described as minor, in accordance with 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'). The applicant maintains that, by decision of 19 December 2002, RegTP had even rejected an application by the applicant for an increase in its retail charges beyond the ceiling prescribed, even though, in support of the application, the applicant had referred to the procedure initiated by the Commission as justification for exceeding that ceiling.

302. The 10% reduction in the basic amount of the fine to take account of the regulation of charges by RegTP is therefore insufficient. A reasonable doubt' as to whether the applicant's conduct

does indeed constitute an infringement' within the meaning of the Guidelines can be justified on the basis of RegTP's decisions. The applicant refers moreover to Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 - Deutsche Post AG - Interception of cross-border mail) (OJ 2001 L 331, p. 40; the Deutsche Post decision'), in which the Commission imposed only a symbolic fine, owing to the fact that the company in question had behaved in a manner which was in accordance with the case-law of the German courts, and no Community case-law existed concerning cross-border letter mail services.

303. The Commission should also have taken other attenuating circumstances into account when setting the fine, namely the lack of any serious restriction on competition and the fact that the applicant's low retail prices fulfil a social function.

304. In its reply, the applicant draws attention to the judgment of the Oberlandesgericht Düsseldorf of 16 January 2002. It observes that that court held that the levy of charges set by RegTP cannot constitute an abuse of the applicant's dominant position and that the mere lodging of a tariff application by the applicant is not sufficient to make the applicant responsible for an infringement of competition law. According to the Oberlandesgericht Düsseldorf, the applicant was under no obligation under competition law to make other applications. At most, a symbolic fine could have been imposed on the applicant, in view of the fact not only that the charges are partially in accordance with the case-law of the German courts (recital 193 to the Deutsche Post decision), but also that they have been mandatorily fixed by RegTP.

305. The Commission and the second intervener contend that this plea should be rejected.

2. Findings of the Court

306. In recitals 206 and 207 to the contested decision, the Commission characterised the infringement as serious, not as very serious, in respect of the period from 1 January 1998 to 31 December 2001 on the grounds, first, that the weighted method applied to determine the margin squeeze was new and had not previously been the subject of a formal decision and, second, that the applicant had steadily reduced the margin squeeze since 1999 at least.

307. As regards the period from 1 January 2002 to May 2003, the Commission held that there was a minor infringement (recital 207 to the contested decision), because [the applicant's] only legal means of reducing the margin squeeze [was] limited to increases in the TDSL charges' (recital 206 to the contested decision). Furthermore, in respect of the same period, the Commission made no increase in the fine to reflect the duration of the infringement in view of the regulatory restrictions on [the applicant's] scope for adjusting tariffs' (recital 211 to the contested decision).

308. In recital 212 to the contested decision, the Commission treated the fact that the [applicant's] retail and wholesale charges in question in the current proceeding were subject to sector specific regulation since [1998] on national level until today' as an attenuating circumstance.

309. On the basis of the foregoing considerations, the Commission imposed a fine of EUR 12.6 million on the applicant in Article 3 of the contested decision. It determined the amount of the fine using the method which it had laid down in the Guidelines. Thus, in accordance with the second paragraph of Section 1A of the Guidelines, the amount of the fine to take account of the gravity of the infringement was set at EUR 10 million (recital 207 to the contested decision). Applying the first paragraph of Section 1B of the Guidelines, that amount was increased by 40% to take account of the duration of the infringement for the period from 1 January 1998 to 31 December 2001, which results in a basic amount of EUR 14 million (recital 211 to the contested decision). That figure was then reduced by 10% to take account of attenuating circumstances in accordance with Section 3 of the Guidelines.

310. It must be held that, contrary to the applicant's claim, the Commission was entitled to characterise the infringement as serious for the period from 1 January 1998 to 31 December 2001 (recital 207 to the contested decision). The pricing practices complained of strengthen the barriers to entry to the recently liberalised markets and thus jeopardise the proper functioning of the common market. In that regard, it must be borne in mind that the Guidelines (second paragraph of Section 1A) describe the exclusionary behaviour of dominant firms as serious infringements, or even very serious infringements if committed by undertakings holding a virtual monopoly.

311. As regards the intervention of RegTP in setting the applicant's tariffs, it must be borne in mind that, when the level of the penalty is set, the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a mitigating factor (see, to that effect, Suiker Unie and Others v Commission , cited in paragraph 89 above, paragraph 620, and CIF , cited in paragraph 86 above, paragraph 57).

312. At the hearing, the Commission explained that the 10% reduction of the fine to take account of the fact that the [applicant's] retail and wholesale charges... were subject to sector specific regulation since [1998] on national level' (recital 212 to the contested decision) relates to RegTP's intervention in setting the applicant's prices and to the fact that that national authority has, on several occasions during the period covered by the contested decision, considered the question of the existence of a margin squeeze resulting from the applicant's tariff practices.

313. Having regard to the Commission's discretion when determining the amount of a fine (Case T150/89 Martinelli v Commission [1995] ECR II1165, paragraph 59, and Joined Cases T109/02, T118/02, T122/02, T125/02, T126/02, T128/02, T129/02, T132/02 and T136/02 Bolloré and Others v Commission [2007] ECR II0000, paragraph 580), it must be held that the Commission duly took into account the matters referred to in the preceding paragraph when reducing the basic amount of the fine by 10%.

314. As regards the alleged social function fulfilled by the applicant, it must be observed that, according to Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are subject to the rules of the EC Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Even on the assumption that the applicant has been entrusted with a task of operating services of general economic interest within the meaning of that provision, the applicant fails to show why the pricing practices which have been criticised in the contested decision are necessary to the performance of that task. That argument cannot therefore be upheld.

315. The applicant refers again to the Deutsche Post decision and takes the view that the Commission should have imposed a symbolic fine on the applicant, as it did on the dominant undertaking in that decision.

316. In that regard, it must be observed first of all that, according to settled case-law, the fact that the Commission in the past imposed fines of a certain level for particular types of infringement does not mean that it is estopped from raising that level within the limits set by Regulation No 17, if that is necessary to ensure the implementation of Community competition policy. The proper application of the Community competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (see Bolloré and Others v Commission , cited in paragraph 313 above, paragraph 376, and the case-law cited).

317. Next, it must be held that the applicant's situation is fundamentally different from that of the undertaking referred to in the Deutsche Post decision.

318. It follows from recitals 192 and 193 to the Deutsche Post decision, which concerned abuse in relation to the processing of cross-border letter mail, that the Commission deemed it appropriate

to impose only a symbolic fine on the undertaking referred to in that decision on three grounds: (1) the undertaking concerned had behaved in accordance with the case-law of German courts; (2) there was no Community case-law relating specifically to the cross-border letter mail services concerned; and (3) the undertaking concerned had undertaken to introduce a procedure for the processing of incoming cross-border letter mailings which would avoid practical difficulties and facilitate the detection of future interference with free competition, should it occur.

319. In the present case, first, it must be noted that the only judgment of the German courts to which the applicant refers is the judgment of the Oberlandesgericht Düsseldorf, which was delivered on 16 January 2002, thus in the period during which the infringement was characterised in the contested decision as minor (recital 207). In any event, that judgment was set aside by the judgment of the Bundesgerichtshof of 10 February 2004. Second, it follows from the contested decision (recitals 106 and 206) that the Commission applied the same principles as those underlying the 1988 Napier Brown/British Sugar decision. In its Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles (paragraphs 117 to 119), the Commission had already announced that it proposed to apply the principles of the Napier Brown/British Sugar decision in the telecommunications sector. The only new element of the contested decision is the weighted approach which had to be used [because of] the fact that in Germany, a single wholesale tariff for local loop unbundling has been fixed, while the tariffs for the corresponding retail services differentiate between analogue, ISDN and ADSL lines' (recital 206 to the contested decision). However, the Commission took account of the novelty of that approach in characterising the infringement as serious', instead of as very serious', for the period from 1 January 1998 to 31 December 2001 (recital 206 to the contested decision). Finally, third, the applicant in the present case has not given any undertaking to avoid any other future infringement.

320. The three criteria laid down by the Deutsche Post decision have not been fulfilled in this case; therefore, the argument based on the approach adopted in that decision cannot be upheld.

321. It follows from all the foregoing that this plea must be rejected.

E - Fifth plea: incorrect assessment of the duration of the infringement

1. Arguments of the parties

322. The applicant notes that the Commission increased the amount of the fine on account of the purported gravity of the infringement during the period from 1998 to 2001. However, the Commission itself acknowledges in the contested decision (recital 208) that the applicant was aware of the abuse in its charge structure only from 1999.

323. The applicant claims that it was informed by agents of the Commission at the meeting on 17 April 2000 that the Commission would bring proceedings against the Federal Republic of Germany for failure to fulfil obligations. As a result of that information and the length of the administrative procedure, the Commission itself reinforced the applicant's belief that its charges did not contravene Article 82 EC, and thus helped to extend the duration of the infringement. The whole of that duration should not therefore be taken into account for the purposes of fixing the amount of the fine (Joined Cases 6/73 and 7/73 Istituto chemioterapico italiano and Commercial Solvents v Commission [1974] ECR 223, paragraph 51).

324. The Commission contends that this plea should be rejected.

2. Findings of the Court

325. In so far as the applicant calls into question in the context of the present plea the calculation of the duration of the infringement, it must be noted that, in the form of order sought in the alternative, the applicant seeks not only a reduction in the fine but also the partial annulment of Article

1 of the contested decision (Case T38/02 Groupe Danone v Commission [2005] ECR II4407, paragraphs 210 to 214).

326. As regards the assessment as to whether the plea in law is well founded, it must be borne in mind that the Commission refers in the contested decision to the complaints lodged by competitors of the applicant in 1999. According to the Commission, the applicant has therefore been aware since that time of the accusation of possible abuse in the charge structure for access to the local network' (recital 208 to the contested decision).

327. The fact that the applicant knew only from 1999 that it was being accused of abuse of its dominant position is irrelevant to the fact that its conduct constituted an infringement from 1 January 1998. An abuse' within the meaning of Article 82 EC is an objective concept (Hoffmann-La Roche v Commission , cited in paragraph 226 above, paragraph 91; AKZO v Commission , cited in paragraph 189 above, paragraph 69; order in Piau v Commission , cited in paragraph 233 above, paragraph 37; Irish Sugar v Commission , cited in paragraph 122 above, paragraph 111). The dominant undertaking's own knowledge of the abusive nature of its conduct is not, therefore, a prerequisite for the application of Article 82 EC.

328. The first argument must therefore be rejected.

329. The applicant's argument that the fine would have been lower if the decision had been adopted earlier cannot be upheld either, for it is purely hypothetical. Moreover, it must be pointed out that it is apparent from the contested decision (recital 211) that the Commission did not make any increase in the fine in respect of the period from 1 January 2002 to May 2003.

330. The second argument cannot therefore be accepted and the final plea in law must consequently be rejected in its entirety. Accordingly, the action must be dismissed.

Costs

331. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission.

332. In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, the interveners are to bear their own costs.

(1) .

(1) - Confidential data omitted.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
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11997E081 : N 85 - 89
11997E082 : N 85 - 89 106 - 124 145 223 243 264 268 269 271 278 287 327
11997E086-P2 : N 314
11997E211 : N 243
11997E230 : N 244
11997E253 : N 284 285
31962R0017 : N 316
31962R0017-A03P1 : N 263
31962R0017-A15P2 : N 286
31962R0017-A15P2L1 : N 276 279 295 298
31988D0518 : N 191 319
31991Q0530-A48P2 : N 138 150 255
31996L0019 : N 196 265
31998Y0114(01)-PT1LAL2 : N 309 310
31998Y0114(01)-PT1LBL1 : N 309
31998Y0822(01) : N 113 319
32000R2887-A03 : N 243
32001D0892 : N 317 318 320
32003D0707 : N 34 - 329
32003R0001-A07P1 : N 263
61973J0040 : N 89 311
61976J0015 : N 244
61976J0085 : N 233 298 327
61978J0209 : N 86 88 243
61981J0322 : N 122
61982J0240 : N 86 88
61983J0041 : N 86
61983J0123 : N 107
61984J0042 : N 185
61984J0142 : N 185
61986J0062 : N 189 233 327
61989A0065 : N 295
61989A0148 : N 243
61989A0150 : N 313
61991A0083 : N 295
61993A0513 : N 87 107
61994A0387 : N 89
61994A0395 : N 244
61995A0025 : N 243
61995J0219 : N 88
61995J0359 : N 85 88
61995O0137 : N 276 279 286 297
61997A0005 : N 190
61997A0228 : N 122 233 327
61998J0344 : N 120
61999J0017 : N 284 285
61999J0194 : N 185

61999J0462 : N 198
62000A0005 : N 252
62000A0048 : N 277
62000J0113 : N 285
62001A0203 : N 122
62001C0500 : N 196
62001J0198 : N 86 89 113 311
62001J0500 : N 196
62002A0038 : N 325
62002J0186 : N 270
62003J0327 : N 198
62005O0171 : N 233 327

SUB	Competition ; Rules applying to undertakings ; Dominant position
AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
NOTES	Zivy, Fabien: Droit communautaire - Procédure juridictionnelle - Droit d'intervenir dans un litige - Tierce personne autre qu'un Etat membre ou une institution communautaire: Un large éventail d'intérêts juridiques ou économiques justifiait d'intervenir à la procédure de référé dans l'affaire Microsoft... et dans quelques autres, Concurrences : revue des droits de la concurrence 2004 no 1 p.94-96
PROCEDU	Action for annulment
DATES	of document: 10/04/2008 of application: 30/07/2003

Case T-271/03

Deutsche Telekom AG

v

Commission of the European Communities

(Confidentiality – Challenge by the interveners)

Summary of the Order

1. *Procedure – Intervention – Communication of pleadings to interveners – Derogation*

(Rules of Procedure of the Court of First Instance, Art. 116(2))

2. *Procedure – Intervention – Communication of pleadings to interveners – Derogation*

3. *Procedure – Intervention – Communication of pleadings to interveners – Derogation*

1. Article 116(2) of the Rules of Procedure of the Court of First Instance provides that 'the intervener shall receive a copy of every document served on the parties', but that '[t]he President may, however, on application by one of the parties, omit secret or confidential documents'.

For the purpose of determining the conditions under which confidential treatment may be given to certain documents in the file, it is necessary to balance, in respect of each document or part of a document on the Court's file for which confidential treatment is claimed, the applicant's legitimate concern to prevent substantial damage to its business interests and the interveners' equally legitimate concern to have the necessary information for the purpose of being fully in a position to assert their rights and to state their case before the Community judicature.

When the applicant has set out, in respect of each item covered by the request for confidential treatment, the reasons why it considers that disclosure thereof would substantially damage its business interests, the interveners' challenge to the request for confidentiality must, so that the President can evaluate the balance of interests, relate to precise items of the procedural documents which have been obscured and indicate the reasons why confidentiality with regard to those items should be refused.

(see paras 9-12)

2. A request by one of the parties to withdraw from the file documents or parts of documents in respect of which the President is likely to reject the request for confidential treatment cannot be accepted, since it seeks to circumvent the President's decision on the request for confidential treatment.

(see para. 13)

3. Confidential treatment of information relating to facts dating from more than five years ago can only, exceptionally, be granted if it is shown that, notwithstanding their historical nature, they still constitute essential elements of the commercial position of the undertaking concerned.

(see para. 45)

ORDER OF THE PRESIDENT OF THE FIFTH CHAMBER OF THE COURT OF FIRST INSTANCE

15 June 2006 (*)

(Confidentiality – Challenge by the interveners)

In Case T–271/03,

Deutsche Telekom AG, established in Bonn (Germany), represented by K. Quack, U. Quack and S. Ohlhoff, lawyers,

applicant,

v

Commission of the European Communities, represented initially by K. Mojzesowicz and S. Rating, and subsequently by K. Mojzesowicz and A. Whelan, acting as Agents,

defendant,

supported by

Arcor AG & Co. KG, established in Eschborn (Germany), represented by M. Klusmann, F. Wiemer and M. Rosenthal, lawyers,

and by

CityKom Münster GmbH Telekommunikationsservice, established in Munster (Germany),

EWE TEL GmbH, established in Oldenbourg (Germany),

HanseNet Telekommunikation GmbH, established in Hamburg (Germany),

ISIS Multimedia Net GmbH & Co. KG, established in Dusseldorf (Germany),

Versatel Nord-Deutschland GmbH, previously KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, established in Flensburg (Germany),

NetCologne Gesellschaft für Telekommunikation mbH, established in Cologne (Germany),

TeleBel Gesellschaft für Telekommunikation Bergisches Land mbH, established in Wuppertal (Germany),

Versatel Süd-Deutschland GmbH, previously tesion Telekommunikation GmbH, established in Stuttgart (Germany),

Versatel West-Deutschland GmbH & Co. KG, previously VersaTel Deutschland GmbH & Co. KG, established in Dortmund (Germany),

represented by N. Nolte, T. Wessely and J. Tiedemann, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 EC (Case COMP/C–1/37.451, 37.578, 37.579 – Deutsche Telekom AG) (OJ 2003 L 263, p. 9),

THE PRESIDENT OF THE FIFTH CHAMBEROF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Procedure

1 By application lodged at the Registry of the Court of First Instance on 30 July 2003, Deutsche Telekom AG ('the applicant') brought an application for annulment of Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 EC (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG) (OJ 2003 L 263, p. 9, 'the contested decision').

2 By documents lodged at the Registry of the Court on 12 December 2003, Arcor AG & Co. KG ('the first intervener'), and CityKom Münster GmbH Telekommunikationsservice, EWE TEL GmbH, HanseNet Telekommunikation GmbH, ISIS Multimedia Net GmbH & Co. KG, NetCologne Gesellschaft für Telekommunikation mbH, TeleBel Gesellschaft für Telekommunikation Bergisches Land mbH, Versatel Nord-Deutschland GmbH, previously KomTel Gesellschaft für Kommunikations- und Informationsdienste mbH, Versatel Süd-Deutschland GmbH, previously tesion Telekommunikation GmbH, Versatel West-Deutschland GmbH & Co. KG, previously Versatel Deutschland GmbH & Co. KG (jointly referred to as 'the second intervener'), applied for leave to intervene in this action in support of the form of order sought by the Commission.

3 By letter of 30 January 2004, the applicant sent the Court of First Instance a request for confidential treatment of certain passages of the application, the defence, the reply and certain annexes relating thereto.

4 By letter of 22 March 2004, the applicant sent the Court a request for confidential treatment of a passage from the rejoinder.

5 By order of the President of the First Chamber of the Court of First Instance of 6 May 2004, the companies mentioned in paragraph 2 above were granted leave to intervene in support of the form of order sought by the Commission. The decision on the validity of the request for confidential treatment was reserved.

6 Non-confidential versions of procedural documents, prepared by the applicant, were sent to the first and second interveners.

7 By letters of 24 June 2004, the first and second interveners disputed the request for confidentiality made by the applicant.

8 By letter of 20 December 2004, the applicant lodged observations on the objections of the first and second interveners. In the same letter, the applicant also requested that it be given the opportunity – in the event of its request for confidential treatment being completely or partially rejected – to withdraw from the Court's file the documents or parts of documents affected by the refusal of confidential treatment.

The request for confidential treatment

1. Preliminary observations

9 The request for confidential treatment was made on the basis of Article 116(2) of the Rules of Procedure of the Court of First Instance, which provides that 'the intervener shall receive a copy of every document served on the parties', but that '[t]he President may, however, on application by one of the parties, omit secret or confidential documents'.

10 According to case-law, for the purpose of determining the conditions under which confidential treatment may be given to certain documents in the file, it is necessary to balance, in respect of each document or part of a document on the Court's file for which confidential treatment is claimed, the applicant's legitimate concern to prevent substantial damage to its business interests and the interveners' equally legitimate concern to have the necessary information for the purpose of being fully in a position to assert their rights and to state their case before the Community Court (orders of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1990] ECR II–163, paragraph 11, and of the President of the First Chamber of the Court of First Instance in Case T–168/01 *Glaxo Wellcome* v *Commission* [2003], not published in the ECR, paragraph 35).

11 It must therefore be stated that sufficient grounds for the request for confidential treatment were given by the applicant in a document lodged at the Registry of the Court on 30 January 2004 and that those grounds were further supplemented by a document lodged on 20 December 2004. It stated, in respect of each item covered by the request for confidential treatment, the reasons for which it considers that the disclosure thereof would substantially damage its business interests.

12 Under those circumstances, so that the President can make the evaluation referred to in paragraph 10, the challenging of the request for confidentiality by the interveners must relate to precise items of the procedural documents which have been obscured and indicate the reasons for which confidentiality with regard to those items should be refused.

13 Finally, the applicant's request concerning the withdrawal of documents or of parts of documents in respect of which the President rejects the request for confidential treatment (see paragraph 8 above) cannot be accepted since, as presented, it seeks to circumvent the President's decision on the request for confidential treatment.

2. The items covered by the request for confidential treatment which were not disputed, expressly and precisely, by the interveners

14 The interveners have not disputed, expressly and precisely as referred to in paragraph 12 above, various items of the procedural documents in respect of which the applicant had requested confidential treatment. In accordance with the case-law referred to in paragraph 10 above, as regards those items, the President is unable to balance the applicant's legitimate concern to prevent substantial damage to its business interests and the interveners' equally legitimate concern to have the necessary information for the purpose of being fully able to assert their rights and to state their case before the Community Court.

15 Under those conditions, the applicant's request for confidential treatment must be upheld in so far as it concerns items which have not been disputed, expressly and precisely, by the interveners. Those items are:

– the contested decision (Annex A.1 to the application): the items obscured in recitals 99, 151, 152, 154, 160 to 162, 167 and 172;

– the statement of objections of 2 May 2002 (Annex A.2 to the application): the items obscured in paragraphs 26 to 28, 39, 45, 92, 124 to 126, 128, 131, 133, 137 to 140 and 143 to 147;

– the applicant's observations of 29 July 2002 on the statement of objections (Annex A.3 to the application): the items obscured on pages 4, 11 to 13, 37, 41, 65 to 67, 75, 76, 78 to 80, 88 to 91, 93, 94, 98, 100 to 106, 108, 109 and 122;

– the applicant's observations of 25 October 2002 on the complainants' responses (Annex A.4 to the application): the items obscured on pages 14 and 31;

– the supplementary statement of objections of 21 February 2003 (Annex A.5 to the application): the items obscured in paragraphs 1, 3, 4, 5 and 8 to 10;

– the applicant's observations of 14 March 2003 on the supplementary statement of objections (Annex A.6 to the application): the items obscured on pages 5, 7, 20 and 21;

– the decision of the Regulierungsbehörde für Telekommunikation und Post (German regulatory authority for telecommunications and post, 'RegTP') of 11 April 2002 (Annex A.8 to the application): the items obscured on pages 22 to 35 and 37;

– the decision of RegTP of 29 April 2003 (Annex A.9 to the application): the items obscured on pages 14, 15, 21, 22, 24, 25, 27, 30, 31 to 33 and 35;

– the decision of RegTP of 21 December 2003 (Annex A.10 to the application): the item obscured on page 13;

– the decision of RegTP of 30 March 2001 (Annex A.11 to the application): the items obscured on pages 31, 32 and 34 to 38;

– a document relating to the customer structure and consumption habits of the applicant's customers according to net household income (Annex A.15 to the application): the whole document;

– a document relating to mathematical models concerning the profitability of the applicant's competitors (Annex A.21 to the application): the items obscured on each page of this document;

– a document relating to the market shares of the applicant's competitors (Annex A.23 to the application): the entire document;

– a document concerning the development of the renting of subscriber lines (Annex A.27 to the application): the entire document;

– the defence: the figure obscured in paragraph 42;

– a letter from the German Government of 8 June 2000 (Annex B.3 to the defence): the figures obscured on page 3;

– a letter from RegTP of 3 April 2002 (Annex B.4 to the defence): the figures obscured on page 1;

– a decision of RegTP of 23 December 1999 (Annex C.2 to the reply): the items obscured on pages 12, 13 and 15;

– the rejoinder: the figure obscured in paragraph 31.

3. The items covered by the request for confidential treatment which have been disputed, expressly and precisely, by the interveners

16 The interveners dispute, expressly and precisely, the confidentiality of various items covered by the applicant's request for confidential treatment.

17 First, the first and second interveners dispute the confidentiality of the figure relating to the effect of the margin squeeze which has been obscured in paragraph 14 of the application.

18 Second, in addition to the item mentioned in the previous paragraph, the second intervener disputes the confidentiality of the following items of the application, which have also been obscured by the applicant:

– paragraph 76 and Annex A.14 to the application: the figures on the criteria used by people when choosing their telecommunications provider;

– paragraph 104: the information concerning the applicant's product-specific costs;

– paragraph 136: the applicant's assessment concerning the market shares of its competitors;

– paragraph 145: the figure indicating the applicant's loss of subscribers since 1998.

19 Third, the first and second interveners dispute the confidentiality of the following information, which has been obscured in the published version of the contested decision:

– recital 28: the applicant's ADSL (Asymmetric Digital Subscriber Line) turnover in the period from 1998 to 2002 (Table 2);

– recital 37: the decrease in the applicant's turnover due to price reductions from 1998 to 2001;

– recital 146: the relationship between the provision of new lines and the taking over of existing lines by the applicant;

– recital 147: the average one-off charge for all end-user lines of the applicant.

20 Fourth, in addition to the items mentioned in the preceding paragraph, the second intervener submits that the following figures contained in the contested decision cannot be considered as business secrets the disclosure of which would damage the applicant's business interests:

– recital 27: the number of the applicant's end-users from 1998 to 2002 (Table 1);

– recital 48: the percentage of the costs concerning ADSL services which are covered by the applicant's sale prices;

– recitals 143 to 145 (including Tables 3 to 7): the number of the applicant's end-users from 1998 to 2002;

– recital 148 (including Table 8): the average length of subscription of the applicant's clients, the proportionate weighted one-off charges and the average total retail price for access to the network;

– recitals 158 to 159 (including Table 11): the total monthly costs of the services offered by the applicant to end-users and the specific costs for 2001.

21 Fifth, the second intervener disputes the confidentiality of the passages obscured in pages 34 and 35 of the applicant's observations of 29 July 2002 on the statement of objections.

22 Sixth, the second intervener disputes the confidentiality of the passages obscured in the decision of RegTP of 8 February 1999 (Annex C.3 to the reply).

23 As regards the items mentioned in paragraphs 17 to 22 above, the confidentiality of which has been disputed, expressly and precisely, by the interveners, the President is able, in the light of the observations lodged by the applicant, to weigh up the interests of the parties in question (see paragraph 14 above).

4. The validity of the request for confidential treatment in so far as it covers, expressly and precisely, the items disputed by the interveners

Arguments of the parties

24 The applicant points out first of all that the contested decision concerns the prices which it charges to its competitors and to consumers for access to its local networks, which each consist of a number of local loops connecting end-users. According to the contested decision, the applicant has infringed Article 82 EC by implementing a pricing strategy in the form of a margin squeeze, consisting in charging prices to competitors for unbundled access to local loops ('wholesale charges') which were greater than or comparable to the prices paid by the applicant's end-users for access to its fixed network ('retail charges').

25 It further submits that all of the items obscured in the various documents lodged and the annexes thereto constitute business secrets. They include information on its costs, sale volumes, customer structure and other economic bases of its activity. In any event, the interveners do not need the information the disclosure of which they request for the purpose of being fully in a position to assert

their rights and to state their case before the Court.

26 The interveners reply that the obscured information relating to calculation of the applicant's costs or its turnover cannot all be considered as business secrets. The communication of this information is, in any case, necessary to allow them to verify the effect of the margin squeeze noted by the Commission and to support the latter's arguments on that point. Moreover, certain information is more than five years old and can no longer be considered as business secrets.

Findings of the Court

The request for confidential treatment of the figure obscured in paragraph 14 of the application and disputed by the first and second interveners

27 It must be noted that, at paragraph 14 of the application, the applicant summarises recitals 140 to 162 of the contested decision. The applicant has obscured the amount of the margin squeeze – that is the divergence between the applicant's wholesale charges and retail charges – existing, according to the Commission, at the time of the contested decision.

28 Since, according to the Commission, the gap between the wholesale charges and the retail charges is not sufficient to cover the applicant's product-specific costs for providing retail services (contested decision, recital 161), the interveners would indirectly but unavoidably obtain information on the applicant's cost structure if the exact amount of the margin squeeze was revealed to them.

29 As the aim of protecting the confidentiality of that information vis-à-vis the applicant's competitors is legitimate, application of the exception referred to in the second sentence of Article 116(2) of the Rules of Procedure is, accordingly, justified.

30 The request for confidential treatment should therefore be granted in so far as it concerns the figure obscured in paragraph 14 of the application.

The request for confidential treatment concerning various items of the application and disputed only by the second intervener

– Paragraph 76 of the application and Annex A.14 to the application

31 In paragraph 76 of the application, the applicant provides information concerning the criteria used by people when choosing their telecommunications provider. Those figures come from a document entitled 'Factors influencing the choice of supplier', which forms Annex A.14 to the application.

32 The information in question was obtained through a survey carried out at the applicant's request and to which third parties do not have access. Moreover, the results of that survey are such as to play an important role in the applicant's business strategy.

33 Under those circumstances, the applicant's request for confidential treatment should be granted in so far as it concerns paragraph 76 of the application and its Annex A.14.

– Paragraph 104 of the application

34 In paragraph 104 of the application, the applicant alleges that the Commission has made errors in its calculation of the weighted monthly product-specific costs per line (analogue, ISDN and ADSL lines considered together) in recital 159 of the contested decision. It has obscured, in that paragraph of the application, the figure given by the Commission in the contested decision and the allegedly correct figures relating to its product-specific costs.

35 Even if the figures in question concern 2001, they still constitute business secrets. In fact, the costs of the products which a company offers on the market directly influence its commercial behaviour. Moreover, in the present case, the applicant states that its product-specific costs have hardly changed since 2001.

36 Under those circumstances, the applicant's request for confidential treatment should be granted in so far as it concerns the items obscured in paragraph 104 of the application.

– Paragraph 136 of the application

37 In paragraph 136 of its application, the applicant has obscured its estimates relating to the market shares of its competitors in certain local areas served. Those estimates do not take account of its competitors' own networks, but are based purely on a comparison between the number of lines which the applicant uses itself and the number which it rents to its competitors. As it is, moreover, possible to deduce from this information the market shares held by the applicant itself, this information constitutes business secrets of the applicant (see, to that effect, the order of the President of the Third Chamber of the Court of First Instance of 15 October 2002 in Case T-203/01 *Michelin* v *Commission* [2002] not published in the ECR, paragraph 26).

38 The request for confidential treatment should therefore be granted in so far as it concerns the items obscured in paragraph 136 of the application.

– Paragraph 145 of the application

39 In paragraph 145 of the application, the applicant has obscured the figure representing an estimate of the number of clients it has lost since 1998 to its competitors. This is information relating to the applicant's business development, and constitutes a business secret.

40 The request for confidential treatment should also be granted in so far as it concerns the figure obscured in paragraph 145 of the application.

The request for confidential treatment concerning various items of the contested decision and disputed by the first and second interveners

– Recital 28 (Table 2) of the contested decision

41 The information in recital 28 (Table 2) of the contested decision specifies the number of the applicant's analogue and digital lines which are equipped with ADSL technology. This is a business secret. Even if, as the first intervener submits, the RegTP's 2003 annual report mentions the relationship between the applicant's analogue and digital connections, it does not specify the applicant's activity in the ADSL sector.

42 However, in so far as the information in recital 28 (Table 2) of the contested decision concerns the years 1998 to 2000, it no longer constitutes business secrets (see, to that effect, orders of the Court of First Instance of 19 June 1996 in Joined Cases T–134/94, T–136/94 to T–138/94, T–141/94, T–145/94, T–147/94, T–148/94, T–151/94, T–156/94 and T–157/94*NMH Stahlwerke and Others* v *Commission* [1996] ECR II–537, paragraph 27, and *Glaxo Wellcome* v *Commission*, paragraph 39). It must be underlined that the evolution of the ADSL sector has been such, from 2001, that the disclosure of information relating to the years 1998 to 2000 to the interveners would not allow them to draw precise conclusions concerning the evolution of the applicant's business as regards the different segments of that sector.

43 Concerning recital 28 of the contested decision, the applicant's request for confidential treatment should therefore be granted in so far as it concerns the figures contained in Table 2 concerning 2001 and 2002 and should be dismissed as to the remainder.

– Recital 37 of the contested decision

44 It must be pointed out, first, that in recital 35 of the contested decision it is stated that the German authorities required the applicant to reduce its retail charges by 4.3% during the period from January 1998 until December 1999 and by 5.6% during the period from January 2000 until December 2001. In recital 37, it is indicated that, during those periods, the applicant substantially lowered its prices, going beyond the mandatory reductions. The information obscured concerns the reduction in turnover resulting from the price reductions in respect of the 'residential' basket and the 'business' basket during the two abovementioned periods and the total voluntary price reductions.

45 It must therefore be stated that that information largely relates to facts dating from five or more years ago. Confidential treatment could, exceptionally, be granted to such information only if it were shown that, notwithstanding their historical nature, they still constitute, in this case, essential

elements of the commercial position of the undertaking concerned (*Glaxo Wellcome* v *Commission*, paragraph 39).

46 To that effect, the applicant submits that the business clients sector (the 'business' basket), which includes important clients, comes under a particularly confidential area of its activity. The relationship between the 'residential' and 'business' baskets does not significantly change with the passing of time. It would be easy to extrapolate, from the information in recital 37 of the contested decision, the relationship between the turnover relating to the 'residential' basket and that relating to the 'business' basket.

47 Under those circumstances, the request for confidential treatment should be granted in so far as it concerns the figures obscured relating to, respectively, the 'residential' basket and the 'business' basket. However, the request for confidential treatment is rejected in so far as it concerns the total voluntary, supplementary reductions for the two baskets together.

– Recitals 146 and 147 of the contested decision

48 The information obscured in recital 146 of the contested decision concerns the relationship between the provision of new connections (that is to say completely new installations) and the taking over of existing lines of the applicant. This is sensitive commercial information which should not, in principle, be disclosed to the interveners.

49 The information obscured in recital 147 of the contested decision concerns the percentage of TDSL (Turbo Digital Subscriber Line, broadband connections) connections provided in relation to all of the applicant's end-user lines. On the basis of this percentage, the Commission then calculates the average charge for all of the applicant's end-user lines. This information, which is, moreover, recent, must also be classified as business secrets (see, to that effect, *Glaxo Wellcome* v *Commission*, paragraph 10 above, paragraph 47).

50 The applicant's request for confidential treatment must therefore be granted in so far as it concerns the items obscured in recitals 146 and 147 of the contested decision.

The request for confidential treatment concerning various elements of the contested decision and disputed only by the second intervener

– Recitals 27 (Table 1) and 143 to 145 (including Tables 3 to 7) of the contested decision

51 The information obscured in those recitals concerns the detailed breakdown of the applicant's clients in the various segments of the telephone connections market, including all of the sub-segments in the ISDN and ADSL sectors. This information constitutes, in principle, business secrets.

52 However, certain items in respect of which confidential treatment has been requested relate to facts dating from five years ago and no longer constitute business secrets, in view in particular of the evolution of the different segments of the market since 2001 (see, to that effect, *NMH Stahlwerke and Others* v *Commission*, paragraph 42 above, paragraph 27, and *Glaxo Wellcome* v *Commission*, paragraph 10 above, paragraph 39).

53 The applicant's request for confidential treatment should therefore be granted in so far as it concerns figures relating to the years 2001 and 2002 and rejected as to the remainder. Consequently, the request for confidential treatment is rejected in so far as it concerns figures relating to the years 1998 to 2000, set out in Table 1 of recital 27 of the contested decision, and in Tables 5 to 7 of recital 145 of the contested decision.

– Recitals 48, 158 and 159 of the contested decision

54 Information relating to the applicant's costs concerning its ADSL services has been obscured in recital 48 of the contested decision.

55 The figures in recitals 158 and 159 (including Table 11) concern the applicant's total monthly costs of services to end-users, differentiating between analogue, RNIS and ADSL lines.

56 For the reasons mentioned in paragraph 35 above, the applicant's request for confidential

treatment should be granted in so far as it concerns the items obscured in recitals 48, 158 and 159 of the contested decision.

– Recital 148 of the contested decision

57 The applicant's customers pay, for taking over an existing telephone line, a one-off charge to which is added the monthly charge. To calculate the end-user's total average monthly charge, the one-off charge (taking account of the average length of a subscription) must be added to the monthly charge.

58 The items obscured in recital 148 of the contested decision give the average length of subscription of the applicant's customers. This is information concerning the applicant's customer structure, which constitutes business secrets.

59 The items obscured in Table 8 of recital 148 concerns the calculation of the average monthly price for the end-user for the years 1998 to 2003. This information, when recent, constitutes business secrets. Moreover, even if certain information relates to facts dating from five years ago or more, the applicant's request should nevertheless be granted in so far as it covers all of the information obscured in Table 8, as disclosure of the total average monthly price for end-users for the years 1998 to 2000 would allow the second intervener to deduce the average length of subscription of the applicant's customers.

60 The applicant's request for confidential treatment should therefore be granted in so far as it concerns the items obscured in recital 148 (including Table 8).

The request for confidential treatment concerning certain passages of pages 34 and 35 of the applicant's observations of 29 July 2002 on the statement of objections and disputed only by the second intervener

61 The passages obscured on pages 34 and 35 of the applicant's observations on the statement of objections contain a description of the contacts which have taken place between the Commission and the applicant, on the one hand, and the German authorities, on the other, during the period from 1999 to 2000.

62 There is nothing in those passages concerning the applicant's commercial policy. In any case, the disclosure of the items obscured in pages 34 and 35 of the applicant's observations on the statement of objections cannot prejudice the applicant's business interests. The passages in question do not in fact convey information liable to be used by third parties in the context of competitive relations to the applicant's detriment.

63 The request for confidential treatment must therefore be rejected in so far as it concerns the items obscured on pages 34 and 35 of the applicant's observations of 29 July 2002 on the statement of objections.

The request for confidential treatment concerning the obscured passages of RegTP's decision of 8 February 1999 and disputed only by the second intervener

64 It is common ground between the parties that some of the companies, which for the purposes of this order are jointly referred to as the second intervener, have had, following a judgment of the Bundesverwaltungsgericht (German Federal Administrative Court) of 15 August 2003 (BVerwG 20 F. 8.03), access to the full text of RegTP's decision of 8 February 1999.

65 As the information in respect of which confidential treatment has been requested constitutes information which is already available to some companies which are competitors of the applicant, the request for confidential treatment must be rejected in so far as it concerns RegTP's decision of 8 February 1999 (see, to that effect, orders of the Court of First Instance of 29 May 1997 in Case T-89/96 *British Steel* v *Commission* [1997] ECR II–835, paragraphs 26 and 37, and *Glaxo Wellcome* v *Commission*, paragraph 43).

On those grounds,

THE PRESIDENT OF THE FIFTH CHAMBER OF THE COURT OF FIRST INSTANCE hereby orders:

1. **The request for confidential treatment, made by the interveners, is granted in respect of the following items:**

- **the application, paragraph 14 (the figure obscured);**
- **the application, paragraph 76 (the whole paragraph);**
- **the application, paragraph 104 (the items obscured);**
- **the application, paragraph 136 (the items obscured);**
- **the application, paragraph 145 (the figure obscured);**
- **the application, Annex 14 (the whole Annex);**
- **Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 EC (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), recital 27 (the figures obscured relating to the years 2001 and 2002 set out in Table 1);**
- **Decision 2003/707, recital 28 (the figures obscured relating to the years 2001 and 2002 set out in Table 2);**
- **Decision 2003/707, recital 37 (the figures obscured concerning respectively the 'residential' basket and the 'business' basket);**
- **Decision 2003/707, recital 48 (the figures obscured);**
- **Decision 2003/707, recital 99 (the figure obscured);**
- **Decision 2003/707, recital 143 (the figures obscured);**
- **Decision 2003/707, recital 144 (the figures obscured set out in Table 3);**
- **Decision 2003/707, recital 145 (the figures obscured set out in Table 4);**
- **Decision 2003/707, recitals 146 and 147 (the figures obscured);**
- **Decision 2003/707, recital 148 (the figures obscured including those set out in Table 8);**
- **Decision 2003/707, recitals 151, 152 and 154 (the figures obscured including those set out in Tables 9 and 10);**
- **Decision 2003/707, recitals 158 and 159 (the figures obscured including those set out in Table 11);**
- **Decision 2003/707, recitals 160 to 162, 167 and 172 (the figures obscured including those set out in Table 12);**
- **the statement of objections of 2 May 2002 (Annex A.2 to the application), paragraphs 26 to 28, 39, 45, 92, 124 to 126, 128, 131, 133, 137 to 140 and 143 to 147 (the items obscured);**
- **the applicant's observations of 29 July 2002 on the statement of objections (Annex A.3 to the application), pages 4, 11 to 13, 37, 41, 65 to 67, 75, 76, 78 to 80, 88 to 91, 93, 94, 98, 100 to 106, 108, 109 and 122 (the items obscured);**

– the applicant's observations of 25 October 2002 on the complainants' responses (Annex A.4 to the application), pages 14 and 31 (the items obscured);

– the supplementary statement of objections of 21 February 2003 (Annex A.5 to the application), paragraphs 1, 3, 4, 5 and 8 to 10 (the items obscured);

– the applicant's observations of 14 March 2003 on the supplementary statement of objections (Annex A.6 to the application), pages 5, 7, 20 and 21 (the items obscured);

– the decision of the Regulierungsbehörde für Telekommunikation und Post (RegTP) of 11 April 2002 (Annex A.8 to the application), pages 22 to 35 and 37 (the items obscured);

– the decision of RegTP of 29 April 2003 (Annex A.9 to the application), pages 14, 15, 21, 22, 24, 25, 27, 30, 31 to 33 and 35 (the items obscured);

– the decision of RegTP of 21 December 2003 (Annex A.10 to the application), page 13 (the item obscured);

– the decision of RegTP of 30 March 2001 (Annex A.11 to the application), pages 31, 32 and 34 to 38 (the items obscured);

– a document relating to the customer structure and consumption habits of the applicant's clients according to net household income (Annex A.15 to the application) (the whole document);

– a document relating to mathematical models concerning the profitability of the applicant's competitors (Annex A.21 to the application) (the information obscured on each page of this document);

– a document relating to the market shares of the applicant's competitors (Annex A.23 to the application) (the entire document);

– a document concerning the development of the renting of subscriber lines (Annex A.27 to the application) (the whole document);

– the defence, paragraph 42 (the figure obscured);

– a letter from the German Government of 8 June 2000 (Annex B.3 to the defence), page 3 (the figures obscured);

– a letter from RegTP of 3 April 2002 (Annex B.4 to the defence), page 1 (the figures obscured);

– a decision of RegTP of 23 December 1999 (Annex C.2 to the reply), pages 12, 13 and 15 (the items obscured);

– the rejoinder, paragraph 31 (the figure obscured).

2. The request for confidential treatment made by the first intervener is rejected in respect of the following elements:

– Decision 2003/707, recital 28 (the figures relating to the years 1998 to 2000 set out in Table 2);

– Decision 2003/707, recital 37 (the total amount of the supplementary voluntary reductions in respect of the 'residential' and 'business' baskets together).

3. The request for confidential treatment made by the second intervener is rejected in respect of the following elements:

- **Decision 2003/707, recital 27 (the figures relating to the years 1998 to 2000 set out in Table 1);**
- **Decision 2003/707, recital 28 (the figures relating to the years 1998 to 2000 set out in Table 2);**
- **Decision 2003/707, recital 37 (the total amount of the supplementary voluntary reductions in respect of the 'residential' and 'business' baskets together);**
- **Decision 2003/707, recital 145 (all of the figures set out in Tables 5 to 7);**
- **the applicant's observations of 29 July 2002 on the statement of objections (Annex A.3 to the application), pages 34 and 35 (the whole pages);**
- **a decision of RegTP of 8 February 1999 (Annex C.3 to the reply) (the whole decision).**

4. A non-confidential version of the procedural documents including the passages referred to in paragraphs 2 and 3 sent by the applicant within the time-limit set by the Registrar shall be served by the Registrar on the interveners concerned.

5. The costs are reserved.

Luxembourg, 15 June 2006.

E. Coulon	M. Vilaras
Registrar	President

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*Language of the case: German.

Case T-282/06

Sun Chemical Group BV and Others

v

Commission of the European Communities

(Competition – Concentration – European rosin resin market for printing ink applications – Decision declaring a concentration compatible with the common market – Guidelines on the assessment of horizontal mergers – Market shares and concentration levels – Non-coordinated effects – Coordinated effects – Obligation to state reasons)

Summary of the Judgment

1. *Competition – Concentrations – Examination by the Commission – Assessment of compatibility with the common market – Compliance with the Guidelines adopted by the Commission*

   (Council Regulation No 139/2004, Art. 2; Commission Notice 2004/C 31/03)

2. *Competition – Concentrations – Assessment of compatibility with the common market – Risk of creating a collective dominant position – Criteria for assessment*

   (Council Regulation No 139/2004, Art. 2; Commission Notice 2004/C 31/03, paras 19 to 21)

3. *Competition – Concentrations – Assessment of compatibility with the common market*

   (Council Regulation No 139/2004, Art. 2)

4. *Competition – Concentrations – Assessment of compatibility with the common market*

1. The Commission is bound by the Guidelines which it issues in the area of supervision of concentrations, provided they do not depart from the rules in the Treaty and from the Merger Regulation.

   The Guidelines do not require an examination in every case of all the factors mentioned therein, since the Commission enjoys a discretion enabling it to take account or not to take account of certain factors, and is not bound to include specific reasons concerning the assessment of a number of aspects of the concentration which seem to it manifestly irrelevant or insignificant or plainly of secondary importance for the assessment of the concentration.

   Review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by the Merger Regulation is limited to ascertaining compliance with the rules governing procedure and the statement of reasons, the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers. In that respect, the Community judicature must not only ascertain whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Thus, review by the Court of First Instance cannot be limited merely to establishing whether or not the Commission took into account elements mentioned in the Guidelines as relevant to the assessment of the impact of the concentration on competition. The Court must also, in the course of its review, consider whether any possible omissions on the part of the Commission are capable of calling its finding into question.

   (see paras 55, 57-58, 60-61)

2. Whilst it is necessary, for the purposes of showing that there is a risk of collective dominance, to establish the existence of a significant collective market share, the latter is not by itself sufficient to prove that such collective dominance exists, since market conditions must also be conducive to the creation of a collective dominant position. Thus the existence of a dominant position must be assessed on a case-by-case basis according to the circumstances of the case. Moreover, the second sentence of paragraph 21 of the Commission's Guidelines on the assessment of horizontal mergers states that exceeding the concentration thresholds laid down in paragraphs 19 to 21 of the Guidelines does not give rise to a presumption of the existence of competition concerns. However, the greater the margin by which those thresholds are exceeded, the more the values will be indicative of competition concerns.

(see paras 126, 136, 138)

3. It is not necessary, in order to discourage any anti-competitive conduct on the part of the merged entity, for all its customers to be able to transfer all their orders to other suppliers. The possibility of their transferring a substantial part of their requirements to other suppliers may be regarded as a threat liable to cause sufficient losses for the merged entity to deter it from pursuing such a strategy.

(see paras 171, 214)

4. Since general availability or unavailability of a raw material has the same effect on all the producers of the product concerned, including the merged entity, only preferential access for the merging parties as compared with their competitors could affect competition.

(see paras 182-183)

Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)2007. Sun Chemical Group BV, Siegwerk Druckfarben AG and Flint Group Germany GmbH v Commission of the European Communities. Competition - Concentration - European rosin resin market for printing ink applications - Decision declaring a concentration compatible with the common market - Guidelines on the assessment of horizontal mergers - Market shares and concentration levels - Non-coordinated effects - Coordinated effects - Obligation to state reasons. Case T-282/06.

In Case T282/06,

Sun Chemical Group BV, established in Weesp (Netherlands),

Siegwerk Druckfarben AG, established in Siegburg (Germany),

Flint Group Germany GmbH, established in Stuttgart (Germany),

represented by N. Dodoo and K.H. Eichhorn, lawyers,

applicants,

v

Commission of the European Communities, represented by A. Whelan, S. Noe and V. Bottka, acting as Agents,

defendant,

supported by

The Apollo Group, established in New York, New York (United States),

Hexion Specialty Chemicals, Inc., established in Columbus, Ohio (United States),

represented by I.M. Sinan, Barrister, and J. Uphoff, Solicitor,

interveners,

APPLICATION for the annulment of the Commission Decision of 29 May 2006 declaring a concentration compatible with the common market and the EEA Agreement by which Hexion Speciality Chemicals (The Apollo Group) proposed to acquire full control of Akzo Nobel's Inks and Adhesive Resins business (Case COMP/M.4071 - Apollo/Akzo Nobel, IAR),

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2007,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Sun Chemical Group BV, Siegwerk Druckfarben AG and Flint Group Germany GmbH to

bear their own costs and to pay those of the Commission and of the interveners.

Legal context

1. Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1; the Merger Regulation') provides inter alia:

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.'

2. Article 6(1) of the Merger Regulation provides that the Commission shall examine the notification as soon as it is received and states, at subparagraph (b):

Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

...'

3. The Commission has set out the analytical approach of its appraisal of horizontal mergers in its Guidelines on the assessment of horizontal mergers under the Merger Regulation (OJ 2004 C 31, p. 5; the Guidelines').

Background to the dispute

A - Parties to the procedure and the concentration

4. Sun Chemical Group BV (Sun') manufactures printing inks used in packaging, publication, commercial and industrial, pigments, dispersions, and security and brand protection. It is an indirect wholly owned subsidiary of Dainippon Ink and Chemicals, Inc. Sun employs more than 12 000 people and its turnover in the last financial year was in excess of EUR 3 billion. In 2005, Sun sourced approximately [confidential] (1) of rosin resins in Europe.

5. Siegwerk Druckfarben AG (Siegwerk') is a global manufacturer of printing inks, with its focus on packaging ink, gravure ink and web offset. It is the parent company of the Siegwerk group of companies. Siegwerk employs approximately 4 000 people and its turnover in the last financial year was approximately EUR 830 million. In Europe, it purchases approximately [confidential] of rosin resins each year from independent third party suppliers.

6. Flint Group Germany GmbH (Flint') supplies the printing, converting, and colorant industries. It was formed by the merger of XSYS Print Solutions and Flint Ink Corp in 2005. Flint employs nearly 7 500 people and its turnover in the last financial year was approximately EUR 2.2 billion. In Europe, Flint sources approximately [confidential] of rosin resins each year from independent third party suppliers.

7. Hexion Speciality Chemicals, Inc (Hexion') produces and sells a range of thermosetting and specialty resins, in particular, rosin resins, hydrocarbon resins, rosin-hydrocarbon hybrid resins, alkyd resins, acrylic dispersions, acrylic resins and other resins such as amino resins, epoxy resins, phenolic resins and polyester resins. Hexion has more than 90 production and distribution facilities in 18 countries in the Americas, Europe and the Asia Pacific region, and employs approximately 7 000 employees.

8. The Apollo Group (Apollo') manages a number of investment funds with interests in a wide range of activities at global level. Apollo controls Hexion.

9. Akzo Nobel's Inks and Adhesive Resins business (Akzo') primarily manufactures products based on rosin, in particular rosin resins, hybrid resins and other rosin derivatives, for use mainly as printing inks and adhesives. It has production facilities in the Netherlands, Portugal, China, New Zealand, Argentina, Canada and the United States.

B - Product market

10. Rosin resin is a naturally occurring resin derived from pine trees. It is classified into three types: wood rosin, gum rosin and tall oil rosin. The raw material is upgraded through chemical processing that includes hydrogenation, esterification, polymerisation and purification. From a chemical or technical standpoint, such rosin resins can be classified as rosin soaps, resinates, rosin esters, maleic and fumaric modified resins. Rosin resin is an essential component in the manufacture of printing inks. Printing ink companies rely heavily on the supply of rosin resins and expend, according to the applicants, each year significant efforts to secure the supplies that they need for their production of printing inks. The applicants purchase, according to their own account, 90% of the rosin resins for ink applications available in Europe. Rosin resin is also used in other products such as varnishes, adhesives, medicines, chewing gum and soap.

C - Administrative procedure

11. The proposed concentration by which Hexion, owned by Apollo, was to acquire control within the meaning of Article 3(1)(b) of the Merger Regulation, either directly or through wholly owned subsidiaries, of the whole of Akzo by way of purchase of shares and assets did not have a Community dimension within the meaning of Article 1(2) or (3) of the Merger Regulation. Knowing that it was capable of being reviewed under the national merger control laws in four Member States, the parties to the concentration applied to the Commission, on 3 February 2006, for a referral pursuant to Article 4(5) of the Merger Regulation. As none of the Member States expressed its disagreement within the applicable period, the concentration was deemed to have a Community dimension and the Commission received notification of the proposed concentration on 18 April 2006.

12. On 25 April 2006, the Commission sent out detailed questionnaires to 21 competitors (the competitors' questionnaire') and to 13 customers (the customers' questionnaire') of the merging parties in the markets for rosin resins, hydrocarbon resins and hybrid resins. The questionnaires were to be answered by 2 May 2006. The Commission received replies from 13 competitors and 10 customers.

13. On 28 April 2006, Flint submitted its reply to the customers' questionnaire. On the same date, the Commission published a notice in the Official Journal of the European Union (OJ 2006 C 102, p. 9), inviting interested third parties to submit any observations they might have on the proposed operation to the Commission no later than 8 May 2006.

14. On 4 May 2006, having obtained an extension of two days, Sun submitted its reply to the customers' questionnaire. On 10 May 2006, Sun contacted the Commission's case team and left a voicemail message seeking a meeting to discuss both the concentration and Sun's reply to the customers' questionnaire. On 11 May 2006, Sun sent an email to a member of the Commission's case team, indicating that it would be prepared to meet with the Commission at short notice to discuss the case.

15. On 12 May 2006, Siegwerk submitted its reply to the customers' questionnaire. On the same date, Sun provided information and additional explanations as to why it had concerns about the concentration. The Commission asked the notifying party to give its views on the issues raised in Sun's submissions.

16. On 16 May 2006, the notifying party gave its views by letter. On 17 May 2006, Sun lodged

two separate submissions in which it set out why the Commission should declare the operation incompatible with the common market. The information provided concerned recent price increases, capacity constraints in the market and difficulties of switching suppliers that had been experienced by the customers of the merging parties. The Commission asked the notifying party for observations on Sun's final comments.

17. On 18 and 19 May 2006, the notifying party submitted its observations in three emails.

D - Contested decision

18. On 29 May 2006, the Commission adopted, pursuant to Article 6(1)(b) of the Merger Regulation, its decision in Case COMP/M.4071 - Apollo/Akzo Nobel IAR, declaring the notified concentration to be compatible with the common market (the contested decision').

19. In the contested decision, the Commission first considered, in recitals 10 to 45, the relevant product and geographic markets and then analysed, in recitals 51 to 80, the effects of the concentration on competition on these markets.

20. As to the relevant product markets, the Commission identified, in recitals 8 to 24 of the contested decision, an overlap of the merging parties' activities in the production of rosin resins, hydrocarbon resins, alkyd resins and acrylic dispersions. It observed that this overlap only occurred in resins used for the production of inks. Leaving open the precise delimitation of the relevant product market, because it considered that the transaction did not raise competitive concerns under any definition, the Commission examined each of the resins for printing ink applications and took the view that the rosin resins for printing ink applications all belonged to the same product market.

21. With respect to the relevant geographic market, the Commission considered, in recitals 35 to 38, that it covered at least the European Economic Area (EEA) and that it may be global. It left the precise definition open, observing that the final assessment did not change regardless of whether the market should be defined as being at least the EEA or worldwide.

22. As regards the assessment of the effects of the concentration on the EEA market for rosin resins for printing ink applications, in recitals 51 and 53 the Commission estimated the market shares of the merging parties and of their competitors on this market in 2005 as follows: Hexion [10-20]%, Akzo Nobel IAR [20-30]% (combined [30-50]%), Arizona [10-20]%, Cray Valley [10-20]%, Respol [0-10]%, DRT [0-10]%, Euro-Yser [0-10]%, Kraemer [< 5]%, Westvaco [< 5]%, Others [010]%. At the level of the worldwide market for rosin resins, the Commission estimated that the combined market shares of the merging parties would be [20-30]%, due to the presence of a significant number of new entrants.

23. As to anti-competitive effects on this market, the Commission began by stating in recital 59 that 11 out of 13 of the merging parties' competitors considered that the transaction would not have such effects, but that around half of the customers which had participated in the market survey had indicated that the reduction in the number of players and the relatively high market share of the merged entity could lead to price increases and to a reduction in product development.

24. Recital 60 then points out that the market investigation confirmed that most of the customers needed specific grades of rosin resins for their applications and that in some instances the resin was customised for the customer, a process which could take several months. According to the Commission, this indicated that the products sold on the market in question were not homogeneous and that there were many producers on the market, characterised by lack of symmetry in market shares. Recital 60 also notes concerns voiced by around 30% of producers about the growing impact of other producers from outside of the EEA, such as Arez (China). The Commission therefore considered that, in principle, coordinated anti-competitive behaviour was unlikely to result from this transaction.

However, given that two big players were to merge, the transaction could give rise to anti-competitive effects in this market, resulting from the unilateral behaviour of the merging undertakings.

25. In recitals 62 to 65, the Commission first examined production capacities and observed that, according to the results of the market investigation, the market was not subject to capacity constraints. Recital 64 states that, considering that production on the EEA market for rosin resins for ink applications is around 144 000 t, the producers who took part in the market investigation (Arizona, Cray Valley, Respol, Kraemer, Megara, Union Resinera and Eastman) accounted for 28 200 t of spare capacity, which represents 19.5% of total production on the market. According to the contested decision, if the parties' estimates for other producers (including DRT and Euro-Yser) were correct, spare capacity would amount to 41% of total production on the market. Recital 65 affirms that the market investigation confirmed, and the majority of the customers acknowledged, that there was overcapacity on the market.

26. Recitals 66 and 67 then address the concerns expressed by one customer relating to the price increases of rosin resins by Akzo and Hexion and to supply problems between September and December, when seasonal demand for rosin resins is at its peak, leading to supply constraints during these months. In that respect, recital 67 states that the evidence submitted by the parties to the merger indicates that the supply issues reported were not caused by an anti-competitive situation on the relevant market. First, they resulted rather from an increase in the prices of raw materials which are key inputs for the production of rosin resins, such as crude oil, gum rosin and tall oil resin, which were subject to significant price increases in recent years, with the price of gum rosin having risen from USD 500 per tonne in January 2004 to about USD 1 250 per tonne at the date of the contested decision. Secondly, it is noted that the available information regarding the supply problems mentioned above appears to indicate that they were due to technical problems experienced by a particular supplier or to shutdowns resulting from scheduled maintenance work and not to a general lack of production capacity in the overall market during the period considered. Furthermore, it appears that the customer in question was able to find alternative sources of supply which mitigated the impact of that unexpected shortage.

27. Recital 68 affirms that, in the light of the above, it appears to be likely that any attempt of the merged entity to raise prices unilaterally could be defeated by significant competitors currently on the market such as Arizona, Cray Valley, Respol and by other smaller producers, which have both the spare capacity and the technical knowledge to counteract any anti-competitive behaviour.

28. In recitals 69 to 71, the Commission examines possible countervailing buyer power exerted by ink manufacturers on the resin manufacturers. Recital 69 states that the parties to the merger indicated that their customers are in a position to influence the prices and that some, which have in-house rosin resin production, discipline their suppliers successfully. With respect to the influence of in-house production of rosin resins that some ink manufacturers have, recital 69 notes that the parties estimate that three major customers have significant in-house production: Flint and Siegwerk, which have an estimated production capacity of around 25 000 t and 12 000 t respectively, and Huber, which recently acquired Micro Inks and informed its suppliers that it would begin shifting purchases to its subsidiary. Recital 70 then states that the investigation has shown that, in general, rosin resin producers' sales are concentrated with two or three big customers, with the top five ink producers accounting for approximately [80-90]% of Hexion's sales of rosin, hybrid and hydrocarbon resins for ink applications and [90-100]% of Akzo's. In addition, the top two customers accounted for [50-60]% and [70-80]% of the two companies' respective sales of rosin, hybrid and hydrocarbon resins for ink applications. Therefore, the Commission considers in recital 71 that the strong dependence of the parties on a few big customers, and the ability that other producers have to serve these customers, constitute significant disincentives to potential unilateral anti-competitive behaviour.

29. Recital 72 concludes that, in the light of the above, the proposed transaction does not give rise to competition concerns with respect to rosin resins for printing ink applications.

Procedure

30. By an application lodged at the Registry of the Court of First Instance on 9 October 2006, the applicants brought the present action.

31. By a separate document lodged on the same day, the applicants also applied for an expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court of First Instance.

32. By a document lodged at the Registry of the Court of First Instance on 31 October 2006, Apollo and Hexion applied for leave to intervene in support of the Commission.

33. On the same day, the Commission lodged its observations on the application for an expedited procedure, in which it indicated that, in order to exercise its rights of defence, it would have to rely on confidential information and documents submitted by the merging parties and by third parties.

34. By a separate document lodged on the same day at the Registry of the Court of First Instance, the Commission lodged an application for measures of organisation of procedure pursuant to Article 64(4) of the Rules of Procedure.

35. By way of measures of organisation of procedure, the applicants, the Commission and the interveners attended an informal meeting on 8 November 2006 with three judges of the Second Chamber of the Court of First Instance, to whom the case was assigned, in order to examine the possibility of the application for an expedited procedure being granted. At that meeting, the applicants stated that, given the constraints of the expedited procedure, they did not intend to dispute the market definition set out in the contested decision.

36. On 14 November 2006, the Second Chamber of the Court of First Instance decided to grant the application for an expedited procedure.

37. On 16 November 2006, the Second Chamber of the Court of First Instance adopted measures of organisation of procedure governing the submission in evidence of confidential information or documents in the present case.

38. By order of the President of the Second Chamber of the Court of First Instance of 17 November 2006, after hearing the views of the main parties, Apollo and Hexion were granted leave to intervene in support of the Commission and to submit a statement in intervention, which they did on 8 December 2006.

39. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure, sent the parties a number of questions to be answered orally at the hearing.

40. The parties presented oral argument and answered the written and oral questions put by the Court at the hearing on 27 February 2007.

41. At the hearing, the Commission gave a non-confidential version of a new document to the members of the Court of First Instance and to the other parties. After hearing the parties' views, the decision on the admissibility of that document in evidence was reserved. The Court decided not to add it to the file.

Forms of order sought by the parties

42. The applicants claim that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

43. The Commission contends that the Court should:

- declare the action inadmissible with respect to Siegwerk and Flint;

- dismiss the remainder of the application;

- order the applicants to pay the costs.

44. The interveners claim that the Court should:

- dismiss the application;

- order the applicants to bear their own costs and to pay those incurred by the interveners.

Law

A - The admissibility of the application

1. Arguments of the parties

45. The Commission submits that the contested decision is not of individual concern to Siegwerk and Flint. Whether a third party is individually concerned by a decision finding a concentration to be compatible with the common market depends, first, on its active participation in the administrative procedure, and secondly, on the effect of the decision on its market position. Mere participation in the administrative procedure is not sufficient on its own, because merger control requires regular contact with numerous undertakings. Only active participation in the administrative procedure is a factor regularly taken into account to establish, in conjunction with other specific circumstances, the admissibility of an action, especially where such active participation had an effect on the course of the procedure and on the content of the contested decision.

46. In the present case, however, the participation of Siegwerk and Flint in the administrative procedure was limited to submitting a reply to the Commission's customers' questionnaire and their replies are terse and general. Their limited participation did not have any identifiable effect on the course of the procedure or on the content of the contested decision. Therefore, their participation in the administrative procedure cannot be described as active participation. The application does not detail any other circumstances that would differentiate those two undertakings from other customers of the merging parties. The concentration affects the market position of Siegwerk and Flint in the same way as it affects that of any other buyer of rosin resins.

47. According to the Commission, there are no good grounds in the present case for allowing Siegwerk and Flint to be parties to an action that they could not have brought on their own. The application relies to a considerable extent on statements that Siegwerk made in its reply to the Commission's customers' questionnaire with respect to the availability of raw materials and neither Sun nor Flint had raised this issue of availability during the administrative procedure. This lack of consistency in the applicants' respective replies is another reason for assessing the standing of each party separately.

48. The applicants consider that the contested decision is of direct and individual concern to them since it will affect their businesses and in particular their circumstances in respect of supply, because rosin resins form a vital input in their production, accounting for a significant part of the price of the end product. Furthermore, prior to the merger, the applicants were major customers of both Hexion and Akzo and they are the largest purchasers of rosin resins in the ink industry, accounting together for approximately 90% of rosin resins purchased in the EEA. The applicants also consider that each of them took an active part in the administrative procedure.

2. Findings of the Court

49. It must be pointed out at the outset that the Commission does not dispute Sun's locus standi. Since Sun participated actively in the administrative procedure, the admissibility of its application is not in any doubt.

50. According to case-law which is now well established, since one and the same application is involved, there is no need to consider whether the other applicants are entitled to bring proceedings (Case C313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraph 31, and Case T374/00 Verband der freien Rohrwerke and Others v Commission [2003] ECR II2275, paragraph 57; see also, to that effect, Joined Cases T-447/93 to T-449/93 AITEC and Others v Commission [1995] ECR II1971, paragraph 82).

51. None of the points put forward by the Commission in the present case provides justification for the Court to depart from this case-law. The Court has indeed distinguished, in some cases, between applicants as regards the purpose of admissibility of an action (Case T-131/99 Shaw and Falla v Commission [2005] ECR II2023, paragraph 12, and the order in Joined Cases T228/00, T229/00, T242/00, T243/00, T245/00 to T248/00, T250/00, T252/00, T256/00 to T259/00, T265/00, T267/00, T268/00, T271/00, T274/00 to T276/00, T281/00, T287/00 and T296/00 Gruppo ormeggiatori del porto di Venezia and Others v Commission [2005] ECR II787, paragraphs 38 and 45). However, the distinctions in those cases were based, as with the case-law referred to in the previous paragraph, on considerations of economy of procedure.

52. The examination which the Commission proposes in the present case would not be in line with those considerations, since, even if it transpires from separate consideration of the admissibility of Flint's and Siegwerk's action that neither has locus standi , the Court must nevertheless consider the action as a whole. In that case, the statements made by Flint and Siegwerk would not be excluded from the Court's assessment. Since those statements were submitted to the Commission for assessment during the administrative procedure, they should in any event be taken into account in the present proceedings and the Court's assessment should cover all the pleas and arguments raised in the course of the present action.

53. For reasons of economy of procedure, it is not therefore appropriate to consider the admissibility of the action brought by Flint and Siegwerk separately.

B - The substance of the application

54. In support of their application, the applicants raised two pleas in law. The first alleges that the Commission did not follow the Guidelines, and the second, that it made factual errors and errors in its assessment. As regards the second plea, the applicants also allege, in essence, inadequacy of reasoning.

1. Preliminary observations

55. It must be pointed out that the Commission is bound by notices which it issues in the area of supervision of concentrations, provided they do not depart from the rules in the Treaty and from the Merger Regulation (Case T-114/02 BaByliss v Commission [2003] ECR II1279, paragraph 143, and Case T-119/02 Royal Philips Electronics v Commission [2003] ECR II1433, paragraph 242).

56. It is clear from paragraph 5 of the Guidelines that they describe the analytical approach which the Commission aims to follow in its appraisal of horizontal mergers and which it applies to the particular facts and circumstances of each case. Paragraph 13 states that it is not a question of a checklist' to be mechanically applied in each and every case; rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger

in the light of the relevant factors and conditions. According to the same paragraph [n]ot all the elements will always be relevant to each and every horizontal merger... and it may not be necessary to analyse all the elements of a case in the same detail'.

57. It follows that the Guidelines do not require an examination in every case of all the factors mentioned in the Guidelines, since the Commission enjoys a discretion enabling it to take account or not to take account of certain factors (see, by analogy, Joined Cases T67/00, T68/00, T71/00 and T78/00 JFE Engineering and Others v Commission [2004] ECR II2501, paragraph 553).

58. Furthermore, it cannot be inferred from the obligation to state reasons that the Commission must provide reasons for its assessment of all the matters of law and of fact which may be connected with the notified concentration and/or which were raised during the administrative procedure. The requirement to state reasons must be adapted to suit the measure at issue and depends on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. Therefore, although the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review, the Commission does not fail in its duty to state reasons if, in its decision, it does not include specific reasons concerning the assessment of a number of aspects of the concentration which seem to it manifestly irrelevant or insignificant or plainly of secondary importance for the assessment of the concentration (Verband der freien Rohrwerke and Others v Commission , paragraph 50 above, paragraphs 184 to 186).

59. It should also be pointed out that acts of the Community institutions are presumed to be valid (Case C-137/92 P Commission v BASF and Others [1994] ECR I2555, paragraph 48, and Case T-310/00 MCI v Commission [2004] ECR II-3253, paragraph 55), and that the legality of the individual contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. Consequently, the legality of the contested decision must be assessed on the basis of the facts existing at the time when the measure was adopted and not in the light of subsequent events (see, to that effect, Case T177/04 easyJet v Commission [2006] ECR II-1931, paragraphs 203 and 204).

60. Lastly, according to settled case-law, review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by the Merger Regulation is limited to ascertaining compliance with the rules governing procedure and the statement of reasons, the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers (see Case T-342/00 Petrolessence and SG2R v Commission [2003] ECR II-1161, paragraph 101; Case T-87/05 EDP v Commission [2005] ECR II-3745, paragraph 151 and easyJet v Commission , paragraph 59 above, paragraph 44). In that respect, it should be borne in mind that not only must the Community judicature ascertain whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P Commission v Tetra Laval [2005] ECR I987, paragraph 39).

61. It is clear from the foregoing that review by the Court of First Instance of the contested decision is not limited merely to establishing whether or not the Commission took into account elements mentioned in the Guidelines as relevant to the assessment of the impact of the concentration on competition. The Court must also, in the course of its review, consider whether any possible omissions on the part of the Commission are capable of calling into question its finding that the

present concentration does not raise serious doubts as to its compatibility with the common market (see, to that effect, Case T201/01 General Electric v Commission [2005] ECR II-5575, paragraphs 42 to 44 and 48).

2. The first plea in law, alleging that the Commission did not follow the Guidelines

62. The first plea is subdivided into three parts concerning, respectively, market shares and concentration levels, non-coordinated effects and coordinated effects of the merger. It is appropriate to examine the second and third parts of this plea before the first part.

a) The second part, alleging the Commission's failure to follow the Guidelines as regards non-coordinated effects of the merger

63. In the context of the second part of the first plea, concerning non-coordinated effects of the merger at issue, the applicants put forward five complaints relating to, first, classification of the merging parties as close competitors, secondly, the credibility of the alternative suppliers identified by the Commission, thirdly, the opportunities for the merging parties' customers to switch supplier, fourthly, available capacity in the market, and fifthly, the merged entity's ability to hinder expansion by competitors.

64. In that regard, it is appropriate to recall the key elements of the Commission's reasoning in the contested decision relating to non-coordinated effects. The Commission based its finding that the proposed transaction does not raise competition problems on four criteria. First, it found that the competitors Arizona, Cray Valley, Respol and other smaller producers had excess capacity. Secondly, it took the view that price increases and supply problems during the peak period which had been pointed out by a customer were the result, according to the evidence provided, of a price increase in raw materials and temporary technical problems suffered by one producer. Thirdly, the Commission took the view that Arizona, Cray Valley, Respol and other smaller producers had both the capacity and the knowledge enabling them to counter anti-competitive conduct by the merged entity. Fourthly, it stated that the merged entity's customers could exercise countervailing buyer power owing to their size, in-house production of certain rosin resins (including Flint and Siegwerk), vertical integration in the production of rosin resins of others (Huber) and the dependence of rosin resin producers for their sales on two or three large customers.

The first complaint, alleging that the Commission did not follow the Guidelines with regard to the closeness of the merging parties' competitive relationship

- Arguments of the parties

65. The applicants contend that the Commission should have examined whether the merging firms were close competitors, whether they had a history of past rivalry, and whether the merger would eliminate an important competitive force. The applicants observe that they replied to the customers' questionnaire, first, stating that Hexion and Akzo were their main suppliers. Secondly, they maintained that those two undertakings were indispensable first and second choice suppliers to large printing ink producers, as they were more capable of supplying larger volumes than their competitors. Thirdly, they stated, with regard to certain grades of rosin resins for printing ink applications, that the merging parties possessed highly confidential know-how and were the only ones to have access to raw materials and customers necessary to develop them.

66. The applicants assert that the Commission did not take their comments into account and did not examine whether the merging parties were close competitors within the meaning of the Guidelines and whether the reduction in competition following the merger would lead to price increases, even though the activities of the two merging parties overlapped. The applicants note that the higher the degree of substitutability between the products of merging firms, including their technical

skills and their factories' respective production capacities, the more likely it is that they will raise their prices significantly postmerger. Given its size and available production capacity, the combination of Hexion and Akzo has made the merged company an indispensable supply partner of the applicants, allowing it to behave wholly independently of all other market participants, including customers.

67. The Commission replies that the classification of the merging parties as major suppliers does not prove that they were close competitors within the meaning of the Guidelines. At least three other suppliers are also classified as major suppliers by the applicants (without any indication of a preference), by other customers and by competitors. Since Arizona and Cray Valley have [confidential] and seven of the eight producers have stated that they could easily produce the whole range of rosin resins, the applicants have not substantiated their argument that the competitors of the merged entity could not invest in the development of potentially profitable new grades of resins. The applicants also failed to produce evidence of the closeness of their product portfolios or competitive strategies.

68. The interveners add that the Commission's finding in recital 68 of the contested decision, which states that other producers would be likely to defeat any attempt of the merged entity to raise prices unilaterally, necessarily implies that the merging parties' products are not significantly closer substitutes for each other than for those of their competitors.

- Findings of the Court

69. As a preliminary point, it must be pointed out that the contested decision did not expressly examine whether the merging parties were close competitors. In that regard, according to paragraph 28 of the Guidelines, such proximity is assessed by reference to the degree of substitutability between the parties' products. That same paragraph explains that indications as to the degree of substitutability may result, inter alia, from the fact that a substantial number of customers regard the merging parties as their first and second choices of supplier, that rivalry between the parties has been an important source of competition and that their competitors produce substitutes which are not close to the products of the merging parties.

70. It must therefore be ascertained whether the Commission failed to follow the Guidelines by not examining whether the merging parties were close competitors.

71. As regards, first of all, the applicants' argument that they had informed the Commission that the merging parties were their main suppliers, it is apparent from the file that the applicants also described Arizona, Cray Valley and Respol as their main suppliers and that other customers added Arez, Westvaco, Resinall and DRT (replies to questions 35 and 36 of the customers' questionnaire) to that list. In addition, of the applicants only Siegwerk clearly stated that the merging parties were its number one suppliers, Flint and Sun not having made any classification of their main suppliers. Of the other customers, only two described the merging parties as their number one and number two suppliers (Ciba Specialty Chemicals mentions Hexion and Akzo, Van Son refers to Hexion), but none of them specified whether this was the case for rosin resins. The other customers did not make any classification. In addition, Huber points out that Hexion lost market share, Van Son states that Akzo lost market share and Epple Druckfarben states that both merging parties lost market share.

72. In the light of all those replies, it must be concluded that the assertions of the applicants and the other customers that the merging parties were their main suppliers pre-merger does not indicate that a substantial number of customers regarded the merging parties as their first and second choice suppliers within the meaning of paragraph 28 of the Guidelines (see paragraph 69 above). Therefore, contrary to what the applicants claim, those assertions do not substantiate their argument that

the merging parties are close competitors within the meaning of the Guidelines.

73. As regards, secondly, the argument that the merging parties are indispensable suppliers to large printing ink producers, as they are more capable than their competitors of supplying the larger volumes needed, it must be borne in mind that Flint and Sun referred, in their replies to questions 40 and 45 (Flint) and 42 (Sun) of the customers' questionnaire, to the size of rosin resin volumes which those producers can supply. It is apparent from the administrative file that three of the merging parties' competitors state that the volumes are large because of the limited number of customers which have major global requirements and which purchase 90% of printing ink resins (replies of Neville, Cray Valley and Respol to question 40 of the competitors' questionnaire).

74. However, it is also apparent from the administrative file that the applicants also obtain supplies from smaller producers such as Megara and Kraemer (replies of Megara and Kraemer to question 48 of the competitors' questionnaire). This fact indicates that, at least for certain categories of rosin resins, the smaller competitors of the merging parties can meet the applicants' requirements. In that regard, it is clear from the contested decision that the smaller undertakings together have a market share which is not insignificant (around 21% according to the Commission) and that they have excess capacity. In addition, the market shares of Arizona, Cray Valley and Respol show that they are able to supply all volumes required. Furthermore, it is clear from the file that they also have considerable excess capacity. In addition, Arez is described by two of the customers who replied to question 35 of the customers' questionnaire as one of their main suppliers and the Commission points, in recital 60 of the contested decision, to Arez's growing impact on the market. Finally, the fact that other customers mentioned Westvaco, Resinall and DRT (smaller suppliers) as their main suppliers shows that the need for large volumes as argued by the applicants does not relate to all the demand in the market.

75. In the light of all those replies, it must be held that the assertion made by the applicants and by certain competitors that the applicants require large volumes does not therefore show that the competitors' products are less close substitutes, from the customer point of view, than the merging parties' products. Consequently, contrary to what the applicants claim, that assertion does not substantiate their argument that the merging parties are close competitors within the meaning of the Guidelines.

76. Thirdly, as regards the argument that the merging parties are the only ones to possess highly confidential know-how and the raw materials and customers necessary to develop certain grades of resins, it must be pointed out that almost all the merging parties' competitors indicated that they could easily produce the whole range of rosin resins (replies to question 25 of the competitors' questionnaire). Even though the applicants dispute that fact, in particular in relation to Arizona, it must be observed, however, that the applicants have not provided any evidence to that effect and that Arizona had also asserted, in reply to question 25 of the competitors' questionnaire, that it could easily produce the whole range of rosin resins. In addition, the market shares of Arizona and Cray Valley show that they have a customer base which is comparable in quantitative terms to Hexion's pre-merger customer base. Furthermore, the applicants have not given details of the nature of the alleged difficulties in accessing the necessary raw materials in the present case. Accordingly, the applicants have not sufficiently proven their argument.

77. Finally, it must be held that the applicants have not provided any evidence other than that referred to in the previous paragraphs to support the specific argument that there was a history of particular rivalry between the merging parties. By the same token, they also have not substantiated their claim that the merger eliminated an important competitive force within the meaning of paragraphs 37 and 38 of the Guidelines.

78. For those reasons, it must be held that the applicants have not shown that the merging parties

were close competitors within the meaning of the Guidelines. Accordingly, and in the light of the evidence put forward by the parties and examined above, the Commission cannot be criticised for not dealing with the closeness of competitive relations between the merging parties in the contested decision. Therefore, since the absence of such analysis does not undermine the Commission's finding, this plea must be rejected.

The second complaint, alleging that the Commission did not follow the Guidelines with regard to the credibility of the alternative suppliers

- Arguments of the parties

79. The applicants maintain that the Commission did not correctly examine whether the competitors on the market could be regarded as credible suppliers to the printing ink industry. When stating in recital 68 of the contested decision that it appears to be likely that ... other smaller players... have both the capacity and the knowledge [to be credible suppliers], the Commission ignored the applicants' submissions which indicated that pre-merger only four or five (main) players in the market were worth considering. The Commission, however, estimated the number of credible suppliers at 13. Contrary to its previous practice, the Commission took the view that suppliers accounting for less than 5% of total supply could be considered to be credible competitors and therefore deemed to exercise a sufficient competitive constraint.

80. In the view of the applicants, it is apparent from previous decisions that the Commission should have taken into account factors such as the credibility of fringe' suppliers (Commission Decision 2002/174/EC of 3 May 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1693 - Alcoa/Reynolds) (OJ 2000 L 58, p. 25; Alcoa/Reynolds'), their reliability as long-term suppliers of sufficient quantities where supply of small and fragmented quantities on an irregular basis does not make them an option for customers (Alcoa/Reynolds), whether large customers could shift purchases from larger suppliers to a greater number of smaller suppliers (Commission Decision 92/553/EEC of 22 July 1992 relating to a proceeding under the Merger Regulation (Case No IV/M.190 - Nestlé/Perrier) (OJ 1992 L 356, p. 1; Nestlé/Perrier'), and whether other smaller suppliers would be able to meet orders in the short term for a significant part of the market (Commission Decision 91/535/EEC of 19 July 1991 declaring the compatibility with the common market of a concentration (Case No IV/M068 - Tetra Pak/Alfa-Laval), Tetra Pak/Alfa-Laval').

81. For those reasons, the applicants question the Commission's market definition, as a number of smaller competitors may be able to supply smaller customers, but are unable to supply larger needs such as those of the applicants. Therefore, the Commission should have investigated whether the market for rosin resins for printing ink applications had to be sub-divided into, on the one hand, a market for large customers, and on the other, a market for small customers.

82. The Commission considers that, by virtue of their market shares, Arizona, Cray Valley and Respol are credible alternative suppliers which also have significant excess production capacity. As regards smaller suppliers, the relevant question is not whether each of the smaller suppliers can compete with the main suppliers, but whether, as a whole, they can put competitive pressure on the merged entity. In that regard, the Commission notes that the smaller suppliers account for 21 to 25% of the total production capacity of rosin resins, that the majority of producers of rosin resins have confirmed that they were able to produce easily the whole range of rosin resins and that the applicants also sourced their needs from smaller competitors, including Megara and Kraemer. The contested decision also states that producers from outside the EEA, in particular Arez, may be credible alternative suppliers. Finally, according to the Commission, the facts in Alcoa/Reynolds, Nestlé/Perrier and Tetra Pak/Alfa-Laval are different from those in the present case.

83. The interveners support the Commission's reasoning, in particular in relation to statements

made by the applicants at joint meetings which took place prior to adoption of the contested decision. Those statements indicate that, in fact, the applicants purchase large quantities of rosin resins from various competitors of the merging parties. The interveners also claim that the applicants have not provided proof that the suppliers referred to in the contested decision are not credible alternatives.

- Findings of the Court

84. At the outset, it should be recalled that the Commission examined, in recitals 62 to 67 of the contested decision, the production capacity, and in particular, the excess capacity of the suppliers on the market, including smaller competitors of the merging parties. According to paragraph 31 of the Guidelines, customers of merging parties may have difficulties switching to other suppliers where there are few alternative suppliers or where their switching costs are too high, and, therefore, the merger may affect these customers' ability to protect themselves against price increases.

85. It must therefore be established whether the Commission failed to follow the Guidelines by taking the view that the smaller producers were alternative credible suppliers.

86. First of all, the applicants stated, during the administrative procedure, that there were no alternative suppliers and that only a very few producers (Akzo, Hexion, Arizona, Respol and Cray Valley) were capable of producing resins able to be used to produce printing inks (Siegwerk's replies to questions 12 and 15 of the customers' questionnaire), that the same five undertakings were the main suppliers of rosin resins in Europe (Flint's reply to question 36 of the customers' questionnaire) and that there were very few suppliers (Akzo, Hexion, Arizona and Cray Valley) (Sun's replies to questions 36 and 40 of the customers' questionnaire).

87. However, it has already been pointed out that it is also clear from the file that other customers also described other, smaller producers as their main suppliers (see paragraph 71 above), that the applicants also obtain supplies from smaller competitors of the merging parties (see paragraph 74 above), that smaller undertakings together have a significant market share and have excess capacities (see paragraph 74 above), and, finally, that almost all competitors of the merging parties stated that they could easily produce the whole range of rosin resins (see paragraph 76 above). Therefore, it must be held that the applicants have not shown that the Commission failed to follow the Guidelines by including the smaller competitors of the merging parties in the group of credible alternative suppliers. In particular, in the light of their combined market share and their excess capacities, the evidence on the file does not exclude the possibility that the smaller competitors can, at least with regard to the customers which described them as their main suppliers, exert competitive pressure on the merged entity.

88. Secondly, as regards the Commission's previous decisions on which the applicants rely, it must be observed that the credibility of alternative suppliers must be assessed according to the circumstances of each case. Consequently, the Commission's assessments of the facts in earlier cases cannot be transposed to the present case. In the light of the findings in the previous paragraphs, the Commission can not be accused of failing to make the same assessment of the facts in the present case as of those in the cases to which it refers (see, to that effect, General Electric v Commission , paragraph 61 above, paragraphs 118 to 120).

89. Finally, although the applicants submit that a number of smaller competitors would be capable of supplying smaller customers but could not meet larger needs such as those of the applicants, they confirmed, however, at the informal meeting of 8 November 2006, that they were not disputing the market definition set out in the contested decision. Consequently, the credibility of the alternative suppliers should not be assessed according only to the alleged needs of the large customers such as the applicants, but such assessment must encompass the needs of all purchasers on the market.

For the rest, that argument is the same as that examined in paragraphs 86 and 87 above and, therefore, should be rejected on the same grounds.

90. In the light of the foregoing, the applicants have not shown that the Commission failed to follow the Guidelines by taking the view that the merging parties' smaller competitors were credible alternative suppliers. Accordingly, that complaint must be rejected.

The third complaint in law, alleging that the Commission failed to follow the Guidelines with regard to the possibility for the merging parties' customers to switch suppliers

- Arguments of the parties

91. The applicants submit that the Commission should have assessed the possibility for the merging entities' customers to switch suppliers. Switching to alternative suppliers of rosin resin is a complicated process for ink production companies and requires exceptionally long lead-in periods, as evidenced by the applicants' replies to the customers' questionnaire and additional data submitted. The applicants indicated that, because of laboratory scale and additional production trials needed to qualify a new supplier, it usually took [confidential] to introduce a new resin, but that [confidential] could be necessary for some types of ink. Thus, even if credible alternative suppliers were available, customers would be unable to credibly threaten to resort, within a reasonable time frame, to alternative sources of supply... should [the] supplier decide to increase prices', as stated in paragraph 65 of the Guidelines. However, the Commission ignored the applicants' submissions on the difficulties and feasibility of switching suppliers.

92. The Commission replies that the applicants have not sufficiently substantiated their argument since, even if certain resins appear to require a lengthy qualification period, others seem to allow suppliers to be switched within a short time frame. In particular, certain types of resins produced by various suppliers may be pre-qualified, enabling suppliers to be substituted quickly. Furthermore, where contracts are concluded for an average duration of one to three years, with renegotiations on an annual basis, and where the qualification periods, according to certain customers, last [confidential], a qualification period of, for instance, six months, enables suppliers to be switched without difficulty. Finally, the Commission contends that it took account of the applicants' statements in recitals 21 and 60 of the contested decision.

93. The interveners contend that the large resin purchasers, in particular the applicants, pursue multiple supply strategies and that therefore they approve a number of suppliers when qualifying the important resins. Therefore, they are able to change supplier of those resins without delay.

- Findings of the Court

94. As a preliminary point, it must be observed that it is clear from recitals 21 and 60 of the contested decision that, when defining the relevant product market and assessing the merger's possible anti-competitive coordinated effects, the Commission took into account the periods, tests and adaptations necessary for the substitution, from the customers' point of view, of grades of rosin resins by other grades as well as the customised production of certain grades of rosin resins.

95. It must therefore be established whether the Commission failed to follow the Guidelines by not undertaking an analysis, in the context of its assessment of the merger's non-coordinated effects, such as that requested by the applicants, of the difficulties experienced by the merging parties' customers in changing supplier due to the need to qualify rosin resins.

96. First of all, the applicants' replies to the customers' questionnaire indicate that it is not possible to change supplier within a short period (Sun's reply to question 7 of the customers' questionnaire), that it can take [confidential] (Flint's reply to question 13 of the customers' questionnaire), [confidential] (Sun's reply to question 13 of the customers' questionnaire) or

[confidential] (Siegwerk's replies to questions 7 and 13 of the customers' questionnaire). At the same time, the applicants and the Commission state that the duration of supply contracts generally varies from three months to three years, with annual renegotiations in the case of multiannual contracts. Therefore, since the qualification periods and duration of contracts vary to that extent, the alleged difficulties in transferring orders to other suppliers, even if such difficulties exist, can only concern a part of those orders, that is, generally, the rosin resins for which there are no substitutes available from competing suppliers (see the paragraph below) and for which longer qualification periods are necessary. Accordingly, the applicants' argument concerns, in any event, only one sector of the market in question.

97. Secondly, it is apparent from email correspondence, submitted by Sun during the administrative procedure, that, [confidential]. Therefore, even though Sun argued at the hearing that this was an emergency, it is clear that, when necessary, qualification of grades of several rosin resins equivalent to those used by the applicants may be undertaken within a short time frame, thereby enabling orders to be transferred rapidly to other suppliers. In this regard, it should also be pointed out that almost all producers stated in their answers to question 25 of the competitors' questionnaire that they were capable of producing the whole range of rosin resins.

98. Thirdly, in reply to question 42 of the customers' questionnaire, Sun explained that, for its most important products, it sought to have two or three pre-qualified suppliers. In that respect, it should be pointed out that pre-qualification of rosin resins of several suppliers for the same application allows supply by several suppliers of the same resin, or even equivalent grades of resin, and a quicker change of supplier when necessary. Consequently, it is clear from the administrative file that, by virtue of pre-qualification of several suppliers, the applicants are able to transfer their orders for important rosin resins to other suppliers within shorter time frames.

99. In the light of the foregoing, it must be held that the applicants have not established that there are, as they alleged, considerable difficulties in changing supplier, given the need to qualify rosin resins, which prevent customers from credibly threatening to resort, within a reasonable time frame, to alternative sources of supply should the merged entity decide to increase prices anti-competitively. Consequently, and in the light of the evidence put forward by the parties and examined above, the Commission cannot be criticised for not extending its analysis beyond taking into account, in recitals 21 and 60 of the contested decision, of the limitations to substitution of rosin resins. Therefore, since the lack of analysis claimed by the applicants does not invalidate the Commission's finding, this complaint must be rejected.

The fourth complaint, alleging errors concerning existing capacity in the market

100. The applicants submit that the Commission should have determined whether there is spare or excess capacity in the market. The applicants consider that the Commission conducted an analysis of capacity constraints and of the possibility for competitors to expand output, but that it reached an inaccurate conclusion.

101. In this regard, it suffices to point out that, by this complaint, the applicants are not accusing the Commission of disregarding the Guidelines by failing to conduct an analysis of spare capacity in the market, but rather of having made errors in conducting that analysis. That question falls within the first part of the second plea and will be examined in that context (paragraph 162 et seq. below).

The fifth complaint, alleging that the Commission failed to follow the Guidelines with regard to the merged entity's ability to hinder expansion by competitors

- Arguments of the parties

102. The applicants submit that the Commission should have analysed whether the merged entity could hinder expansion by competitors. They dispute the Commission's assertion that the majority of the competitors, 11 out of 13, consider that the transaction will have no anti-competitive effects. They submit that the Commission had to explain why it considered that the merged undertaking would be constrained to such a degree that it would neither increase prices nor take other action detrimental to competition.

103. The Commission replies that the applicants' argument is not at all reasoned and that the question they raised was discussed at length in recitals 62 to 74 of the contested decision.

- Findings of the Court

104. As a preliminary point, it must be observed that the contested decision does not contain any express examination of the merged entity's ability to hinder expansion by competitors.

105. It must therefore be ascertained whether the Commission failed to follow the Guidelines by not undertaking an analysis of the merged entity's ability to hinder expansion by competitors.

106. In that regard, it should be borne in mind, according to paragraph 36 of the Guidelines, that some proposed mergers could significantly impede effective competition by leaving the merged entity in a position where it would have the ability to hinder expansion by competitors, and in such a case, competitors may not be in a position to constrain the merged entity to such a degree that it would not take actions detrimental to competition. Such a position may result, for instance, from control over the supply of inputs, over distribution possibilities or over patents and from the financial strength of the entity in question.

107. In the present case, it must be held that the applicants do not advance any evidence for the purposes of paragraph 36 of the Guidelines to support their specific argument that the merged entity will enjoy a position enabling it to hinder expansion by competitors. Although they assert, in another context, that the merged entity may, on account of its size, infrastructure and experience, acquire a high degree of control or influence over the supply of gum rosin and will have a bargaining power significantly exceeding that of its competitors (see paragraph 148 below), the Commission submitted, without being contradicted by the applicants, that the merged entity will only purchase 5 to 10% of global gum rosin production, which is not indicative of significant purchasing power (see paragraph 154 below). Thus, the applicants have not established, in the present case, that the Commission was required to examine the question of whether the merged entity had the ability to hinder expansion by competitors.

108. Furthermore, the Commission is right in stating, in response to the claim that it was required to set out the reasons why it considered that the merging parties would not increase their prices, that the contested decision sets out, in recitals 62 to 74, the reasons why the Commission considered that competitive constraints would prevent the merged entity from taking action detrimental to competition.

109. In those circumstances, the Commission cannot be criticised for not conducting an analysis of the merged entity's ability to hinder expansion by competitors. Since the absence of analysis claimed by the applicants does not undermine the Commission's finding, that complaint must be rejected.

b) The third part, alleging that the Commission did not follow the Guidelines with regard to the coordinated effects of the merger in dispute

Arguments of the parties

110. The applicants assert that the Commission failed to analyse properly the coordinated effects which could result from the merger. In their view, the Commission's analysis, based in large measure on the same facts as those relied on by the Commission to find against the creation of a dominant position post-merger, is deficient. Had the Commission reviewed objectively and critically the

evidence at its disposal and followed the Guidelines on the appraisal of coordinated effects, it would have concluded that the high combined market share of the merged firm, the few credible alternative suppliers, the capacity constraints and the absence of buyer power pointed both to a position of collective dominance and to a market displaying certain characteristics likely to lead to coordinated effects.

111. An assessment of the case in accordance with the Guidelines would have led to an examination, first, of the ability of market players to monitor to a sufficient degree whether the terms of coordination were adhered to, second, of the existence of credible deterrent mechanisms, and third, of the reactions of third parties and whether they would be able to affect the results expected from the coordination. Even taking account of all the market players that the Commission described as viable competitors in the contested decision, the rosin resin market is highly concentrated, with the top four players accounting for 60 to 90% of the market. Previous Commission decisions indicate that where three or more leading suppliers account for 60% or more of sales, there may be a risk of collective dominance.

112. The Commission considers that it was entitled to limit its reasoning to some key elements because coordinated effects were unlikely to materialise in the present case. Recital 60 of the contested decision points out that the market is not homogenous - most customers buying specific grades of rosin resin that are sometimes customised for them - that there are many producers in the market, that there is a lack of symmetry in market shares, and that the increasing impact of producers outside the EEA, such as Arez (China), gives rise to some concerns among producers. The Commission stands by this analysis and takes the view that the lack of homogeneity and transparency suggests that it is not easy to agree terms of coordination and that it is difficult to monitor the behaviour of competitors. The mere fact that a limited number of players together account for a high share of the market is not a sufficient basis for a finding of collective dominance.

113. The interveners consider that the same facts are relevant to the analysis of coordinated effects as to that of non-coordinated effects of a concentration. They contend that the merger will increase asymmetry in market shares, which, according to the Guidelines and the case-law (Case T-102/96 Gencor v Commission [1999] ECR II-753, paragraph 134), would make it less likely that the undertakings would be able to coordinate. Furthermore, the applicants' claims as to the difficulties experienced by customers in switching suppliers and the inability of competitors to expand their production would, if true, indicate, according to the Guidelines, that producers lack both the incentive and the ability to punish deviation from the terms of the coordination. Therefore, the Commission cannot be expected to engage in a lengthy analysis of the coordinated effects.

Findings of the Court

114. First of all, it must be recalled that the Commission justified its finding that coordinated anti-competitive behaviour has little chance of being adopted post-merger on four criteria. It took the view, first, that the market in question was not characterised by the homogeneity of the products sold, which were sometimes customised, secondly, that the market had a large number of producers, thirdly, that the market shares were very different, and fourthly, that about 30% of the producers which participated in the market investigation had voiced their concerns about the increasing impact of producers outside the EEA, such as Arez (China).

115. It must therefore be ascertained whether the Commission failed to follow the Guidelines by not carrying out a more detailed analysis of any coordinated effects of the merger.

116. In relation, first, to the contention that the Guidelines provide for an examination of the ability of market players to monitor behaviour deviating from the terms of any coordination, of the existence of credible deterrent mechanisms and of the potential reactions of third parties, it must be pointed out that the Guidelines provide for the examination of those factors, respectively,

in paragraphs 49 to 51, 52 to 55 and 56 and 57. That section of the Guidelines also underlines, however, in paragraphs 44 to 48, the need for a common understanding on the terms of coordination.

117. First, paragraphs 45 and 48 of the Guidelines state that firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration. It is also clear that the less complex and the more stable the economic environment, the easier it is for firms to reach a common understanding on the terms of coordination. Therefore, it is easier, for instance to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products.

118. It follows that the absence of homogeneity of the products sold, the high number of producers in the market and the asymmetry of market shares indicate that it is not easy for firms to reach a common understanding on the terms of any coordination. It that regard, it should be recalled that the Commission stated in recital 60 of the contested decision that the market in question was not characterised by the homogeneity of the product sold, that there were a number of producers and that their market shares were very different. It follows that the Commission focussed its analysis on whether the undertakings could reach a common understanding on the terms of coordination and that it considered, without however saying so explicitly, that for those reasons it was unlikely that the undertakings would reach a common understanding on the terms of coordination.

119. Secondly, the Guidelines state in paragraph 49 that only the credible threat of timely and sufficient retaliation keeps firms coordinating their conduct from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating from the terms of coordination, and thus to know when to retaliate. The Commission considers, in paragraph 50 of the Guidelines, that transparency in the market is often higher, the lower the number of active participants in the market, and that the degree of transparency often depends on how market transactions take place in a particular market.

120. It follows that a high number of producers in the market and an absence of homogeneity of product sold, particularly where it is customised for the customer, indicates a low level of transparency and that, therefore, monitoring of deviating conduct is difficult. In that regard, it should be recalled that, in recital 60 of the contested decision, the Commission stated that the market in question was not characterised by the homogeneity of the product sold, explaining that the product was sometimes customised for the customer, and that there were many producers in the market. Consequently, the Commission also assessed the market players' ability to monitor compliance with the terms of coordination and considered, without saying so explicitly, however, that for those reasons monitoring of non-compliance was difficult in the present case.

121. In addition, the Commission stated, in recital 60 of the contested decision, that around 30% of the producers which participated in the market investigation had expressed concerns about the increasing impact of producers from outside of the EEA, such as Arez. In that regard, their effect on the market can make both the achievement of the mutual understanding on the terms of coordination and the monitoring of non-compliance even more difficult.

122. In those circumstances, the Commission cannot be accused of failing to follow the Guidelines in considering, first, that coordinated anti-competitive behaviour had little chance of being adopted post-merger, and secondly, that an assessment of deterrent mechanisms and of reactions of third parties was not necessary.

123. As regards, secondly, the argument that the combined market shares of the merging parties, the shortage of credible alternative suppliers, the capacity constraints and the absence of buyer

power pointed to collective dominance, it must be observed at the outset that those elements are not among those set out in the Guidelines as being relevant to the assessment of a merger's possible coordinated effects.

124. In particular, according to the Guidelines, purchasing power is a factor to be taken into account when assessing whether the merging parties' customers have countervailing buyer power; the existence of capacity constraints plays a significant role only in the examination of non-coordinated effects. In any event, the Commission found, in recitals 62 to 67 of the contested decision, that there was excess capacity in the market and, in recital 69, that the customers had significant purchasing power. To the extent that the applicants accuse the Commission of having erred in its assessment in this regard, these aspects are examined in the context of the second plea (see paragraphs 162 et seq. and 206 et seq. below).

125. In addition, neither the merging parties' combined market share of [40-50]% nor the alleged shortage of credible alternative suppliers point to likely coordination between undertakings on the relevant market. Furthermore, it has already been held that the applicants have failed to establish that the smaller suppliers were not credible alternatives (see paragraphs 84 et seq. above). The inferences which may be drawn, with regard to paragraph 17 of the Guidelines, from the merged entity's market share will be examined in paragraph 135 et seq. below.

126. As regards, thirdly, the argument that the first four operators hold between 60% and 90% of the market indicates that there may be a risk of collective dominance, the confidential version of the contested decision shows that the merging parties, Cray Valley and Arizona together hold [confidential]% of the market, rising to [confidential]% with Respol. In that regard, it must be borne in mind that, while it is necessary, for the purposes of showing that there is a risk of collective dominance, to establish the existence of a significant collective market share, a significant collective market share is not by itself sufficient to prove that such collective dominance exists. As set out in the Guidelines, the market conditions must be conducive to the creation of a collective dominant position. However, it has already been held that, in the present case, the Commission cannot be accused of failing to follow the Guidelines by considering that, on account of the difficulties in agreeing the terms of coordination and the difficulty in monitoring such coordination, coordinated anti-competitive conduct had very little chance of being adopted post-merger (see paragraphs 115 to 122 above).

127. In relation, fourthly, to the argument that previous Commission decisions indicate that where three or more leading suppliers account for 60% or more of sales, there may be a risk of collective dominance, it must be pointed out, first of all, that the applicants do not refer to any specific previous decision, secondly, that it is clear from the foregoing that a significant collective market share is not by itself sufficient to prove the existence of such dominance, but that the market must be conducive to the creation of a collective dominant position, and thirdly, that in the present case the Commission cannot be accused of failing to follow the Guidelines by considering that coordinated anti-competitive conduct had very little chance of being adopted post-merger (see paragraphs 115 to 122 above).

128. In relation, finally, to the applicants' claim that the Commission's analysis of the merger's possible coordinated effects is based to a large extent on the same facts as those on which it relied to find against the creation of a dominant position post-merger, it must be observed that the same facts may be relevant to several distinct aspects of the Commission's assessment of the possible effects of a merger and that, therefore, consideration of those facts at several points in the analysis does not in any way limit their relevance in those respective contexts. In the present case, it suffices to point out in this regard that it is clear from the considerations set out in paragraphs 115 to 122 above that the Commission based its analysis of any coordinated effects of the merger

on matters of fact relevant to that analysis.

129. In those circumstances, the Court must hold that the applicants have not established that the Commission failed to follow the Guidelines by not carrying out a more thorough analysis of any coordinated effects of the merger. Consequently, that part of the plea must be rejected.

c) The first part, alleging that the Commission failed to follow the Guidelines with regard to market share and concentration levels

Arguments of the parties

130. The applicants claim that, while the Commission was correct to conclude that the transaction would result in a merged entity of the first and the second players in the rosin resin market with a very high combined market share of 40 to 50%, indicative of dominance (Babyliss v Commission , paragraph 55 above, paragraph 329), and with the third and the fourth players having a mere 10 to 20% each, it failed to draw the right conclusions in accordance with its own Guidelines (paragraphs 16 to 21). The Commission also failed to consider the concentration levels in the relevant market, despite their providing a valuable indicator of the competitive situation in the market. In the present case, appropriate consideration of that factor would have revealed that the change in concentration levels brought about by the merger raised real concern.

131. The Commission replies that paragraph 17 of the Guidelines declares that only very large market shares of 50% or more may in themselves be evidence of the existence of a dominant market position. Furthermore, paragraph 21 of the Guidelines does not contain a presumption that concentration levels above those indicative thresholds would give rise to competition concerns. Therefore, where other case-specific grounds exist for concluding that there are no serious doubts, it is not necessary to examine concentration levels.

132. The interveners submit that market shares and concentration levels are only the starting point for the Commission's analysis. Furthermore, the issue in BaByliss v Commission , paragraph 55 above, was not whether the Commission should have presumed that a market share in excess of 40% was likely to give rise to dominance. Furthermore, the Court of First Instance found in Case T-290/94 Kaysersberg v Commission [1997] ECR II-2137, paragraph 179, that a market share of 43.2% was not sufficient to give rise to dominance where the two next largest competitors had market shares of 24.5% and 13.4%.

Findings of the Court

133. As a preliminary point, it must be observed that the Commission set out the market shares of the various suppliers in the market in recitals 51 to 53 of the contested decision, but did not assess those market shares according to the criteria stated in paragraph 17 of the Guidelines nor did it make a Herfindahl-Hirschmann index (HHI') calculation for the purposes of comparison with the thresholds laid down in paragraphs 19 to 21 of the Guidelines.

134. It must therefore be established whether the Commission failed to follow the Guidelines by not carrying out, in the contested decision, an analysis, first, of the market shares in relation to the criteria set out in paragraph 17 of the Guidelines, and secondly, of the concentration levels.

135. As regards, first of all, the market shares, it must be borne in mind that, according to paragraph 17 of the Guidelines, only very large market shares of 50% or more may in themselves be evidence of the existence of a dominant market position. According to the same paragraph of the Guidelines, in the case of a smaller market share, the transaction may raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. It follows that, in the present case, the analysis of market shares would not in itself have shown the existence

of dominance, since the merged entity only held [40-50]% of the market. Therefore, the analysis of the other factors set out in paragraph 17 of the Guidelines is necessary to establish whether, overall, there is evidence of a dominant position. It follows from examining the second and third parts of the plea, however, that the other factors stated in paragraph 17 of the Guidelines and alleged by the applicants to exist in the present case also fail to indicate that the merged entity was dominant.

136. In relation to the reference to BaByliss v Commission , paragraph 55 above (paragraph 329), it must be noted, as the interveners point out, that the issue in that case was not whether a market share in excess of 40% was likely to give rise to dominance, but whether, having established that threshold in that case, the Commission had made a proper assessment of other factors. Furthermore, the interveners correctly point out that it is apparent from another case that a market share of 43.2% is not sufficient to give rise to dominance (Kaysersberg v Commission , paragraph 132 above, paragraph 179). It follows that the existence of a dominant position must be assessed on a case-by-case basis according to the circumstances of the case and that the Commission's findings on the factual circumstances of the merger in BaByliss v Commission , paragraph 55 above (paragraph 329), cannot be transposed to the present case.

137. With regard, secondly, to concentration levels, it must be pointed out that paragraphs 19 to 21 of the Guidelines set out, essentially, the HHI thresholds below which a merger is unlikely to raise competition problems. Thus, the Commission considers, in particular, that a merger is unlikely to raise horizontal competition concerns in a market with a post-merger HHI between 1000 and 2000 and a delta below 250, or where a post-merger HHI is above 2000 and the delta below 150, save in exceptional circumstances. According to paragraph 16 of the Guidelines, the HHI is equal to the sum of the squares of the individual market shares of each of the firms in the market.

138. In the present case, it must be pointed out, first, that the applicants have not elaborated on their argument on HHI value brackets, even though they knew the exact market shares used in the contested decision as soon as the Commission's defence was lodged. However, the HHI calculated on the basis of those figures is shown to increase from around [confidential] pre-merger to about [confidential] post-merger, which represents a delta of approximately [confidential]. Those values indicate that the effects of the merger on the market exceed the HHI thresholds below which the merger does not, in principle, raise any competition concerns. However, the second sentence of paragraph 21 of the Guidelines states that exceeding those thresholds does not give rise to a presumption of the existence of competition concerns. It must be observed, however, that the greater the margin by which those thresholds are exceeded, the more the HHI values will be indicative of competition concerns.

139. It follows that the post-merger HHI value does not provide any clear indication of the existence of competition problems in the present case, since it does not significantly exceed the HHI threshold of 2000. In fact, only the delta significantly exceeds the corresponding HHI threshold. However, that value is the only one likely to indicate competition problems, while neither the market shares nor the factors examined in the context of the second and third parts of this plea are indicative of such problems. In those circumstances, the Commission cannot be accused of disregarding the Guidelines in considering that there was no need to assess the concentration levels in the contested decision.

140. Finally, it must be pointed out that paragraph 14 of the Guidelines states that market shares and concentration levels provide useful first indications of the market structure and of the importance of the merging parties, but it does not require the Commission to assess those factors in every decision.

141. It is clear from the foregoing that the Commission cannot be criticised for not analysing,

in the contested decision, the concentration levels and market shares in relation to the criteria set out in paragraph 17 of the Guidelines. Since the absence of such analysis does not undermine the Commission's findings, that part must be rejected.

142. It follows from the foregoing that the first plea in law must be rejected.

3. The second plea, alleging errors of fact and of assessment

143. The second plea in law is subdivided into four parts, by which the applicants assert that the Commission's analysis of the merger's non-coordinated effects is tainted by errors concerning, first, free capacity in the market for rosin resins for ink applications, secondly, the nature and extent of customers' vertical integration, thirdly, the impact of significant raw material price increases, and fourthly, the alleged countervailing buyer power wielded by customers. In the context of their arguments advanced in the first and fourth parts of the present plea, the applicants also criticise the inadequate reasoning of the Commission's findings, which will be examined in paragraph 218 et seq. below.

a) First part, alleging errors in the assessment of free capacity in the market

Arguments of the parties

144. The applicants consider that the Commission's assessment of the free capacity of the merging parties' competitors lacks sufficient reasoning and is vitiated by manifest errors of assessment, on the ground that the Commission failed to examine the availability of raw materials needed in the production of rosin resins. The importance of such availability is reflected in paragraph 71(b) of the Guidelines and in the Commission's previous decisions. Raw material shortages prevent competitors from increasing production and raise barriers to entry and expansion in the market.

145. In earlier decisions, the Commission concluded that serious competition concerns could be raised on account of a lack of available capacity or an insufficient number of suitable competitors and examined whether competitors had sufficient spare capacity to cover sales to a significant extent, whether they could make available such capacity and whether potential competitors could contribute to making available spare capacity (Commission Decision 2006/171/EC of 3 May 2005 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3178 - Bertelsmann/Springer/JV) (OJ 2006 L 61, p. 17; Bertelsmann/Springer/JV'). The Commission conducted detailed investigations into access to raw materials for alternative suppliers to be able to compete with the merged entity, emphasising and examining closely the need for access to necessary resources (Bertelsmann/Springer/JV), easy access to raw materials [Commission Decision of 29 March 2006 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3975 - Cargill/Degussa Food Ingredients); Cargill/DFI'], access to essential inputs [Commission Decision 96/177/EC of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case IV/M.490 - Nordic Satellite Distribution) (OJ 1995 L 53, p. 20; Nordic Satellite Distribution')], the availability of increased supplies (Commission Decision 2000/42/EC of 9 March 1999 relating to a proceeding under the Merger Regulation (Case IV/M.1313 - Danish Crown/Vestjyske Slagterier) (OJ 1999 L 20, p. 1; Danish Crown/Vestjyske Slagterier') and other aspects such as geographical location, available infrastructure, transport costs, operating costs, political stability, available land for plant expansion and the limited availability of supplies (Alcoa/Reynolds, paragraph 80 above).

146. In the contested decision, the Commission did not follow its previous decisions and ignored, misrepresented or dismissed evidence provided by the applicants without providing reasons for doing so. The applicants submitted to the Commission that capacity on the market for rosin resins was constrained, that they made great efforts each year to secure the supplies needed for their publication

inks and that it was difficult to obtain the necessary volume commitment from the suppliers, given the decline in their production capacity. They submitted further that capacity was the only relevant criterion for awarding a supply contract, that they would be forced to include the merged entity in their supplier portfolio, as the remaining suppliers could not provide the required volumes, that the lack of availability of raw materials was a major hurdle to market entry, that there had been severe procurement problems in the recent past due to a lack of availability of raw materials and that a competing supplier had had to stop production of some rosin resins due to a shortage of raw materials.

147. While the Commission took into account in the contested decision an additional submission of Sun that provided specific examples of supply shortages, it failed to draw the correct conclusions in that it attributed those shortages to technical maintenance and not to a general lack of production capacity in the overall market. The Commission neither re-examined this information after having discussed it with the merging parties nor explained how an isolated technical problem at a supplier could lead to a complete refusal of that supplier to supply a customer when, according to the Commission's own account, all suppliers h ad excess capacity. It is also unclear how the Commission could conclude that [i]t appears that the customer in question was able to find alternative sources of supply which mitigated the impact of the unexpected shortage'. No such information had been submitted to the Commission, nor had it contacted Sun to corroborate that statement.

148. The applicants also point to letters submitted during the administrative procedure which show that Hexion itself had to deal with production capacity issues, because it could not confirm the quantities requested and had to draw lots for its customers. They also submit that, given the shortage of raw materials, the merged entity may, on account of its size, infrastructure and experience acquire a high degree of control or influence over the supply of rosin resins and that this will further disadvantage the smaller suppliers that cannot match the size and strength of Hexion and Akzo. Inevitably, any hypothetical expansion by rival firms will be even more difficult if not impossible. However, the Commission did not investigate whether the combined bargaining power of Hexion and Akzo over providers of gum resin was likely to significantly exceed that of their competitors and what effect that would have on the market.

149. The applicants submit that three internet documents confirm the scarcity of raw materials in the past few months and the applicants' appraisal of the industry dynamics. In their view, in a recent report on resins, published by Ink World Magazine , a Product Manager for resins of Hexion stated that the single largest issue currently facing the resin industry was inconsistent availability of key materials and the corresponding cost increases and that, from Hexion's perspective, cost increases and shortages of tall oil rosin and gum rosin were critical issues. A joint statement on 2 August 2006 by Megara and Resinall similarly confirms, in the view of the applicants, that the supply situation was very difficult, as they state that this year the industry faced unprecedented challenges, including raw material shortages and increased costs, that, as the busiest time of the year was approaching, recent developments made further supply disruptions likely and that, therefore, Resinall was not accepting new customers or business until further notice and would make every effort to avoid the need for quotas. Finally, the website of DRT reveals, according to the applicants, that the latest news from China concerning raw materials shows that the situation remains very difficult.

150. The applicants further submit that, whilst the Resin Report' and the Megara and Resinall statement were not available by 29 May 2006, it is surprising that the Commission failed to perceive any signs of a raw material shortage before adopting the contested decision. While the contested decision notes that Megara and DRT have free capacity of 5 000 t (representing 50% of its production capacity) and 1 000 t (representing approximately 6% of its production capacity) respectively, Megara announced fears that it would not even be able to fulfil its existing commitments. According to

the applicants, moreover, DRT is also facing serious supply problems.

151. The applicants also question the Commission's methodology in measuring capacity. While it realises that demand is seasonal, entailing supply problems due to capacity constraints, it fails to appreciate that an industry characterised by excess capacity should be able to use that excess capacity to meet customers' orders in periods of high demand.

152. The applicants conclude that the data the Commission had at its disposal does not support its conclusions that the majority of customers have acknowledged that the market has overcapacity'. They consider the Commission's assertion that five out of seven customers indicated that the market [was] not capacity constrained and [had] overcapacity' and that two other customers did not take a position' is incorrect since the applicants all stated that the market was capacity constrained.

153. First of all, the Commission notes that the applicants do not dispute that the merging parties' competitors had overcapacity amounting to at least 19.5% of total production in the market, and 41% taking into account the estimates of the market share for the producers which did not reply to this question.

154. Second, the Commission submits that the applicants' argument is conceptually flawed because shortages of raw materials in a market are liable to affect all suppliers in the same way. Anti-competitive effects would only result if the merged entity had preferential access to raw materials, thereby allowing it to limit its competitors' access to those inputs. However, the applicants do not contend this and there is no indication to this effect. In fact, it is clear from a document taken off the Internet by the Commission that only 25% of rosin is used for the production of resins for printing ink applications. Consequently, the merged entity is only likely to purchase, by virtue of its [20-30]% global market share for rosin resins (recital 53 of the contested decision), 5 to 10% of global rosin production, which is not indicative of significant purchasing power.

155. Third, the market investigation did not suggest that shortages of raw materials were a barrier to increases in production. While it did not specifically ask the merging parties' competitors whether they were facing shortages of certain rosins, the Commission considers that that information would have been mentioned in their answers to questions 39 and 40 of the competitors' questionnaire if they had considered that those shortages were a major obstacle to resin production. However, that is not the case. The Commission also contends that the only customer who mentioned the problem of raw material shortages during the administrative procedure was Siegwerk. Both Flint and Sun remained silent during the administrative procedure on a problem which they now regard as a key element for the assessment of the concentration. Furthermore, the information submitted to the Commission concerning [confidential] points to, respectively, problems of a technical nature and maintenance measures for the reactors. The information does not contain any reference to raw material shortages.

156. As regards, fourth, the publications to which the applicants refer, the Commission recalls that the lawfulness of the contested measures must be assessed according to matters of fact and law which existed on the date the measure in question was adopted. It also takes the view that a close examination of those documents shows that none of them contains indications of shortages of raw materials that would have impeded increase in the production of rosin resins.

157. Fifth, in relation to its previous decisions, the Commission argues that those cases concerned very different facts from those in the present case and that they are therefore irrelevant to this case.

158. Finally, the Commission observes that, in reply to questions 35 and 39 of the customers' questionnaire, Siegwerk stated that there [was] some overcapacity in the market'.

159. The interveners state that resin prices had climbed sharply at the time of the merger owing to a temporary shortfall in supply relative to demand resulting from a combination of low starting inventories, bad weather that delayed the gum rosin harvest and speculation, but that rosin could be obtained at the market price and that prices had fallen subsequently. In reference to a meeting with Sun, which took place after the contested decision was adopted, the interveners submit that the applicants knew this when they lodged their application.

160. As regards two of the publications to which the applicants refer, the interveners maintain that the statements which they contain are irrelevant, given that they do not have any connection with rosin resin production in Europe. The third states that Arez began construction in China on a project to double its resin production capacity, which implies that that undertaking believed it had the necessary access to raw materials. Furthermore, those publications, together with a manufacturing and sales agreement between Megara and Resinall, are examples of new market entry which show that barriers to entry and expansion were low.

161. Finally, no facts support the assertion that the merged entity could obtain preferential access to raw materials. Rather, at a meeting on 7 April 2006, Sun expressed concerns that Hexion was not vertically integrated in the rosin sector, unlike some of its competitors.

Findings of the Court

162. By the first part of this plea, the applicants essentially put forward two complaints, the first alleging that the Commission erred in finding that there was excess capacity in the market, the second alleging that it erred in failing to analyse, in the contested decision, either the availability of raw materials needed to produce rosin resins or the impact of alleged raw material shortages on the utilisation of capacity.

- The first complaint, alleging errors concerning existing capacity in the market

163. It must be recalled, at the outset, that the Commission considered in recitals 63 to 67 of the contested decision that the market was characterised by excess capacity.

164. The Court must therefore examine whether the Commission made an a manifest error of assessment by considering that there was excess capacity in the market.

165. As regards, first, the alleged general and seasonal constraints, it is clear from the administrative file that the applicants stated that there were constraints on the market impeding production capacity, that the suppliers' capacity was potentially in decline and that Sun expended great effort each year to secure the supplies it needed, in particular for the period from September to December, when demand was seasonally high and that production capacity was insufficient (replies of Flint to question 40 and of Sun to question 39 of the customers' questionnaire). In addition, in its supplementary observations, Sun stated that [confidential].

166. In this regard, it should be recalled that the contested decision is based primarily, in recitals 62 to 65, on information provided by the merging parties' competitors, according to which there was spare production capacity of at least 19.5% of total production on the market and which could reach, according to estimates, as high as 41% (see paragraph 25 above). According to recital 65 of the contested decision, five of the seven customers who replied to the questionnaire acknowledged that the market had overcapacity. To the extent that the applicants dispute this, the Commission correctly refers to Siegwerk's replies to questions 35 and 39 of the customers' questionnaire, in which it recognises that there is excess capacity. Therefore, it is clear from the file that only Flint and Sun clearly stated, during the administrative procedure, that capacity was constrained. It is also clear from Sun's further observations and [confidential] reply that [confidential]. In fact, they show that [confidential].

167. Furthermore, it is also clear from email correspondence provided by Sun that it was [confidential]. Consequently, the Commission was under no obligation to provide further explanation of how [confidential] or to check its assertions in that regard with Sun. Furthermore, since the information provided [confidential], the Court considers that the Commission was not required to check this aspect with Sun.

168. In those circumstances, the Court considers that the Commission was not required to corroborate further the findings set out in recital 67 of the contested decision and that it made no manifest error of assessment in considering that there was excess capacity in the market.

169. As regards, secondly, the alleged capacity constraints experienced by the applicants' competitors, Flint indicated that other suppliers did not have sufficient free capacity, that it was very difficult to obtain the relevant volume commitments which they needed from the suppliers, that capacity was the main criterion to be taken into account when concluding a supply contract and that it was required to include the merged entity in its supply portfolio, as the other suppliers were unable to supply it with the volumes it needed (replies to questions 12, 40, 43 and 45 of the customers' questionnaire). Furthermore, Sun stated that all rosin resin producers currently supply the ink industry and that, as a result, there was no alternative supplier available to the industry, that the required volume was one of the criteria for concluding supply contracts, that no supplier today was capable of meeting its needs and that all the major rosin purchasers had multiple supply strategies (replies to questions 12, 42 and 44 of the customers' questionnaire). Finally, Siegwerk stated that there was no alternative to the suppliers established in Europe (reply to question 12 of the customers' questionnaire).

170. In that regard, it must be observed that, in the present case, the only relevant question is whether the available capacity permits the merging parties' customers to transfer orders, until now provided by the merging parties, to other existing suppliers or potential new entrants. It is clear from the answers to the customers' questionnaires set out in the previous paragraph that only Flint clearly stated, during the administrative procedure, that there were problems connected with the volumes available from competitors of the merging parties. Flint, however, also stated, as regards difficulties in obtaining commitments to supply for the relevant volumes' from suppliers, that such commitments could be obtained if the customer was prepared to pay the price (If we pay, we get!', reply to question 40 of the customers' questionnaire). Thus, the alleged difficulties identified appear to be linked more to the level of prices charged by the suppliers depending on demand than to capacity shortages.

171. Next, it is not necessary, in order to discourage any anti-competitive conduct on the part of the merged entity, for all its customers to be able to transfer all their orders to other suppliers. In fact, the possibility for the applicants to transfer a substantial part of their requirements to other suppliers may be regarded as a threat liable to cause sufficient losses for the merged entity to deter it from pursuing such a strategy. In the present case, it is clear from the multiple supply strategy which Sun referred to during the administrative procedure that customers seek to include a number of producers in their supply portfolio. It is clear from the market shares of Arizona, Cray Valley and Respol as well as from their production capacities and significant excess capacity, identified in recitals 51 and 62 to 64 of the contested decision and not disputed by the applicants, that those suppliers are capable of supplying the large volumes that the applicants may require. It must also be pointed out that the smaller suppliers together have a market share of around 21% and significant excess capacity. Therefore, the Court considers that the Commission did not make a manifest error of assessment in finding, in recitals 68 and 71 of the contested decision, that the other producers in the market had the capacity to be able to counter anti-competitive conduct and to supply the merging parties' major customers.

172. Finally, it must be remembered that only Flint and Sun submitted, during the administrative

procedure, that there were capacity constraints, while the other customers, including Siegwerk, and the merging parties' competitors all accepted that there was excess capacity. For those reasons, the Court considers that the Commission did not make a manifest error of assessment in considering that the applicants' competitors were not under capacity constraints capable of preventing those customers from transferring a sufficiently significant part of their orders to other suppliers.

173. In the light of the foregoing, the Court considers that the Commission was entitled to consider that there was excess capacity in the market. Consequently, this complaint must be rejected.

- The second complaint, alleging errors relating to the availability of raw materials

174. As a preliminary point, the Court observes that in recital 67 of the contested decision the Commission found that, in the years leading up to the merger, there was an increase in the prices of raw materials constituting essential inputs in the production of rosin resins, such as crude oil, gum rosin and tall oil resin, the price per tonne of rosin resin having increased from USD 500 in January 2004 to around USD 1 250 on the date of the contested decision.

175. It must therefore be established whether the Commission made a manifest error of assessment in failing to examine, in the contested decision, the availability of raw materials necessary for the production of rosin resins or the impact of an alleged shortage of such raw materials on the utilisation of capacity.

176. As regards, first of all, assertions as to the existence of raw material shortages, it must be pointed out that Siegwerk stated, in reply to questions 36 and 39 of the customers' questionnaire, that the high prices and availability of raw materials were a major hurdle to market entry at the current time, and that there had been severe procurement problems in the recent past due to the lack of raw materials. In reply to question 15 of the customers' questionnaire, Siegwerk also stated that in February 2006 Arizona had stopped supplying it with the majority of modified phenolic resins because it had interrupted production due to a persistent lack of two essential raw materials, crude tall oil resin and gum rosin. Further, it has already been recalled that recital 67 of the contested decision refers to a significant increase in the prices of raw materials over the years leading up to the adoption of the contested decision. Finally, the interveners acknowledge that there was a temporary shortfall in supply relative to demand due to a combination of different factors.

177. However, the Commission is right in pointing out that Siegwerk is the only one of the ten customers which replied to the customers' questionnaire to point to problems arising from the availability of raw materials. No other customer, not even Flint and Sun, maintained, during the administrative procedure, that there were such difficulties. By the same token, none of the 13 competitors of the merging parties which replied to the competitors' questionnaire mentioned such problems in relation to crude tall oil resin or rosin resin, even though the Commission asked questions as to the utilisation of capacity for the production of hybrid resins (which are made up of hydrocarbon resins and resins based on tall oil or gum rosin) and as to difficulties in entering, in particular, the market for rosin resins (questions 39 and 40 of the competitors' questionnaire). In fact, the only indication to this effect is from Cray Valley, which claimed that limited access to cheap raw materials (particularly hydrocarbons)' was an obstacle for new entrants. In particular, Arizona did not refer to any difficulty in this regard. However, rosin resin producers are the best placed to detect supply problems concerning their raw materials. In addition, the interveners also maintain that, despite the temporary shortfall observed in supply relative to demand, it was still possible to obtain gum rosin at the market price.

178. Having regard to the foregoing, the Court considers that, in view of the statements of Siegwerk alone, in a situation where all producers should encounter the same difficulties, the Commission did not make a manifest error of assessment by not examining the availability of raw materials in the contested decision.

179. As regards, secondly, the documents available on the internet to which the applicants refer, it must be observed, first, that those documents cannot be taken into account as evidence of the existence of alleged raw material shortages, since none of those documents was submitted to the Commission during the administrative procedure. In addition, the announcement of the agreement between Megara and Resinall and the resin report were published after adoption of the contested decision, while DRT's statement is not dated.

180. Second, to the extent that the applicants seek to rely on those documents in order to show that the shortages of crude tall oil resin and gum resin were, at the time the contested decision was adopted, supposedly common knowledge, it must be observed that Resinall's announcement fails to specify which raw materials were affected by the alleged shortage or the reasons for that shortage and that the interveners stated, without being contradicted by the applicants, that Resinall was not selling rosin resins in Europe at the time of the contested decision and of the announcement. In addition, DRT's statement refers to terpene derivatives and the interveners asserted, without being contradicted by the applicants, that what is true for terpene derivatives is not necessarily so for rosin resins. Furthermore, in so far as that statement refers to gum rosin, it must be observed that it is not apparent from that statement whether it is referring to an increase in production or in prices, and that even evidence of price increases does not necessarily prove that there is a shortage. Finally, it is clear from the resin report that it does not relate specifically to crude tall oil resin and gum rosin, but to all the raw materials and in particular hydrocarbons, that it refers generally to the existence of difficulties in 2005, but that supply stabilised in 2006 and that the difficulties in 2005 were linked to price increases and their volatility rather than to the lack of the two raw materials in question. In fact, the only reference specifically to a shortage of those two raw materials concerns 2005 and explains that shortage as well as their higher costs by reference to, in particular, higher energy costs. It must therefore be considered that those documents do not show that a shortage of crude tall oil resin and gum rosin was common knowledge at the time the contested decision was adopted nor that the Commission was therefore required to investigate that issue.

181. For those reasons, the Court considers that the documents available on the internet to which the applicants refer do not show that the Commission made a manifest error of assessment in not examining the availability of raw materials in the contested decision.

182. In relation, third, to the claim that the alleged raw material shortages prevent competitors from increasing their production and constitute a barrier to entry and expansion in the market, the Commission correctly observes that the applicants have failed to explain how anti-competitive effects could result from raw material shortages which would seem to affect all suppliers in the same way. In that regard, it must be pointed out that Siegwerk stated, in reply to question 12 of the customers' questionnaire, that the highest volume of rosin was produced in China and that if Chinese rosin became more costly, all suppliers across the globe would face the same problem. In fact, if gum rosin is not available, no producer, even the merged entity, is able to produce rosin resins from gum rosin. On the other hand, if it is available, any producer can obtain it to the extent that it is prepared to pay the price (see paragraph 170 above).

183. Thus, as the Commission contends, only preferential access for the merging parties as compared with their competitors could affect competition. However, the applicants do not claim that the merging parties have such access. They merely claim that the merged entity may, on account of its size, infrastructure and experience acquire a high degree of control or influence over the supply of gum rosin. However, the Commission pointed out, without being contradicted by the applicants, that the merged entity will only purchase 5 to 10% of global gum resin production (see paragraph 154 above).

184. For those reasons, the Court considers that the applicants' arguments that, first, raw material shortages would prevent competitors from increasing their production and constitute a barrier to entry and expansion in the market, and second, that the merged entity would have significant purchasing power, have not been sufficiently proven.

185. As regards, fourth, the references made to the Guidelines and the Commission's previous decisions, it suffices to point out that each case must be assessed according to its particular factual circumstances and that it is clear from the foregoing that the evidence advanced by the applicants has not shown that the Commission was under an obligation, in the contested decision, to look into the availability of raw materials and the impact of their alleged shortage on the utilisation of capacity.

186. In the light of the foregoing, the Court considers that the applicants have not established that the Commission made a manifest error of assessment by not dealing, in the contested decision, with the availability of raw materials or the impact of their alleged shortage on the utilisation of capacity. Consequently, that complaint must be rejected.

187. It follows that this part of the plea must be rejected.

b) The second part, alleging errors concerning the nature and extent of vertical integration of the merged entity's customers

Arguments of the parties

188. The applicants assert that the Commission failed to examine the nature and extent of customers' vertical integration. When noting in recital 69 of the contested decision that undertakings such as Siegwerk and Flint who possess in-house rosin resin production... discipline their suppliers successfully', the Commission used production capacity numbers as estimated by the merging parties without asking the applicants about the nature of their production. The in-house production in question only covers one particular type of rosin resin that can only be used in the production of a limited range of printing inks. In addition, instead of 25 000 t and 12 000 t, Flint and Siegwerk actually produce only [confidential]. A proper investigation, attempting to corroborate the data, would have revealed that this production lacks any potential to constrain the merging parties, because the applicants remain dependent on external supplies. The Commission failed to ascertain whether the information at its disposal was accurate, relevant or objective. Since both applicants had voiced serious concerns about the transaction in their submissions, pointing to competitive constraints that the merger would bring about, it is surprising that the Commission did not re-examine the data submitted by the merging parties.

189. The Commission observes that the applicants do not deny that Flint and Siegwerk have significant in-house production and that the difference between the estimates mentioned in the contested decision and the figures given by the applicants is small. The applicants' assertion that in-house production can only be used for a limited range of printing inks should be rejected as unsubstantiated, because producers of rosin resins for ink applications are generally capable of producing the full range. In any case, the applicants' arguments do not call into question the finding in recital 69 of the contested decision that the customers may threaten to integrate vertically.

190. The interveners indicate that Flint's and Siegwerk's combined capacity, according to their own figures, of [confidential] is significant compared with Hexion's pre-merger capacity of 35 000 t. Also, the Commission was aware from the form notifying the concentration that Flint and Sun Chemical only made resinates. Given the ease of supply substitution, Flint and Siegwerk could use their internal production capacity to discipline their suppliers, first, by threatening to stop ordering resins for publication gravure and offset inks and, second, by freeing up other suppliers' capacity to produce other types of resins for the printing ink market. Finally, the applicants are well aware of their ability to threaten vertical integration, Sun having threatened to do so

at a meeting with Hexion on 5 May 2006.

Findings of the Court

191. As a preliminary point, it must be borne in mind that, in the context of its examination of the countervailing buying power of the merging parties' customers, the Commission noted in recital 69 of the contested decision that, according to the parties' estimates, three major customers had significant in-house production capacity: Flint and Siegwerk, which had an estimated production capacity of around 25 000 t and 12 000 t respectively, and Huber, which recently acquired Micro Inks and informed its suppliers that it would start to transfer its purchases to its subsidiary.

192. It must therefore be examined whether the Commission made errors concerning Flint's and Siegwerk's vertical integration which could affect its finding that the merging parties' customers have countervailing buyer power.

193. As regards, first of all, the difference between the production quantities referred to in the contested decision and the figures produced by the applicants, it must be observed that this difference is minimal. Even on the basis of the figures produced by the applicants, Flint's and Siegwerk's combined production amounts to over [confidential]% of Hexion's pre-merger production capacity. For those reasons, it must be considered that the difference suggested by the applicants has no impact on the Commission's finding of countervailing buyer power contained in recital 69 of the contested decision.

194. As regards, second, the argument that Flint's and Siegwerk's production is limited to certain resins and that, therefore, they are reliant on market suppliers, the interveners state that in-house production, even if limited to certain rosin resins, enables them to exert pressure on suppliers. In any event, the Commission correctly asserts that the possible limitations to Flint's and Siegwerk's in-house production do not affect the substance of its reasoning set out in recital 69 of the contested decision. In fact, it uses the examples of Flint, Siegwerk and Huber to show that the countervailing buyer power of the merging parties' customers is strengthened by the reality of their threat to integrate vertically. For those reasons, it must be considered that the Commission's failure to mention, in recital 69 of the contested decision, the possible limitations to Flint's and Siegwerk's production has no effect on the Commission's finding of countervailing buyer power.

195. Finally, it is clear from the foregoing that the Commission did not make a manifest error of assessment in considering that, in the circumstances of this case, there was no need to check the data relating to Siegwerk's and Flint's production.

196. In the light of the foregoing, the applicants have not shown that the Commission made a manifest error of assessment by considering that the merging parties' customers have countervailing buyer power or, in relation to Flint's and Siegwerk's threat to integrate vertically, a factual error likely to undermine that finding.

197. Consequently, this part of the plea must be rejected.

b) The third part, alleging errors concerning the impact of significant raw material price increases

Arguments of the parties

198. The applicants take the view that the Commission failed to investigate properly the impact on competition of the price increase of gum resin from USD 500 to USD 1 250 per tonne during a period of 29 months leading up to the merger. Sun had informed the Commission about steep price increases of rosin resin, in particular price increases applied by the merging parties from February 2005 to 15 May 2006. However, the Commission did not examine the impact of these price increases, coupled with growing demand, on producers and purchasers of rosin resin, while in other cases the Commission concluded that the ability to increase prices... is strong proof that competition has

not been sufficient in the past and is not likely after the merger to significantly constrain the market power' of the merged entity (see Nestlé/Perrier) and that price increases run counter to the argument that prices are constrained by excess capacity' (Commission Decision 2002/244/EC of 14 March 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.1663 - Alcan/Alusuisse) (OJ 2002 L 90, p. 1; Alcan/Alusuisse')).

199. The Commission observes that the applicants do not explain why a detailed investigation into raw material price increases that affect all producers of the relevant product is necessary. It contends that such price increases are not linked to this merger and the merger is not the cause of those increases. Since prices of the raw materials needed for producing rosin resins have increased significantly over the last few years, the prices of rosin resins have followed suit.

200. The interveners also contend that the application does not explain how raw material price increases can relate to the notified concentration. Also, the facts of Alcan/Alusuisse and Nestlé/Perrier are not comparable to those of the present case. Finally, they note that the evidence relating to the price increases provided by Sun was examined in recitals 66 and 67 of the contested decision.

Findings of the Court

201. First of all, it should be observed that the Commission noted, in recital 66 of the contested decision, that Akzo and Hexion have, in the past, increased the prices of rosin resins. It pointed out, in recital 67 of the contested decision, that those increases in the years preceding the merger were due to an increase in the prices of the raw materials, which constitute key inputs for rosin resin production, such as crude oil, rosin gum and tall oil resin, the price per tonne of rosin gum having increased from USD 500 in January 2004 to around USD 1 250 at the date of the contested decision.

202. It must therefore be ascertained whether the Commission made a manifest error of assessment by not carrying out an examination in the contested decision, as the applicants allege, of the impact of the price increases of, first, rosin resins, particularly those increases imposed by the merging parties, and, second, raw materials, on producers and purchasers of rosin resins.

203. As regards, first, the price increase of rosin resins, it has already been pointed out in paragraph 201 above that the contested decision explains in recital 67 that their increase is due to the price increase of raw materials. The applicants do not contest this explanation. It follows that, on the basis of those factors, it cannot be claimed that the Commission found in the present case that, contrary to its findings on the facts in Alcan/Alusuisse and Nestlé/Perrier, the price increases were not indicative of insufficient competition and market power. Since the applicants have not advanced any other explanation to support their view that those general price increases - which affect, a priori, all customers in the same way - are relevant to the assessment of the merger's anti-competitive effects, they have failed to show that the Commission made a manifest error of assessment by not examining the impact of those price increases on purchasers of rosin resins.

204. As regards, secondly, the prices of the raw materials, it is stated in recital 67 of the contested decision that, to some extent, their increase is due to the price increase of crude oil. Furthermore, it should be borne in mind that Siegwerk indicated, and it is not disputed, that those increases affected all producers of the relevant product in the same way (see paragraph 181 above). Therefore, there is no reason to find that those general price increases in raw materials raise competition problems (see paragraphs 181 to 183 above). Indeed, the applicants have not advanced any specific reasons why the Commission should have investigated the impact of the price increase of the raw materials on producers and purchasers of rosin resins.

205. It is clear from the foregoing that the applicants have not shown that the Commission made

a manifest error of assessment in not analysing the impact of the price increases on producers and purchasers of rosin resins. Therefore, this part of the plea must be rejected.

c) The fourth part, alleging errors concerning countervailing buyer power

Arguments of the parties

206. The applicants assert that the Commission failed to properly assess arguments relating to countervailing buyer power. It is not sufficient to show that demand in the market is concentrated or that customers source from a number of suppliers. The Commission should have focused on the ability of buyers to take action to undermine any attempt by suppliers to increase prices. In the light of the evidence in the case file, which contradicted the Commission's buyer power argument, it was incumbent upon the Commission to conduct a more sophisticated analysis, extending to the structure and other dynamics of the industry as well as to the precise strategies that buyers could undertake to curb price increases post-merger (Commission Decision 1999/641/EC of 25 November 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1225 - Enso/Stora) (OJ 1998 L 254, p. 9; Enso/Stora')). The contested decision remains silent on all these issues, since the Commission merely contends that the strong dependence of the merging parties on a few large customers will militate against any anti-competitive behaviour, even though the applicants pointed out that the market is not characterised by buyer power and stated that, because they source from both merging firms, they were particularly vulnerable to the dictates of the merged entity. The applicants had noted in their submissions to the Commission that it was a seller's market and that they could not exercise significant bargaining power over the suppliers in the industry because of the lack of alternative suppliers and technical constraints. In the light of those submissions, the Commission was under an obligation to set out the reasons for its conclusions, but failed to do so as it did not address the applicants' arguments in the contested decision.

207. The Commission states that the applicants do not dispute the finding that the demand side of the market is highly concentrated and observes that the top five ink producers account for approximately [80-90]% of Hexion's and [90-100]% of Akzo's revenues. It also observes that the supply side of the market is less concentrated, as the sales of the merged entity to the applicants represent [confidential]% of Hexion's and [confidential]% of Akzo's total sales, but only [confidential]% of Sun's total requirements. Consequently, the merging parties are much more dependent on the applicants than vice versa. The purchasers also have a significant number of credible alternative suppliers, their own production and the ability to integrate vertically. In those circumstances, the Commission takes the view that the finding in the contested decision that the strong dependence of the merging parties on a few big customers constitutes a constraint on possible anti-competitive behaviour by the merged entity is justified.

208. The interveners maintain that the Commission analysed the issue of buyer power in the contested decision closely. Enso/Stora does not set out a policy that the Commission is bound to follow, nor are the facts in that case sufficiently close to suggest that an equivalently detailed analysis would be appropriate in the present case. The replies to the questions to which the applicants refer are not entirely unambiguous, do not contradict the facts found and analysed by the Commission and are not sufficiently corroborated.

Findings of the Court

209. It must be examined whether the Commission made a manifest error of assessment in limiting its analysis of countervailing buyer power to the elements set out in the contested decision.

210. First of all, it must be borne in mind that paragraphs 64 and 65 of the Guidelines state that even firms with very high market shares may not be in a position, post-merger, to significantly

impede effective competition, if their customers possess countervailing buyer power. According to the Guidelines, countervailing buyer power must be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to credibly threaten to resort, within a reasonable timeframe, to alternative sources of supply should the supplier decide to increase prices, or to otherwise deteriorate quality or the conditions of delivery. This would also be the case if the buyer could credibly threaten to vertically integrate into the upstream market or to sponsor upstream expansion or entry. Finally, it is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry.

211. Next, as regards the applicants' own assertions, Flint stated that, to its knowledge, purchasers of rosin resins had no bargaining power (answer to question 40 of the customers' questionnaire). Siegwerk considered that it was a seller's and not a buyer's market (reply to question 40 of the customers' questionnaire). Sun stated that, in its view, purchasers could not exercise sustained bargaining power over suppliers in the industry because there were very few suppliers, combined with the difficulty for buyers to change supplier rapidly or use alternative chemical products (reply to question 40 of the customers' questionnaire).

212. Therefore, only Sun put forward reasons to show that there was no countervailing buyer power, that is, the very limited number of suppliers and the difficulties in transferring orders to other suppliers. However, it has already been pointed out that the applicants have not sufficiently proved those claims (see paragraphs 84 et seq. and 94 et seq. above). The same is true for the assertions concerning the lack of necessary volumes and the suppliers' declining capacity which, according to the applicants, were made by Flint in that context (see paragraph 73 et seq. above).

213. In relation to the argument that the Commission should have examined the ability of customers to take action against any attempt by suppliers to increase prices and that it was incumbent upon it to conduct a more sophisticated analysis, extending to the structure and other dynamics of the industry as well as to the precise strategies that buyers could undertake to curb price increases post-merger, it must be borne in mind, first, that the contested decision is based, in that regard, on the fact that certain customers operate their own in-house production which allows them to discipline their suppliers to a certain extent. Second, it refers to the possibility for customers to source their supplies from other large and small suppliers which have significant excess capacity and are able to produce the whole range of rosin resins. Third, the Commission observes that demand is concentrated on a very limited number of large customers, which confers on them, in particular in the light of the factors already mentioned, considerable negotiating power. Fourth, it points to the existence of the credible threat of vertical integration, which also allows those customers to discipline their suppliers (see paragraph 28 above).

214. In addition, those considerations set out in the contested decision correspond, in essence, to the relevant factors for assessing countervailing buyer power stated in paragraphs 64 and 65 of the Guidelines (see paragraph 210 above). In fact, the contested decision underlines the suppliers' high level of dependence on a few large customers. The Court considers, in that regard, that it is not necessary, in order to discourage anti-competitive conduct on the part of the merged entity, for such customers to withdraw entirely from the supplier in question. The possibility for the applicants to transfer a substantial part of their requirements to other suppliers may be regarded as a sufficient threat of losses for the merged entity to be capable of deterring it from pursuing such a strategy (see paragraph 171 above).

215. In the present case, it must be borne in mind that the applicants, in respect of resins for printing ink applications, are among the merging parties' largest customers. Consequently, a transfer even of only part of their orders to other suppliers would amount to a significant proportion of

the merged entity's production. It must also be recalled that the Court has already held that the Commission did not make a manifest error of assessment by considering, in recitals 68 and 71 of the contested decision, that the other producers in the market had the capacity to be able to counter anti-competitive conduct and to supply the merging parties' major customers (see paragraphs 170 to 172 above) and that the applicants have not established that there are, as they allege, considerable difficulties in changing supplier, given the need to qualify rosin resins, which prevent customers from credibly threatening to resort, within a reasonable timeframe, to alternative sources of supply should the merged entity decide to increase prices (see paragraphs 96 to 99 above).

216. Furthermore, whilst the facts in Enso/Stora may have required, due to an exceptional market structure, sophisticated analyses of the industry structure and strategies that buyers could undertake to curb price increases post-merger, it is clear from the foregoing that this does not apply to the present case. In the light of the above findings, the Court considers that the Commission could not be required, in the circumstances of this case, to carry out a more detailed examination of the countervailing buyer power of the merging parties' customers.

217. In the light of the foregoing, this part must be rejected.

e) The alleged lack of reasoning

218. To the extent that the applicants contend that the Commission's assessment of available excess capacity on the part of the merging parties' competitors is not sufficiently reasoned, in particular because the Commission did not examine, in the contested decision, either the availability of raw materials needed to produce rosin resins or the impact of an alleged shortage of those raw materials on the utilisation of capacity, and that it ignored or rejected the evidence provided by the applicants without stating reasons for doing so, it must be pointed out that it is clear from the findings in paragraphs 165 to 185 above that the Commission set out sufficient reasons for its finding that there was excess capacity in the market. Recitals 62 to 67 of the contested decision set out clearly and unequivocally the Commission's reasoning in that regard and have enabled the Court to exercise its power of review and the interested parties to defend their rights.

219. Finally, it is also clear from the findings in paragraphs 213 and 214 above that the Commission provided sufficient reasoning for its finding on countervailing buyer power of the merging parties' customers. Recitals 69 to 71 of the contested decision set out clearly and unequivocally the Commission's reasoning in that regard and have enabled the Court to exercise its power of review and the interested parties to defend their rights.

220. It follows that the arguments based on alleged insufficiency of reasoning must be rejected.

221. It follows from all the foregoing that the Court must reject the second plea.

222. In those circumstances, the action must be dismissed.

Costs

223. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for both by the Commission and the interveners.

(1) .

(1) - Confidential information omitted.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
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PROCEDU	Action for annulment
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Case T-351/03

Schneider Electric SA

v

Commission of the European Communities

(Non–contractual liability of the Community – Loss sustained by an undertaking owing to a sufficiently serious infringement of Community law vitiating the procedure for examining the compatibility of a concentration with the common market)

Summary of the Judgment

1. *Procedure – Application initiating proceedings – Formal requirements*

   (Statute of the Court of Justice, Arts 21, first para., and 53, first para.; Rules of Procedure of the Court of First Instance, Art. 44(1)(c))

2. *Non-contractual liability – Conditions – Sufficiently serious breach of Community law*

   (Art. 288, second para., EC)

3. *Non-contractual liability – Conditions – Sufficiently serious breach of Community law*

   (Art. 288, second para., EC)

4. *Non-contractual liability – Conditions – Sufficiently serious breach of Community law*

   (Art. 288, second para., EC)

5. *Non-contractual liability – Conditions – Decision declaring a concentration incompatible with the common market*

   (Art. 288, second para., EC)

6. *Competition – Concentrations – Administrative procedure – Statement of objections – Necessary content – Observance of the rights of the defence*

   (Council Regulation No 4064/89, Art. 18(1) and (3))

7. *Competition – Concentrations – The fact that teams of officials responsible for the various stages of the investigation of a concentration between undertakings, despite there being an annulment between those various stages, are composed of the same members*

   (Council Regulation No 4064/89, Art. 18(3) and (4))

8. *Competition – Concentrations – Sufficiently serious breach of Community law*

   (Council Regulation No 4064/89, Art. 8(4))

9. *Competition – Concentrations – Assessment of compatibility with the common market – Agreements which are lawful under national law and binding on the parties to the concentration taken into*

account by the Commission

(Council Regulation No 4064/89, Art. 2)

10. *Competition – Concentrations – Examination by the Commission – Decision to open the in-depth investigation phase – Conditions*

(Council Regulation No 4064/89, Arts 2(3), 6(1) and 8(3))

11. *Competition – Concentrations – Administrative procedure – Decision to open the in-depth investigation phase*

(Council Regulation No 4064/89, Art. 6(1)(c))

12. *Non-contractual liability – Conditions – Invalid – Damage – Causal link*

(Art. 288, second para., EC)

13. *Competition – Concentrations – Assessment of compatibility with the common market – No presumption*

(Council Regulation No 4064/89, Arts 2 and 10)

14. *Non-contractual liability – Conditions – Invalid – Damage – Causal link*

(Art. 288, second para., EC)

15. *Non-contractual liability – Conditions – Invalid – Damage – Causal link*

(Art. 288, second para., EC)

16. *Non-contractual liability – Conditions – Invalid – Damage – Causal link*

(Art. 288, second para., EC; Council Regulation No 4064/89, Art. 7(3))

17. *Non-contractual liability – Damage – Compensation*

(Art. 288, second para., EC)

1. Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and the sound administration of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself.

   In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there to be a causal link between that conduct and the damage it claims to have suffered, and the nature and extent of that damage.

   (see paras 92-94)

2. In order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a

causal link between the conduct and the damage pleaded.

Where the unlawfulness of a legal measure is relied on as a basis for an action for damages, that measure, in order to be capable of causing the Community to incur non-contractual liability, must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive criterion in that regard is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

The system of rules in relation to the non-contractual liability of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question.

Where the institution criticised has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach of Community law.

The same applies where the defendant institution breaches a general obligation of diligence or misapplies relevant substantive or procedural rules.

(see paras 113-118)

3. If the concept of a serious breach of Community law, necessary to establish the Community's non-contractual liability, were construed as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion, this could compromise its ability to function as a regulator of competition, contrary to the general Community interest.

Therefore, a sufficiently serious breach of Community law, for the purposes of establishing the non-contractual liability of the Community, cannot be constituted by failure to fulfil a legal obligation, which, regrettable though it may be, can be explained by the objective constraints to which the institution and its officials are subject as a result of the provisions governing the control of concentrations.

On the other hand, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, is objectively subject.

Such a definition of the threshold for the establishment of non-contractual liability of the Community is conducive to protection of the room for manoeuvre and freedom of assessment which must, in the general interest, be enjoyed by the Community regulator of competition, both in its discretionary decisions and in its interpretation and application of the relevant provisions of primary and secondary Community law, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct.

(see paras 121-125)

4. In principle, the possibility cannot be ruled out that manifest and serious defects affecting the economic analysis underlying competition policy decisions may constitute sufficiently serious breaches of a rule of law to cause the Community to incur non-contractual liability.

However, for such a finding to be made it is first necessary to verify that the rule infringed by the incorrect analysis is intended to confer rights on individuals. Whilst certain principles and certain rules which must be observed in any competitive analysis are indeed rules intended to confer rights on individuals, not all norms, whether of primary or secondary law or deriving from case-law, which the Commission must observe in its economic assessments can be automatically held to be rules of that kind.

Next, the economic analyses necessary for the classification, under competition law, of a given situation or transaction are generally, as regards both the facts and the reasoning based on the account of the facts, complex and difficult intellectual formulas, which may inadvertently contain certain inadequacies, such as approximations, inconsistencies, or indeed certain omissions, in view of the time constraints to which the institution is subject. That is even more so where, as in the case of the control of concentrations, the analysis has a prospective element. The gravity of a documentary or logical inadequacy, in such circumstances, may not always constitute a sufficient circumstance to cause the Community to incur liability.

Last, the Commission enjoys discretion in maintaining control over Community competition policy, which means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it, and, as a corollary, that it enjoys a degree of latitude regarding the choice of the econometric instruments available to it and the choice of the appropriate approach to the study of any matter, provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied ìconsistently.

(see paras 129-132)

5. The defects in a decision declaring a concentration incompatible with the common market, which have not had any repercussions on the subsequent stages of the procedure and, inter alia, have not deprived the parties to the concentration of an opportunity to secure a decision allowing it to proceed with the transaction are not in themselves capable of causing specific harm to the parties and thus of causing the Community to incur liability.

(see paras 134, 138-139)

6. As addressees of decisions of a public authority which affect their interests to an appreciable extent, the undertakings involved in a concentration having Community dimension must be placed in a position where they can make their views properly known and, to that end, be clearly informed, in due time, of the Commission's main objections to their notified concentration.

The statement of objections is of particular importance in that connection, given that it is specifically intended to enable the undertakings concerned to react to the concerns expressed by the regulatory institution, first by giving their views on the matter and, second, by considering whether to propose to the Commission measures intended to correct the negative impact of the notified concentration.

Respect for that right, which is one of the fundamental rights guaranteed by the Community legal order in administrative procedures, is of particular importance for the control of concentrations between undertakings.

A manifest and serious breach of Article 18(1) and (3) of Regulation No 4064/89 on the control of concentrations between undertakings stems from the fact of the Commission's drafting a statement of objections in such a way that the applicant cannot ascertain that, if it did not submit corrective measures, it would have no chance of securing a declaration that the transaction was compatible with the common market. That breach of the rights of the defence is neither justified nor accounted for by the particular constraints to which Commission staff are objectively subject.

(see paras 147-149, 152, 154, 170)

7. The fact that the teams of officials responsible for the various stages of investigation of a concentration between undertakings were composed wholly or partly of the same members does not constitute a sufficiently serious breach by the Commission of a rule of law intended to confer rights on individuals.

Even if observance of all persons' right to a hearing before an independent and impartial tribunal is guaranteed by Article 6(1) of the European Convention on Human Rights, to which reference is made by Article 6(2) of the Treaty on European Union and which was reaffirmed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and the right to a fair hearing is manifestly a rule intended to confer rights on individuals, provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts.

In the field of merger control, the action for annulment available under Article 230 EC against Commission decisions adopted under Article 8(3) and (4) of Regulation No 4064/89 is a remedy incorporating the safeguards required by Article 6(1) of the Convention.

Moreover, there is no rule of law or principle which prevents the Commission from entrusting to the same officials re–examination of a concentration in compliance with a judgment annulling a decision declaring that concentration to be incompatible with the common market.

Finally, it cannot be stated as a general rule resulting from the obligation to be impartial that an administrative or judicial authority, after annulling a first decision, is bound to send the case back to a different authority or to a differently composed branch of that authority.

(see paras 181-186, 188)

8. Where a concentration has already been implemented when the Commission declares it incompatible with the common market, Article 8(4) of Regulation No 4064/89 on the control of concentrations between undertakings enables the Commission to require any action to be taken to restore effective competition.

In order to decide whether, by requiring separation of the two parties to the transaction in such a way that the target's size could not be affected and by prohibiting any subsequent retransfer of business, the Commission manifestly and seriously infringed that provision, it is necessary to examine the manner in which the divestiture is carried out, by taking account in particular of the positions of the notifying undertakings in the markets at issue, the difference between their market shares and those of their immediate competitors, the reputation of their brands in those markets, and to ascertain whether the period for implementation of the divestiture decision was manifestly excessively short.

(see paras 199-203, 209)

9. In the exercise of its monitoring powers concerning compatibility with the common market of concentrations having a Community dimension, the Commission cannot disregard binding agreements between the notifying parties, provided that their stipulations are lawful under the applicable national law.

(see para. 221)

10. Serious doubts as to the compatibility of a concentration with the common market are a sufficient basis for taking a decision to initiate an in-depth investigation under Article 6(1)(c) of Regulation No 4064/89 on the control of concentrations between undertakings, whilst evidence of the creation or strengthening of a dominant position is required from the Commission by Article 2(3) of the regulation where it declares a concentration incompatible with the common market on the basis of Article 8(3).

(see paras 235, 249-250)

11. In the field of merger control, whilst observance of the rights of the defence is required before the adoption of any decision liable adversely to affect the undertakings concerned, the decision to initiate the in-depth investigatory phase does not constitute an act adversely affecting the undertakings, the legality of which would depend on observance of those rights.

(see para. 240)

12. In the context of the Community's non-contractual liability, in order to determine the harm attributable to a wrongful act of a Community institution, account must be taken of the effects of the failure which caused liability to be incurred and not of the effects of the measure of which it forms part, provided that the institution could or should have adopted a measure having the same effect without breaching any rule of law.

In other words, the analysis of the causal link cannot start from the incorrect premiss that, in the absence of an unlawful measure, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful measure and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law.

Where the unlawful circumstance on which the claim for compensation is based is associated with a decision whose effect is to withhold from an applicant an authorisation or other favourable measure, it cannot be presumed, for the purpose of analysing the effects of the wrongful measure and the comparison between the real situation and the reconstructed legal situation, that, in the absence of the defect identified, the applicant would necessarily have been granted the authorisation or other favourable measure sought by it.

Similarly, it is necessary, where there has been a breach of the rights of the defence affecting a decision declaring a merger of undertakings incompatible with the common market, not to postulate that, in the absence of that breach, the notified concentration would have been declared compatible, explicitly or implicitly, but rather to assess the effects which the defect identified may have had on the decision that was reached.

Thus, the loss attributable to the Community cannot be assessed on the basis of a comparison between the situation brought about by an incompatibility decision and a situation characterised by express or tacit authorisation of the concentration, unless the Community judicature is in a position to find that the incompatibility was declared by the Commission as a direct and certain consequence of an established failure to fulfil its legal obligations.

In addition, even if it is accepted that, in the absence of a right to recognition of the concentration's compatibility, the parties might have been deprived of a real opportunity to secure a decision of compatibility, the materialisation of that opportunity may be linked to parameters that are too uncertain to be the subject of any convincing quantification and to give rise to compensation.

Therefore, there is no sufficiently close causal link between the breach of the rights of defence of an undertaking which is party to a concentration and the loss of any opportunity of obtaining a decision that the concentration was compatible for the Community to incur liability as a result of the obligation imposed on the undertaking to dispose of the assets which it owns in the target, or, consequently, for it to be held that damage equal to the total loss of value of those assets between the time of their acquisition and their subsequent disposal can be attributed to the Community.

(see paras 263-267, 278, 280, 282-283, 286, 292)

13. Regulation No 4064/89 on the control of concentrations between undertakings does not establish a presumption as to the compatibility with the common market of a concentration that has been notified and it is for the Commission in each case to form a clear opinion as to such compatibility and to rule accordingly.

A concentration is tacitly regarded as compatible with the common market where, in particular, the Commission has neither taken a decision to initiate the in-depth phase of investigation within the period of one month set by Article 10(1) of the regulation nor ruled as to the compatibility of a concentration with the common market within the period of four months set by Article 10(3).

(see paras 275-276)

14. The fees of legal, tax and banking consultants and other administrative costs incurred by an undertaking in carrying out a Commission decision requiring divestiture by two undertakings party to a concentration declared incompatible with the common market cannot be accepted as flowing from the unlawfulness of the Commission's incompatibility decision.

The unlawfulness of the incompatibility decision and, consequently, of the divestiture decision does not imply that the transaction should be recognised as compatible or that the undertakings were entitled to continue as a merged entity. It cannot therefore be presumed that the administrative costs normally incurred by an undertaking with a view to divesting itself of the assets would not have had to be borne if the Commission had adopted a lawful decision.

On the other hand, the consultancy fees and administrative expenses of various kinds incurred by an undertaking in participating in the resumed investigation of a concentration – the resumption made necessary by the annulment of the Commission decision declaring that decision incompatible with the common market – must be linked by a direct and certain causal link between them and the unlawful conduct of the institution in order for entitlement to compensation to arise.

Finally, the costs incurred in relation to judicial review proceedings before the Community judicature must be regarded as covered by the decisions given, where appropriate, on costs, under the specific procedural rules applicable to that type of expenditure, in the decisions bringing the proceedings to an end and on conclusion of the special proceedings provided for in cases where the amount of the costs is challenged. Those proceedings exclude any claim for the same sums, or sums expended for the same purposes, in connection with proceedings alleging non-contractual liability of the Community, including those incurred by litigants who, having been unsuccessful, have had to pay the costs.

(see paras 293-294, 297-302)

15. Where a serious infringement of Community law initiating a decision which declares a concentration incompatible with the common market displays a sufficiently direct causal link with the reduction in the transfer price of shares or assets held by the transferor in the undertaking transferred, it is for the Community to compensate the loss suffered. The loss may also be equal to the difference between the transfer price agreed and that which the transferor could have obtained from the transferee if, at the end of the first investigation of the transaction it had been given a lawful decision as to the compatibility of the transaction.

(see paras 316-317, 322)

16. Where an undertaking acquires control of another undertaking by means of a public bid in reliance on the derogation from the principle of the suspensory effect of concentrations provided for in Article 7(3) of Regulation No 4064/89 – in a manner that is entirely lawful under national and Community competition law – it nevertheless assumes the risk that the investigation of the transaction will, on expiry of the periods laid down by the regulation, result in a decision declaring the transaction to be incompatible with the common market and a corresponding obligation for the assets of undertakings already merged to be separated. In addition, if, having regard to the characteristics of the transaction, it could not have been unaware that the merger at the very least entailed the risk of creating or strengthening a dominant position in a substantia

Judgment of the Court of First Instance (Fourth Chamber, extended composition)
of 11 July 2007
Schneider Electric SA v Commission of the European Communities. Case T-351/03.

In Case T351/03,

Schneider Electric SA, established in RueilMalmaison (France), represented by A. Winckler and M. Pittie, lawyers,

applicant,

supported by

French Republic, represented by G. de Bergues, acting as Agent,

intervener,

v

Commission of the European Communities, represented initially by P. Oliver, E. Gippini Fournier and C. IngenHousz, subsequently by P. Oliver, O. Beyne and R. Lyal, and lastly by P. Oliver, R. Lyal and F. Arbault, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by W.D. Plessing and M. Lumma, acting as Agents,

intervener,

APPLICATION for compensation for the damage allegedly suffered by the applicant by reason of the unlawfulness of the procedure for examination of the compatibility with the common market of the concentration between Schneider Electric SA and Legrand SA,

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

composed of H. Legal, I. WiszniewskaBiaecka, V. Vadapalas, E. Moavero Milanesi and N. Wahl, Judges,

Registrar: K. Poche, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2007,

gives the following

Judgment

On those grounds,

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

by way of interlocutory judgment,

hereby:

1. Orders the European Community to make good, first, the expenses incurred by Schneider Electric SA in respect of its participation in the resumed merger control procedure which followed delivery of the judgments of the Court of First Instance on 22 October 2002 in Cases T310/01 and T77/02 Schneider Electric v Commission and, second, twothirds of the loss sustained by Schneider Electric as a result of the reduction in the transfer price of Legrand SA which Schneider Electric had to concede to the transferee in exchange for the postponement of the effective date of sale of Legrand

until 10 December 2002;

2. Dismisses the action as to the remainder;

3. Orders the parties to communicate to the Court, within the period of three months from 11 July 2007, the amount representing the first head of loss, jointly agreed in accordance with the procedure set out in paragraph 320 of this judgment;

4. Failing such agreement, orders the parties to submit to the Court, within the same period, their proposed figures;

5. Orders that the amount of the second head of loss of Schneider Electric referred to in paragraph 1 above shall be assessed by an expert;

6. Invites Schneider Electric and the Commission to nominate the expert or to propose to the Court a list of experts so that one may be appointed by the Court from that list;

7. Instructs the Registrar of the Court to transmit to the expert for the purposes of his examination a certified copy of Annexes 8 and 29 to the application;

8. Declares that the expert shall be invited to submit his report within a period of time to be determined;

9. Instructs the Registrar of the Court to serve the report on the parties;

10. Declares that the compensation shall be reassessed and increased to take account of interest in accordance with the criteria defined in paragraphs 345 and 346 of this judgement;

11. Reserves the decision on costs.

Legal background

1. In the version applicable to these proceedings, Article 2(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1999 L 395, p. 1 and corrigendum OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) (the regulation') provides that a notified concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared incompatible with the common market.

2. Article 3(1)(b) of the regulation provides that a concentration is to be deemed to arise where a company acquires direct or indirect control of another undertaking, in particular by the purchase of securities or assets.

3. Article 6(1)(b) of the regulation states that the Commission is to declare compatible with the common market concentrations notified to it under the Regulation which, although falling within its scope, do not raise serious doubts as to their compatibility.

4. If that is not the case, the Commission is to decide to initiate the indepth control procedure (a decision to initiate phase II'), in accordance with Article 6(1)(c).

5. Article 10(1) states that those decisions must be taken within one month of the day following the receipt of a notification of a concentration or the day following the receipt of the complete information.

6. Article 8(2) and (3) respectively enable the Commission to adopt, as part of the phase II control, either a decision of compatibility, where appropriate after modifications made by the undertakings concerned to their notified concentration plan, or a decision of incompatibility.

7. Article 10(3) states that decisions declaring a concentration incompatible with the common market must be taken within four months of the date on which phase II is initiated.

8. Under Article 8(4), where a concentration that is declared incompatible has already been implemented, the Commission may, in a decision pursuant to Article 8(3) or by a separate decision, require the undertakings to be separated or any other action that may be appropriate to restore conditions of effective competition.

9. Under Article 10(6), the notified transaction is to be deemed compatible with the common market where the Commission has not taken either a decision to initiate phase II by the end of one month following notification or receipt of complete information, or a decision on the compatibility of the transaction within four months following the initiation of phase II.

10. Under Article 10(5), where the Community judicature gives a judgment that annuls a Commission decision, the periods laid down by the regulation start again from the date of the judgment.

11. Article 7(1) states that a concentration is not to be put into effect either before its notification or within the first three weeks following its notification.

12. Article 7(3) states that Article 7(1) is not to impede the implementation of a public bid which has been notified to the Commission, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to Article 7(4).

13. Under Article 7(4), the Commission may, on request, grant a derogation from the obligations imposed in Article 7(1) or (3) in order to prevent serious damage to one or more undertakings concerned by a concentration. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

14. Finally, Article 18(1) of the regulation provides that, before taking any decision provided for inter alia in Article 8(3), the Commission is required, at every stage of the procedure up to the consultation of the Advisory Committee, to give the persons, undertakings and associations of undertakings concerned the opportunity of making known their views on the objections against them.

15. Article 18(3) provides that the Commission is to base its decision only on objections on which the parties have been able to submit their observations and that the rights of the defence are to be fully respected in the proceedings.

Background to the dispute

16. Schneider Electric SA (Schneider'), and Legrand SA (Legrand') are French companies engaged in the production and sale of products and systems in the electrical distribution, industrial control and automation sectors (Schneider) and electrical equipment for lowvoltage installations (Legrand).

17. The electrical products distribution sector is divided into segments according to the following product markets:

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18. The wholesalers, who are local distributors, buy from industrial manufacturing groups the range of materials which installation engineers and switchboard assemblers need. The latter assemble the various components of electric switchboards.

19. Schneider and Legrand informed the Commission of a plan, within the meaning of Article 3(1)(b) of the regulation, whereby Schneider would acquire control of Legrand in its entirety by means

of a public exchange offer (the offer').

20. A letter of 12 January 2001 exchanged by the chairmen of the two companies provided that the chairman of the board of directors of Legrand would be personally involved in the preparation of any solution proposed to the Commission and that no commitment concerning Legrand could be submitted or agreed to by either of the companies without the prior agreement of the chairmen of the boards of directors of Schneider and Legrand.

21. On 15 January 2001, the two companies announced their agreement concerning the proposed concentration (the transaction') and Schneider lodged a draft offer in respect of Legrand's shares with the French Financial Markets Council (Conseil français des marchés financiers), Paris.

22. The offer was open from 1 February to 7 March 2001 and was formally notified to the Commission on 16 February 2001.

23. In their Form CO relating to the notification of a concentration, the notifying parties stated among other things that, as regards the effects of the transaction on supplies between segments 4 and 5 of the sectoral markets in question, there was little reason to believe that there would be any conglomerate effects in consequence of the transaction.

24. Considering that the transaction raised serious doubts as to its compatibility with the common market, on 30 March 2001 the Commission initiated phase II of the investigation under Article 6(1)(c) of the regulation.

25. By letter of 6 April 2001, the Commission sent a request for information to Schneider and Legrand under Article 11(1) of the regulation.

26. That request was followed by a formal decision under Article 11(5) of the regulation, dated 27 April 2001, the effect of which, under Article 10(4), was to suspend the fourmonth period available to the Commission, reckoned from the initiation of phase II, to take a decision on the compatibility of the transaction

27. Following an annulment decision by the Cour d'appel de Paris (France), in proceedings by minority shareholders of Legrand contesting the admissibility of the offer, on 7 June 2001 Schneider lodged an amended offer, which was declared admissible and was launched on 21 June 2001 and closed on 25 July 2001.

28. On 3 August 2001, the Commission sent Schneider a statement of objections in which it concluded that the transaction would create or strengthen a dominant position on a number of national sectoral markets.

29. On 6 August 2001, the Commission des Opérations de Bourse (French Stock Exchange Commission) announced the final outcome of Schneider's offer, by virtue of which Schneider acquired 98.7% of the shares in Legrand.

30. In their response of 16 August 2001 to the statement of objections, the parties to the transaction contested the market definition adopted by the Commission and its analysis of the impact of the transaction on those markets.

31. On 29 August 2001, a meeting was held between the notifying undertakings and Commission staff for the purpose of defining any modifications to the transaction which might resolve the competition problems raised by the Commission.

32. To that end, Schneider proposed corrective measures to the Commission on several occasions.

33. In a note of 25 September 2001 to the Member of the Commission responsible for competition matters, Schneider and Legrand expressed their utter surprise at the Commission's negative reaction

to their latest proposals, since those proposals envisaged that Legrand would withdraw from the markets for panelboard components throughout the entire European Economic Area (the EEA').

34. On 10 October 2001, the Commission adopted, under Article 8(3) of the regulation, Decision 2004/275/EC declaring the transaction incompatible with the common market (Case COMP/M.2283 - SchneiderLegrand) (OJ 2004 L 101, p. 1, the incompatibility decision').

35. The Commission concluded, in recital 782 to the incompatibility decision, that the notified transaction would create a dominant position with the effect of significantly restricting effective competition on the following sectoral markets:

- the markets in moulded case circuit breakers, miniature circuit breakers and cabinets for distribution boards in Italy;

- the markets in miniature circuit breakers, earth leakage protection and enclosures for final panelboards in Denmark, Spain, Italy and Portugal;

- the markets in mains connection circuit breakers in France and Portugal;

- the market in cable trays in the United Kingdom;

- the market in sockets and switches in Greece;

- the market in weatherproof wiring accessories in Spain;

- the market in fixing and connecting equipment in France;

- the market in transformation equipment in France;

- the market in control and signalling units in France.

36. The Commission also considered, in recital 783 to the incompatibility decision, that the transaction would strengthen a dominant position, thereby significantly restricting effective competition on the following French markets:

- the markets in moulded case circuit breakers, miniature circuit breakers and cabinets for distribution boards;

- the markets in miniature circuit breakers, earth leakage protection and enclosures for final panelboards;

- the market in sockets and switches;

- the market in weatherproof wiring accessories;

- the market in emergency lighting systems or selfcontained emergency lighting units.

37. The Commission also considered that the corrective measures proposed by Schneider were not such as to resolve the competition problems identified in the incompatibility decision.

38. Since, as a result of holding 98.1% of Legrand's capital, Schneider had brought about a concentration subsequently declared incompatible with the common market, on 24 October 2001 the Commission adopted a second statement of objections for the purpose of separating Schneider and Legrand.

39. In that document, the Commission proposed making an order requiring Schneider, under Article 8(4) of the regulation, to dispose of assets in Legrand to the extent that it would no longer hold a significant position, in order to restore effective competition with sufficient certainty and within a sufficiently short period. The Commission also considered it necessary to take immediate steps to entrust the management of Schneider's holding in Legrand to an experienced and independent trustee.

40. In response to a request made by Schneider, the Commission adopted a decision on 4 December

2001, which authorised Schneider, on the basis of Article 7(4) of the regulation, to exercise the voting rights attaching to its shareholding in Legrand through a trustee appointed by Schneider and on the terms laid down in an agreement approved by the Commission.

41. On 10 December 2001, Schneider and Salustro Reydel Management, the trustee, signed the agreement appointing the latter as trustee.

42. On 13 December 2001, Schneider brought an action before the Court of First Instance for the annulment of the incompatibility decision (Case T310/01) and, by a separate document, asked the Court of First Instance to adjudicate under the expedited procedure in accordance with Article 76a of its Rules of Procedure.

43. On 23 January 2002, the Court dismissed that application, having taken account of the nature of the case and, in particular, the volume of the application and the documents annexed to it.

44. On 30 January 2002, the Commission adopted a decision (the divestiture decision') under Article 8(4) of the regulation ordering Schneider to separate from Legrand within a period of nine months, expiring on 5 November 2002.

45. The divestiture decision prohibited Schneider from entering into discrete transactions to divest itself of certain of Legrand's businesses, made any purchaser or purchasers of Legrand subject to the Commission's prior approval and prohibited any subsequent transfer of certain of Legrand's businesses back to Schneider.

46. By documents lodged on 18 March 2002, Schneider brought an action for the annulment of the divestiture decision (Case T77/02), requested the Court to adjudicate on that case under the expedited procedure, and made an application for suspension of the operation of the divestiture decision (Case T77/02 R).

47. The application for recourse to the expedited procedure was granted by decision of the Court, which was notified to the parties on 25 March 2002.

48. On 5 April 2002, an informal meeting was organised between the President of the First Chamber and the JudgeRapporteur and the parties' representatives in Case T310/01.

49. After the hearing for interim relief of 23 April 2002 in Case T77/02, the Commission, by letter of 8 May 2002, extended until 5 February 2003 the period within which Schneider was to separate from Legrand, without prejudice to the stages in the divestiture procedure being completed during the extended period.

50. On 3 May 2002, the Court of First Instance (First Chamber) decided, after hearing the Commission's views, to grant Schneider's application for Case T310/01 to be adjudicated under the expedited procedure, since Schneider had confirmed that it would adhere to the abridged version of its application, submitted on 12 April 2002.

51. In view of the extension of the divestiture period granted by the Commission in its letter of 8 May 2002, Schneider withdrew its application for suspension of operation in Case T77/02 R by letter received on 14 May 2002.

52. By order of the President of the Court of First Instance of 28 May 2002, Case T77/02 R was removed from the register and the costs of the proceedings for interim relief were reserved until judgment was given in the main proceedings in Case T77/02.

53. By orders of the President of the First Chamber of the Court of First Instance of 6 June 2002, Legrand, the Comité central d'entreprise de la SA Legrand and the Comité européen du groupe Legrand were granted leave to intervene in Cases T310/01 and T77/02 in support of the form of order sought by the Commission, by reason of Legrand's interest in the outcome of the disputes,

its situation being directly affected by the upholding or annulment of the contested decisions.

54. Schneider made preparations for the transfer of Legrand, to be carried out in the event of its two actions for annulment being rejected, and, for that purpose, on 26 July 2002 entered into a sale and purchase agreement with the WendelKKR consortium, to be implemented no later than 10 December 2002, containing a clause enabling Schneider, in the event of the annulment of the incompatibility decision, to cancel the contract no later than 5 December 2002, in consideration of payment of compensation for cancellation.

55. By judgment of 22 October 2002 in Case T310/01 Schneider v Commission [2002] ECR II4071 (the Schneider I judgment'), the Court of First Instance annulled the incompatibility decision on the grounds of errors of analysis and errors in the assessment of the impact of the transaction on the national sectoral markets outside France, and breach of the rights of the defence vitiating the analysis of the impact of the transaction on the French sectoral markets and of the corrective measures proposed by Schneider.

56. Regarding the first point, the Schneider I judgment states as follows:

256 ... the Commission has... overestimated the economic power of the new entity on the national sectoral markets referred to at recitals 782 and 783 by including in its analysis of the impact of the transaction on those markets the total effect of a product range which does not reflect the true competitive situation which will obtain in those markets following the concentration.

257 The same reasoning must apply as regards the merged entity's wide variety of brands, which is also deemed to be unrivalled because the brands owned by the notifying parties in the EEA as a whole have been taken together in the abstract.

...

296 ... in refusing to include in ABB's and Siemens' market shares their integrated sales of panelboard components, the Commission underestimated the economic power of the merged entity's two main competitors and correspondingly overestimated that entity's strength on the French and Italian markets for distribution panelboard components and on the Danish, Spanish, French, Italian and Portuguese markets for final panelboard components.

...

404 The Court considers the errors, omissions and inconsistencies which it has found in the Commission's analysis of the impact of the merger to be of undoubted gravity.

405 In taking as its basis the fact that the merged entity's activities extend throughout the EEA, the Commission has included indicators of economic power outside the scope of the national sectoral markets affected by the merger and having the effect of unduly magnifying the impact of the transaction on those markets.

406 In that regard, it is appropriate to bear in mind that none of the findings of fact in the Decision suggest that the proposed transaction could give rise to competition problems on markets other than the sectoral markets in France and in six other countries, which the Decision identifies, at recitals 782 and 783, as affected by the transaction.

407 In particular, the Decision does not contain any analysis of the structure of competition in the national sectoral markets not affected by the concentration at issue...

408 Owing to the incompleteness of, and inconsistencies in, the analysis of distribution structures, the Commission could not qualify as substantial competitive advantages for the merged entity either its alleged privileged access to distributors consequent upon its positions on all the markets for lowvoltage electrical equipment at distributor level or the inability of wholesalers to exert competitive

constraints on the new entity.

409 The abstract nature of the indicators of economic power based on the SchneiderLegrand group's unrivalled range of products and incomparable variety of brands and the fact that those indicators bore no relation to the relevant national sectoral markets, led the Commission to overestimate even further the merger's impact on the national sectoral markets affected.

410 The same is true, first, of the Commission's refusal to take account of the integrated sales made by ABB and Siemens on the national markets for panelboard components affected by the merger and, second, of the incomplete nature, in particular, of the analysis of the impact of the transaction on the Danish markets for final panelboard components and on the Italian markets for components for distribution panelboards and final panelboards.

411 The errors of analysis and assessment found above are thus such as to deprive of probative value the economic assessment of the impact of the concentration which forms the basis for the contested declaration of incompatibility.

412 None the less, however incomplete a Commission decision finding a concentration incompatible with the common market may be, that cannot entail annulment of the decision if, and to the extent to which, all the other elements of the decision permit the Court to conclude that in any event implementation of the transaction will create or strengthen a dominant position as a result of which effective competition will be significantly impeded for the purposes of Article 2(3) of [the regulation]...

413 In that regard, the errors found do not in themselves suffice to call in question the objections which the Commission raised in respect of each of the French sectoral markets listed at recitals 782 and 783.

414 The Court notes in that regard that Schneider did not fundamentally dispute the analysis of the impact of the transaction on those markets. On the contrary, it applied itself to criticising the Commission for having used the competitive situation obtaining on the French markets in the aftermath of the transaction to draw conclusions about the other national sectoral markets affected...

415 In the light of the factual findings in the Decision, it is impossible not to subscribe to the Commission's conclusion that the proposed transaction will create or strengthen on the French markets, where each of the notifying parties was already very strong, a dominant position as a result of which, for the purposes of Article 2(3) of [the regulation], effective competition will be significantly impeded in the common market or in a substantial part of it...

416 It is clear from the Decision that the SchneiderLegrand group has, on each of the French markets affected, market shares which are indicative of dominance or of a strengthened dominant position, given the weak market presence and thinly spread market shares of its main competitors ...

417 In addition, as the Commission found..., without challenge from Schneider, and as is also clear from [the Decision], the prices paid by wholesalers for lowvoltage electrical equipment prior to the merger were on average appreciably higher in France than on the other national markets affected.

418 ... there is no doubt that the rivalry between the notifying parties was extremely significant on the French sectoral markets to which the objections relate and that one effect of the merger will be to eliminate a key factor in competition there.

...

419 The economic analysis underpinning the Decision can therefore be held inadequate only as regards all the national sectoral markets affected apart from the French markets; and the latter markets indisputably constitute a substantial part of the common market within the meaning of Article 2(3)

of [the regulation]...

57. As regards breach of Schneider's rights of defence vitiating the analysis of the impact of the transaction on the French sectoral markets and the remedies proposed by the applicant, the Schneider I judgment states as follows:

444 The Commission was... required to explain all the more clearly the competition problems raised by the proposed merger, in order to allow the notifying parties to put forward, properly and in good time, proposals for divestiture capable, if need be, of rendering the concentration compatible with the common market.

445 It is not apparent on reading the statement of objections [of 3 August 2001] that it dealt with sufficient clarity or precision with the strengthening of Schneider's position visàvis French distributors of lowvoltage electrical equipm ent as a result not only of the addition of Legrand's sales on the markets for switchboard components and panelboard components but also of Legrand's leading position in the segments for ultraterminal electrical equipment. The Court observes in particular that the general conclusion in the statement of objections lists the various national sectoral markets affected by the concentration, without demonstrating that the position of one of the notifying parties on a given product market would in any way buttress the position of the other party on another sectoral market.

...

453 ... the statement of objections did not permit Schneider to assess the full extent of the competition problems to which the Commission claimed the concentration would give rise at distributor level on the French market for lowvoltage electrical equipment.

454 It follows that Schneider's rights of defence have been infringed in various respects.

455 Schneider, first, was not afforded the opportunity of properly challenging the substance of the Commission's argument that, at distributor level, Schneider's dominant position would be strengthened in France in the sector for distribution and final panelboard components by Legrand's leading position in ultraterminal equipment.

456 It follows that Schneider was not given a proper opportunity to submit its observations in that regard either in its response to the statement of objections or at the hearing on 21 August 2001.

457 If it had been given such an opportunity, the Commission could have reconsidered its position or, on the contrary, have provided further evidence in support of its proposition, so that the Decision might have been different in any event.

458 Schneider must therefore be regarded as not having been afforded the opportunity to submit, properly and in good time, proposals for divestiture sufficiently extensive to provide a solution to the competition problems identified by the Commission on the relevant French sectoral markets.

459 The Court notes, in that connection, that Schneider stated at the hearing that it had not in fact been able to propose in good time any remedies for the competition problems in respect of which it did not challenge the Decision.

460 Thus Schneider was indirectly deprived of the chance of obtaining the approval which the Commission might have given to the remedies proposed, had the notifying parties been put in a position to submit in good time proposals for divestiture sufficiently extensive to resolve all the competition problems identified by the Commission at distribution level in France.

461 The effect of those irregularities is all the more serious, because, as the Commission stated several times at the hearing, remedies are the only means of preventing a concentration falling

under Article 2(3) of Regulation No 4064/89 from being declared incompatible.

462 Consequently, the Decision is vitiated by an infringement of the rights of defence and the plea must be accepted.

463 In those circumstances the Decision must be annulled, without there being any need to adjudicate on the other pleas and arguments put forward by Schneider in support of its action and directed, in particular, against the Commission's assessment of the proposals for divestiture which Schneider submitted with a view to rendering the transaction compatible with the common market.

464 Under Article 233 EC, it is incumbent upon the Commission to take the necessary measures to comply with this judgment.

465 Such measures to comply with the judgment must have regard to the grounds constituting the essential basis for the operative part of the judgment (see Joined Cases 97/86, 99/86, 193/86 and 215/86 Asteris and Others v Commission [1988] ECR 2181, paragraph 27). The relevant grounds of this judgment require, in particular, that, if the Commission should resume its examination of the compatibility of the transaction, Schneider should be placed in a position, as regards the relevant national sectoral markets in respect of which the economic analysis in the Decision has not been rejected, i.e. the French sectoral markets, to put forward a proper defence and, where appropriate, to propose corrective measures addressing the objections made and previously indicated by the Commission.'

58. By judgment of 22 October 2002 in Case T77/02 Schneider Electric v Commission [2002] ECR II4201 (the Schneider II judgment'), the Court of First Instance consequently annulled the divestiture decision on the ground that it was a measure giving effect to the annulled incompatibility decision, without there being any need to examine the other pleas alleging unlawfulness raised independently against the divestiture decision.

59. The Commission did not appeal against the Schneider I and Schneider II judgments, which thus became final.

60. By note of 29 October 2002, Schneider drew attention to the extent and serious financial consequences of the periods prescribed for the various procedural steps and confirmed that its corrective measures for France of 24 September 2001 could serve as a provisional basis for reexamination of the compatibility of the transaction, pending the notification of any objections.

61. The Commission published in the Official Journal of the European Communities of 15 November 2002 (OJ 2002 C 279, p. 22) a notice concerning recommencement of the investigation procedure, stating that, under Article 10(5) of the regulation, the investigation period would run from 23 October 2002, the day following delivery of the Schneider I judgment. The Commission added that, on a preliminary analysis of phase I and without prejudice to a final decision, the transaction might fall within the scope of the regulation, and invited interested third parties to submit any observations to it.

62. By statement of objections of 13 November 2002, the Commission informed Schneider that the concentration was liable to undermine competition in the French sectoral markets, by reason of the significant overlapping of the market shares of Schneider and Legrand, the end of their long-standing rivalry, the importance of the brands owned by the Schneider- Legrand entity, its power over wholesalers and the inability of any competitor to replace the competitive pressure exerted by Legrand before the transaction was effected

63. The Commission observed in particular:

Thus the transaction results, in each of the affected markets on which one or other of the parties held a dominant position before the transaction, in the elimination of the only immediate competitor in a position to exercise any competitive restraint on the dominant undertaking owing to the support provided to it by the very strong positions held by the same group in other segments of the same sector, in particular as regards the reputation of its brands and its commercial relations with wholesalers.'

64. On 14 November 2002, Schneider proposed to the Commission a number of corrective measures intended to remove the overlap between the businesses of Schneider and Legrand in the affected French sectoral markets.

65. By letter of 25 November 2002, Schneider informed the Commission that the arguments put forward in the statement of objections of 13 November 2002 remained, in the absence of a market-by-market examination of the effects of the transaction, imprecise in nature and scope and failed to demonstrate the existence of any anti-competitive effect on the affected markets and that the general considerations put forward by the Commission were belied by the actual situation.

66. By note of 29 November 2002, the Commission informed Schneider that the corrective measures successively submitted by it were not sufficient to eliminate all the restrictions of competition deriving from the transaction, because of persistent doubts as to the viability and independence of the businesses transferred and the inability of the proposed measures to create a counterweight to the strength of the SchneiderLegrand entity.

67. By judgment of 29 November 2002, the Cour d'appel de Versailles (France), issued an interlocutory decision in which it held that Schneider's proposals for corrective measures had not been submitted for prior approval to the chairman of Legrand, in breach of the letter of 12 January 2001, and consequently ordered Schneider to withdraw divestiture proposals concerning the assets of Legrand which had not been approved by that company'.

68. By letter of 2 December 2002, Schneider criticised the Commission for contesting the viability and the capability of the corrective measures to ensure the maintenance of a competitive situation on the affected French markets and declared that, at that very advanced stage of the procedure, the Commission's position made further pursuit of the discussions unrealistic. To bring to an end uncertainty that had lasted more than a year, Schneider therefore informed the Commission that it had decided to sell Legrand to WendelKKR.

69. By fax of 3 December 2002, Schneider confirmed its decision to the Commission, stating that, under the sale and purchase agreement of 26 July 2002, the sale of Legrand to WendelKKR required no further action on its part and was to take place on 10 December 2002.

70. By decision of 4 December 2002, the Commission initiated phase II of the investigation of the transaction, concluding that the corrective measures proposed by Schneider did not make it possible, at the investigation stage, to eliminate the remaining serious doubts as to the compatibility of the transaction, having regard to its effects on the French sectoral markets identified in recitals 782 and 783 to the incompatibility decision.

71. The Commission concluded in particular that businesses proposed for transfer related to the assets of Legrand and appeared to conflict with the judgment of the Cour d'appel de Versailles, and, in the alternative, rejected the measures proposed on grounds concerning the viability and independence of the entities concerned.

72. On 10 December 2002, Schneider transferred its shareholding in Legrand to WendelKKR and on the following day it informed the Commission services that it had done so.

73. By letter of 13 December 2002, the Commission informed Schneider that the investigation procedure had been closed as being devoid of purpose, since Schneider no longer controlled Legrand.

74. On 10 February 2003, Schneider brought an action for annulment of the decision of 4 December

2002 to initiate phase II and of the closure decision of 13 December 2002 (Case T48/03).

75. By orders of 29 October 2004 in Cases T310/01 DEP and T77/02 DEP Schneider Electric v Commission , not published in the ECR, the Court of First Instance set the amount of costs that Schneider could recover from the Commission at EUR 419 595.32 in Case T310/01 and EUR 426 275.06 in Cases T77/02 and T77/02 R.

76. By order of 31 January 2006 in Case T48/03 Schneider Electric v Commission [2006] ECR II111, the Court of First Instance dismissed as inadmissible the application for annulment lodged in that case on the ground that the decisions complained of, namely the decision to initiate phase II and the decision to close the procedure, were not acts adversely affecting Schneider.

77. By application lodged at the Registry of the Court of Justice on 12 April 2006, Schneider appealed against that order.

78. That appeal was dismissed by order of the Court of Justice of 9 March 2007 (Case C188/06 P Schneider Electric v Commission [2007] ECR I35). In paragraph 48 of that order, the Court of Justice held that, by opting to resume the investigation of the concentration in phase I, the Commission's intention was to draw the appropriate inferences from the Schneider I judgment, thus taking all necessary precautions to ensure that there was no possible breach of Schneider's rights of defence.

Procedure and forms of order sought

79. By application lodged on 10 October 2003, Schneider brought the present action for damages.

80. By decision of 2 December 2003, the President of the Court of First Instance assigned the case to the Fourth Chamber.

81. On 11 December 2003, the Court of First Instance (Fourth Chamber) adopted a measure of organisation of procedure limiting the scope of the pleadings to the principle of the Community's noncontractual liability and the method for evaluation of the loss.

82. By orders of 20 April 2004 and 6 December 2004, the Federal Republic of Germany and the French Republic were granted leave to intervene, the first in support of the form of order sought by the Commission and the second in support of that sought by Schneider.

83. At the Commission's request, on 13 October 2004 the Court referred the case to the Fourth Chamber, Extended Composition.

84. Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and to put written questions to the main parties, which answered them within the prescribed periods.

85. The parties presented oral argument and replied to the Court's questions at the hearing on 25 April 2007.

86. Schneider, supported by the French Republic, claims that the Court should:

- primarily:

- order the Community to pay it the sum of EUR 1 663 734 716.76, subject to a reduction of the recoverable costs determined by the taxation orders made in cases T310/01 DEP and T77/02 DEP, and to an increase by reason, first, of interest accruing from 4 December 2002 until full payment, at an annual rate of 4%, and, second, the amount of taxation for which Schneider will be liable when receiving the compensation awarded to it;

- in the alternative:

- declare the action admissible;

- find that the Community has incurred noncontractual liability;

- determine the procedure to be followed in order to establish the recoverable loss actually suffered by Schneider;

- in any event, order the Commission to pay all the costs.

87. The Commission, supported by the Federal Republic of Germany, contends that the Court should:

- dismiss the action as partially inadmissible and entirely unfounded;

- order Schneider to pay the costs.

Admissibility

Arguments of the parties

88. Without raising an objection of inadmissibility under Article 114 of the Rules of Procedure, the Commission contends in its defence that the details of certain of Schneider's claims involve general references to pleas put forward in support of its three applications for annulment in Cases T310/01, T77/02 and T48/03, which diverge, as regards either their subjectmatter or their description, from the arguments put forward in the present action for damages. General references of that kind do not meet the requirements of the first paragraph of Article 21 of the Statute of the Court of Justice or of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

89. The Commission thus confines itself to contesting the merits only of the arguments put forward in the application and does not therefore consider that it is required to respond to the arguments put forward in support of the pleas for annulment contained in the three applications for annulment, since they are not repeated in the present application but are merely referred to.

90. The Commission also states that no effort has been made in the application to identify, justify and classify the nature of the alleged link between the conduct imputed to it and each of the heads of damage relied on.

91. Schneider replies, in essence, that the presentation of all the arguments put forward by it in the application fulfils the conditions of admissibility laid down by the applicable procedural provisions and expounded by the caselaw.

Findings of the Court

92. It should be borne in mind that, under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, and under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must indicate the subjectmatter of the dispute and contain a summary of the pleas in law on which the application is based.

93. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order of the Court of First Instance of 11 July 2005 in Case T294/04 Internationaler Hilfsfonds v Commission [2005] ECR II2719, paragraph 23).

94. In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there to be a causal link between

that conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T210/00 Biret et Cie v Council [2002] ECR II47, paragraph 34, upheld on appeal by judgment of the Court of Justice in Case C94/02 P Biret et Cie v Council [2003] ECR I10565).

95. In the present case, although lengthy and numerous, the references in the application to the arguments put forward in support of the pleas for annulment in Cases T310/01, T77/02 and T48/03 are to be regarded merely as expanding upon the account set out in the application of the unlawful acts which are alleged to vitiate the Commission's conduct, an account which the Commission does not contend is formally inadmissible.

96. In view of the identity of the parties and of the legal basis, namely the unlawful acts alleged to vitiate the Commission's action, between the three actions for annulment and the present action for damages, it is appropriate to declare admissible the references made in the arguments in the application, which are in themselves admissible, to the account of the pleas put forward in support of the three actions for annulment.

97. The Commission's argument as to the inadmissibility of the application, in that it does not properly describe the causal link between the loss suffered and the conduct imputed to the Commission, must also be rejected.

98. It appears to the Court that the account of the causal link contained in the application meets the minimum conditions for formal admissibility required of laid down for applications by the relevant rules and caselaw. Schneider is sufficiently clear and precise to enable the Commission to present its defence and the Court to give an appropriate ruling on the claims for damages when it maintains that the two unlawful acts vitiating the incompatibility decision directly caused it damage and that the Commission's general conduct throughout the investigation of the transaction prevented the applicant from reducing that damage to below the level of compensation claimed.

99. The Commission's observations in that regard must therefore be rejected and both the present action for compensation and all the arguments put forward in support of it should be declared admissible.

Substance

General arguments of the parties

100. Schneider relies on two sufficiently serious breaches of rules of law intended to confer rights on individuals, in the form of the two unlawful elements established in the incompatibility decision by the Schneider I judgment, namely, first, the deficiencies in the Commission's analysis of the impact of the transaction on the national sectoral markets outside France and, second, the breach of the applicant's rights of defence represented by the inadequate particularisation in the statement of objections of 3 August 2001 of the objection based on the support, in the wholesale French lowvoltage electric equipment markets, which Schneider's dominant position in the sector of components for distribution panelboards and final panelboards represented to Legrand's leading position in the ultraterminal equipment segments.

101. The transaction could not be implemented solely because of the unlawful conduct of the Commission. It follows that the two serious irregularities vitiating the incompatibility decision first of all directly resulted in the depreciation of the value of the applicant's assets, that depreciation consisting, first, of the book loss recorded in respect of the assets in Legrand, second, of a loss of profit attributable to the impossibility of achieving the synergies expected from the transaction and the subsequent destruction of the group's industrial strategy and, third and last, a very negative impact on the applicant's reputation.

102. Next, the incompatibility decision directly caused Schneider to incur, first, the costs associated with the special trustee's fees in connection with the administrative procedure for the separation

of Schneider and Legrand and the reexamination of the transaction undertaken the day after delivery of the Schneider I and Schneider II judgments and, second, the costs relating to the applications in Cases T310/01, T77/02 and T77/02 R to the Court of First Instance, after deduction of the recoverable costs already awarded to Schneider by the two orders for taxation of costs of 29 October 2004 in Cases T310/01 DEP and T77/02 DEP Schneider Electric v Commission.

103. The Commission's hostile conduct towards Schneider throughout the investigation of the transaction continued and worsened after the adoption of the incompatibility decision, and that conduct, without being the cause of the initial damage, nevertheless contributed to its final extent.

104. By its attitude, the Commission aggravated the damage initially suffered by reason of the incompatibility decision and, second, caused the applicant additional damage in the form of certain costs which it had to incur as from 10 October 2001.

105. First, from the start of the investigation procedure, the Commission treated Schneider unfairly, then, after the incompatibility decision, infringed the applicant's right to be heard by an impartial authority, and seriously misconstrued the exclusive investigatory authority which the regulation reserves to the institution. When reexamining the transaction, the Commission did not comply in good faith with the Schneider I judgment, it again infringed the applicant's rights of defence and, finally, it carried out an incorrect, unfair and discriminatory analysis of the applicant's corrective measures.

106. Second, the intransigence displayed by the Commission in determining the conditions and time-limit for the separation of Schneider and Legrand prompted Schneider to incur various fees of legal, banking and tax advisers in order to explore the various possible methods of separation. Finally, by playing on the tensions which had arisen between Schneider and Legrand following the incompatibility decision, the Commission prompted Legrand to start legal proceedings in France against Schneider in November 2002, then used the decision of the national court as a basis for hindering the applicant's attempts to secure a finding that the concentration was compatible with the common market. This resulted in further costs to which Schneider should never have been exposed.

107. The Commission replies, in essence, that neither of the two unlawful acts in the incompatibility decision found by the Schneider I judgment is of sufficient gravity to constitute a fault liable to cause the Community to incur noncontractual liability as against Schneider.

108. The other forms of alleged unlawful conduct have not in its view been established and, in any event, do not constitute sufficiently serious infringements of Community law to cause the Community to incur liability.

109. As regards the amount of its loss, Schneider claims that the loss of value of its assets amounted, as at the date of the unlawful incompatibility decision, namely 10 October 2001, to a sum between EUR 2 483 and 3 326 million. The amount of that damage subsequently changed, being ultimately limited to EUR 1 663 734 716.76, including the costs incurred by the applicant as a result of all the Commission's unlawful conduct.

110. The incompatibility decision caused Schneider a loss of asset value between the date of the announcement of the offer for the shares in Legrand, in January 2001, and the effective date of the sale and purchase agreement, in December 2002. That loss included the book loss recorded in respect of the assets in Legrand, a loss of profit caused by the impossibility of achieving the synergies expected from the transaction, the subsequent undermining of Schneider's industrial strategy and damage to its image.

111. The Commission replies that no loss has been established. It rejects both the reality and the certainty of the alleged depreciation of assets and the method proposed by Schneider to evaluate

that head of damage. It was also incumbent upon the applicant not to incur excessive fees following the incompatibility decision. The Commission reserves the right to analyse in detail the invoices submitted in support of those claims and the possibility of supplementing and adapting the methodology for assessment of the damage.

112. In any event, the Commission denies any causal link between the conduct imputed to it and the various heads of damage alleged. The Commission draws attention to the very hypothetical nature of Schneider's argument that, in the absence of the illegal acts attributed to the Commission, the transaction would have been authorised and carried out.

Preliminary views of the Court

113. It must first be borne in mind that it is settled caselaw that, in order for the Community to incur noncontractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 Oleifici Mediterranei v EEC [1982] ECR 3057, paragraph 16, and Case T383/00 Beamglow v Parliament and Others [2005] ECR II5459, paragraph 95).

114. Where, as in this case, a legal measure is relied on as a basis for an action for damages, that measure, in order to be capable of causing the Community to incur noncontractual liability, must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals.

115. The decisive criterion in that regard is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (Case C282/05 P Holcim (Deutschland) v Commission [2007] ECR I2941, paragraph 47).

116. The system of rules which the Court of Justice has worked out in relation to the noncontractual liability of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question (Holcim (Deutschland) v Commission, paragraph 50).

117. Where the institution criticised has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach of Community law (Holcim (Deutschland) v Commission, paragraph 47).

118. The same applies where the defendant institution breaches a general obligation of diligence (see, to that effect, Case C308/87 Grifoni v EAEC [1990] ECR I1203, paragraphs 13 and 14) or misapplies relevant substantive or procedural rules (Joined Cases 5/66, 7/66 and 13/66 to 24/66 Kampffmeyer and Others v Commission [1967] ECR I245, 262 and 263).

119. Moreover, it is for the party seeking to establish the Community's liability to adduce conclusive proof as to the existence or extent of the damage he alleges and to establish a sufficiently direct causal link between that damage and the conduct complained of on the part of the Community institution (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 Dumortier Frères and Others v Council [1979] ECR 3091, paragraph 21, and Case T178/98 Fresh Marine v Commission [2000] ECR II3331, paragraph 118, upheld on appeal by the judgment in Case C472/00 P Commission v Fresh Marine [2003] ECR I7541).

120. Where one of the three conditions governing establishment of noncontractual liability on the part of the Community is not satisfied, the claims for damages must be rejected without there being any need to examine the other two conditions (Case C146/91 KYDEP v Council and Commission [1994] ECR I4199, paragraph 81, and Case T170/00 FördeReederei v Council and Commission [2002] ECR II515, paragraph 37), the Community judicature not being required, moreover, to examine the

conditions in a particular order (Case C257/98 P Lucaccioni v Commission [1999] ECR I5251, paragraph 13).

121. In that context, the Commission contends that, if it were to incur financial liability in circumstances such as those of this case, its capacity fully to function as a regulator of competition, a task entrusted to it by the EC Treaty, would be compromised as a result of the possible inhibiting effect that the risk of having to bear damages alleged by the undertakings concerned might have on the control of concentrations.

122. It must be conceded that such an effect, contrary to the general Community interest, might arise if the concept of a serious breach of Community law were construed as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion.

123. Therefore, a sufficiently serious breach of Community law, for the purposes of establishing the noncontractual liability of the Community, cannot be constituted by failure to fulfil a legal obligation, which, regrettable though it may be, can be explained by the objective constraints to which the institution and its officials are subject as a result of the provisions governing the control of concentrations.

124. On the other hand, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, is objectively subject.

125. Such a definition of the threshold for the establishment of noncontractual liability of the Community is conducive to protection of the room for manoeuvre and freedom of assessment which must, in the general interest, be enjoyed by the Community regulator of competition, both in its discretionary decisions and in its interpretation and application of the relevant provisions of primary and secondary Community law, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct.

126. It is in the light of those principles that it is appropriate to consider whether the Commission committed sufficiently serious breaches of rules of law intended to confer rights on individuals by adopting the incompatibility decision that was annulled by the Schneider I judgment, before considering the aspects of the institution's overall conduct in the course of the investigation of the transaction that might have exacerbated the loss.

The irregularities rendering the incompatibility decision unlawful

The defects found in the analysis of the impact of the transaction

- Arguments of the parties

127. Schneider maintains that the errors, omissions and contradictions in the incompatibility decision established by the Schneider I judgment regarding the assessment of the impact of the transaction on national sectoral markets outside France constitute sufficiently serious breaches which cannot be justified either by the complexity of the investigation of the transaction or by any time constraints, in view of the fact that the period of four months allowed to the Commission to adopt a decision on the compatibility of the transaction was extended.

128. The Commission replies that, in the absence of proof of manifest and serious failure to observe the limits imposed on its broad discretion, those irregularities are not sufficiently serious, in view of the complexity of the situations examined, the prospective nature of the market analyses

and the requirement for speed in the investigation procedure. In any event, the Court made clear in paragraph 412 of the Schneider I judgment that the errors committed were not such as to entail annulment of the incompatibility decision.

- Findings of the Court

129. In principle, the possibility cannot be ruled out that manifest and serious defects affecting the economic analysis underlying competition policy decisions may constitute sufficiently serious breaches of a rule of law to cause the Community to incur noncontractual liability.

130. However, for such a finding to be made it is first necessary to verify that the rule infringed by the incorrect analysis is intended to confer rights on individuals. Whilst certain principles and certain rules which must be observed in any competitive analysis are indeed rules intended to confer rights on individuals, not all norms, whether of primary or secondary law or deriving from caselaw, which the Commission must observe in its economic assessments can be automatically held to be rules of that kind.

131. Next, it must be noted that the economic analyses necessary for the classification, under competition law, of a given situation or transaction are generally, as regards both the facts and the reasoning based on the account of the facts, complex and difficult intellectual formulas, which may inadvertently contain certain inadequacies, such as approximations, inconsistencies, or indeed certain omissions, in view of the time constraints to which the institution is subject. That is even more so where, as in the case of the control of concentrations, the analysis has a prospective element. The gravity of a documentary or logical inadequacy, in such circumstances, may not always constitute a sufficient circumstance to cause the Community to incur liability.

132. Last, it must be borne in mind that the Commission enjoys discretion in maintaining control over Community competition policy, which means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it, and, as a corollary, that it enjoys a degree of latitude regarding the choice of the econometric instruments available to it and the choice of the appropriate approach to the study of any matter (see, for example, regarding the definition of the relevant market, Case T219/99 British Airways v Commission [2003] ECR II5917, paragraph 89 et seq., upheld on appeal in Case C95/04 P British Airways v Commission [2007] ECR I2331), provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied iconsistently.

133. However, it is unnecessary in this case to decide whether the three foregoing considerations support the view that the defects in the economic analysis of the expected effects of the transaction on the relevant sectoral markets outside France go beyond the threshold at which the Community must be held to have incurred noncontractual liability.

134. The defects in the analysis of the impact of the transaction on national sectoral markets outside France found by the Schneider I judgment cannot have had any effect on the finding finally arrived at by the Commission in the incompatibility decision that the transaction was incompatible with the common market.

135. Even in the absence of that breach of Community law, the Commission would not have been in a position to authorise the transaction as proposed at that time, since, according to paragraph 413 of the Schneider I judgment, the errors found did not in themselves suffice to call in question the objections which the Commission had raised in respect of each of the French sectoral markets listed at recitals 782 and 783 of the incompatibility decision. In the light of the findings of fact contained in the incompatibility decision, it was impossible, according to paragraph 415 of the same judgment, not to subscribe to the Commission's conclusion that the transaction would create or strengthen on the French sectoral markets for lowvoltage electrical equipment, in which each

of the two parties was already very strong, a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it within the meaning of Article 2(3) of the regulation.

136. Whilst it has no effect on the characterisation of the concentration in relation to the French sectoral markets, the criticism of the economic analysis of the incompatibility decision is nevertheless not superfluous in the Schneider I judgment, since it has the effect of rendering invalid the assessment of compatibility made in relation to the other markets and, consequently, of restricting the examination of observance of the rights of the defence solely to the aspect of the incompatibility decision that remains valid, namely that which relates to the French sectoral markets.

137. For that result to be reached, it was sufficient that the economic analysis of the impact of the transaction should be declared devoid of probative value, as it was in paragraph 411 of the Schneider I judgment, the question whether that defect also constituted a sufficiently serious breach of Community law being of no importance in that regard.

138. Consequently, the complaint regarding the defective economic analysis in the incompatibility decision is not, as a matter of construction, capable, by itself, of having had any repercussions whatsoever on the subsequent stages of the procedure nor, consequently, can it have caused Schneider any damage distinct from that which might have derived from a breach of its rights of defence.

139. The only defect in the incompatibility decision which, according to the Schneider I judgment, is liable to have deprived the applicant of an opportunity to secure a decision allowing it to proceed with the transaction is therefore to be found in the discrepancy identified between the statement of objections of 3 August 2001 and the incompatibility decision itself, regarding the objection concerning the buttressing of the positions of the parties to the transaction. It is therefore the nature and gravity of that sole defect in the incompatibility decision that must be assessed in determining whether the threshold for Community liability was overstepped by that decision.

The breach of Schneider's rights of defence

- Arguments of the parties

140. Schneider states that the Commission did not articulate sufficiently clearly and precisely in its statement of objections of 3 August 2001 the objection to the compatibility of the transaction based on the support, on the French sectoral lowvoltage electrical equipment wholesale markets, which Schneider's dominant position in the sector of components for distribution boards and terminal boards provided for Legrand's leading position in the segment for ultraterminal equipment, thus depriving the applicant of any opportunity to contest the merits of that objection during the administrative investigation procedure and properly to propose corrective measures.

141. Schneider claims, however, that, when notifying the transaction, it provided the Commission with information on the links that were supposed to exist between market segments 4 and 5 and the respective positions of the parties to the transaction in those segments in France, emphasising at the outset that there were no portfolio effects. However, the Commission did not raise that objection until 24 September 2001, after expiry of the normal period for putting forward corrective measures and only a few days before the end of the procedure for the investigation of the transaction.

142. The Commission replies that the discrepancy between the statement of objections of 3 August 2001 and the incompatibility decision derives not from the total absence of, but merely a lack of clarity and precision in, the objection based on that support, since the statement of objections did indeed raise that problem in a number of its recitals.

143. The breach of Schneider's rights of defence is not in its opinion sufficiently serious, in view of the drafting of the statement of objections within a short period, the complex assessment

both of all the substantive arguments, in respect of which the objection based on the support provided was merely one of numerous relevant factors, and of the corrective measures proposed by Schneider.

144. The fact that the applicant provided the Commission with information showing that the transaction involved no support problem further reduces the seriousness of the procedural error committed.

- Findings of the Court

145. It must be borne in mind that, before adopting a decision finding that a concentration is incompatible with the common market, the Commission is required, under Article 18(1) of the regulation, to give the notifying undertakings an opportunity, at every stage of the procedure up to consultation of the Advisory Committee, of making known their views on the objections against them.

146. It is also apparent from Article 18(3) of the regulation that the Commission may base its incompatibility decisions only on objections on which the undertakings concerned have been able to submit their observations.

147. As addressees of decisions of a public authority which affect their interests to an appreciable extent, the undertakings involved in a concentration having Community dimension must be placed in a position where they can make their views properly known and, to that end, be clearly informed, in due time, of the Commission's main objections to their notified concentration (see, to that effect, Case 17/74 Transocean Marine Paint v Commission [1974] ECR I1063, paragraph 15, and Case T87/96 Assicurazioni Generali and Unicredito v Commission [1999] ECR II203, paragraph 88).

148. The statement of objections is of particular importance in that connection, given that it is specifically intended to enable the undertakings concerned to react to the concerns expressed by the regulatory institution, first by giving their views on the matter and, second, by considering whether to propose to the Commission measures intended to correct the negative impact of the notified concentration.

149. Respect for that right, which is one of the fundamental rights guaranteed by the Community legal order in administrative procedures, is of particular importance for the control of concentrations between undertakings (see, to that effect, Case C269/90 Technische Universität München [1991] ECR I5469, paragraph 14).

150. Account must be taken, in that regard, both of the importance of the financial interests involved and the industrial implications of a concentration having a Community dimension and of the considerable scope of the investigatory powers available to the Commission to regulate competition in the common market.

151. It follows that Schneider is alleging breach of a rule intended to confer rights on individuals.

152. In this case, a manifest and serious breach of Article 18(1) and (3) of the regulation stems from the fact of the Commission's drafting, as in this case, a statement of objections in such a way that, as is apparent from the Schneider I judgment, the applicant could not ascertain that, if it did not submit corrective measures conducive to reducing or eliminating the support between its positions and those of Legrand in the French sectoral markets, it had no chance of securing a declaration that the transaction was compatible with the common market.

153. Thus, the corrective measures submitted by Schneider in September 2001, which included Legrand's withdrawal from the market in components for panelboards throughout the EEA, were not objectively capable of resolving the specific problem of the support provided, on the French sectoral markets in lowvoltage electrical equipment perceived at wholesale level, by Schneider's dominant position in the sector of components for distribution and final panelboards to Legrand's leading position in the ultraterminal equipment segments.

154. That breach of the rights of the defence is neither justified nor accounted for by the particular constraints to which Commission staff are objectively subject. The fault at issue, the existence and extent of which are not contested by the Commission, therefore imposes upon the Community a duty to make good the harmful consequences.

155. The defendant's argument as to the difficulty inherent in undertaking a complex market analysis under a very rigid time constraint is irrelevant, since the fact giving rise to the damage under consideration here is not the analysis of the relevant markets contained in the statement of objections or the incompatibility decision but the omission from the statement of objections of a reference which was of the essence as regards its consequences and the operative part of the incompatibility decision, which did not involve any particular technical difficulty or call for any additional specific examination that could not be carried out for reasons of time and the absence of which cannot be attributed to a fortuitous or accidental drafting problem that could be compensated for by a reading of the statement of objections as a whole.

156. It follows that the breach of Schneider's rights of defence is to be regarded in this case as a manifest and serious disregard by the Commission of the limits to which it is subject and, as such, constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals.

157. The breach of Schneider's rights of defence therefore constitutes a fault on the part of the Commission such as to cause the Community to incur noncontractual liability, provided that it is established in addition that there was real and certain damage and a sufficiently direct causal link between that damage and the sufficiently serious breach of Community law constituting a fault.

158. Before examining whether those two conditions are satisfied, the Court must consider whether or not the Commission conducted itself in relation to the applicant during the investigation of the transaction in a manner that was generally unlawful, resulting, as contended by Schneider, either in aggravation of the loss caused by the unlawful incompatibility decision or in a separate loss represented by further costs incurred by the applicant.

159. Since the complaints made by the applicant against the Commission in addition to those established in the Schneider I judgment are presented as supplementing the latter complaints and may therefore constitute circumstances giving rise to damage, over and above the main faults committed, they must be analysed in the light of the general criteria for the establishment of noncontractual liability of the Community, which presuppose, as stated in paragraphs 113 to 126 above, a sufficiently serious breach of a rule of law by the Community institution.

The other instances of unlawful conduct on the part of the Commission which are claimed to have exacerbated the damage allegedly suffered as a result of the incompatibility decision or to have caused separate damage

Lack of fairness

- Arguments of the parties

160. Schneider considers that the Commission was unfair towards it by unlawfully giving it the impression that a decision declaring the transaction compatible might be contemplated, by not warning it early enough that it intended prohibiting the transaction and by not informing it of the existence of decisive obstacles to the authorisation of the concentration.

161. The Commission never informed Schneider of the mutual support objection before 24 September 2001, although it had information capable of settling that matter long before the drafting of its statement of objections of 3 August 2001. The leading positions of the parties to the transaction on the sectoral markets in question and the importance of the distribution vectors were dealt with

at length in the Form CO and were very quickly identified by the Commission.

162. As early as May 2001, the Commission possessed information which prompted it to say in October 2001 that the mutual support of the notifying parties' positions constituted an obstacle to the concentration.

163. That lack of fairness is confirmed by the statement of the Member of the Commission responsible for competition published in Le Monde on 8 November 2001 according to which...where the strength of undertakings even before their merger is such that no corrective measure can be found, the Commission has no alternative but to prohibit the merger...'

164. The Commission replies that in May 2001 it did not have all the information necessary to conclude a competition analysis and identify possible competition problems. It would have been, to say the least, premature for the Commission to express, at that stage, opposition to the transaction in principle without thereby failing in its duty to show reserve and to observe the principle of sound administration.

165. The statement by the Member of the Commission is irrelevant since it postdated the incompatibility decision and merely presented the Commission's conclusions after the event.

166. In any case, Schneider could, as a normally wellinformed trader, have assessed the various risks inherent in the transaction under French law and Community competition law, by reason of the considerable strength of the parties in France.

- Findings of the Court

167. It must be held that Schneider's arguments do not provide a sufficient basis for upholding the complaint of unfairness.

168. In particular, Schneider has not been able to put forward information of a reliable, precise and consistent nature such as to establish that, as the applicant had contended in Case T310/01, the Commission wished, long before discussion of the corrective measures proposed by Schneider, to prohibit the transaction from the outset for reasons of principle which excluded a priori any solution to the problem of the incompatibility of the transaction with the common market.

169. In view of the background to the dispute, the possibility cannot be ruled out that the Commission was not in a position to assess objectively and in full knowledge of the facts the impact of the transaction on the various national sectoral markets affected until the stage of the drafting of the statement of objections of 3 August 2001, after examining and using a considerable volume of information provided by Schneider and Legrand at the end of a response time of several weeks, the extent and complexity of which were commented on by the applicant itself in its application in Case T310/01.

170. It must be borne in mind in that connection that the specific purpose of a statement of objections is to provide all the information needed for the undertakings properly to express their views on the objections raised by the Commission, having regard to information previously supplied by the interested parties, concerning the compatibility of the notified concentration, so that the Commission can thereafter give a final decision in full knowledge of the facts.

171. Whilst the failure to mention the mutual support objection in the statement of objections of 3 August 2001 constitutes a serious breach of Schneider's rights of defence, it is not glaringly obvious from the file that that unlawful conduct must necessarily be seen as stemming from unfairness on the part of the Commission.

172. The statement of the Member of the Commission responsible for competition to which exception was taken, set out in paragraph 163 above, does not necessarily lend itself to the view taken by

Schneider. It is not impossible that the Member of the Commission intended, by using the present indicative, to state a general rule which did not apply solely to the transaction in this case, which, moreover, was not the only case referred to in the statement in question.

173. The statement in question cannot therefore in this case be interpreted with certainty as a manifestation ex post facto of the Commission's deliberate intention to oppose the transaction from the outset as a matter of principle.

174. In those circumstances, the criticism of unfair conduct on the Commission's part cannot be upheld.

175. Schneider's claims must therefore be rejected.

Breach of Schneider's right to be heard by an impartial authority

- Arguments of the parties

176. Schneider maintains that decisions of an administrative authority which, as in the case of Commission decisions relating to the control of concentrations, are not subject to a full review on the merits meeting the safeguards required by Article 6(1) of the European Convention for the Protection of Human Rights (the Convention'), which guarantees individuals the right to a fair trial, must conform to that provision as from the start of the administrative investigation procedure.

177. Use of the same team of officials to prepare incompatibility decisions and decisions requiring divestiture is, in Schneider's view, contrary to the principle of impartiality enshrined in that provision.

178. Moreover, there is reason to doubt the objectivity and neutrality of the reexamination of the transaction undertaken the day following delivery of the Schneider I and Schneider II judgments in view of the fact that the teams which successively examined the transaction throughout the investigation procedure were made up, at least in part, of the same people.

179. The Commission objects that no failure in its duty of impartiality has been established and that it is not a tribunal' within the meaning of Article 6(1) of the Convention. In any event, compliance with that provision is fully ensured by the right of undertakings to apply to the Community judicature for the annulment of decisions adopted under the regulation.

180. Moreover, no rule of law or of professional conduct opposes reexamination of the transaction being entrusted to the team of officials who carried out the initial investigation.

- Findings of the Court

181. Observance of all persons' right to a hearing before an independent and impartial tribunal is guaranteed by Article 6(1) of the Convention, to which reference is made by Article 6(2) of the Treaty on European Union and which was reaffirmed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

182. As an integral part of the fundamental rights protected in the Community legal order, compliance with which by the Commission in the conduct of its control procedures relating to concentrations is ensured by the Community judicature, the right to a fair hearing is manifestly a rule intended to confer rights on individuals (Case T309/03 Camos Grau v Commission [2006] ECR II1173, paragraphs 102 and 103).

183. However, provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts (see European Court of Human Rights, Le Compte v Belgium , judgment of 23 June 1981, Series A No 43, paragraph 51).

184. In this case, the action for annulment available under Article 230 EC against Commission decisions adopted under Article 8(3) and (4) of the regulation is a remedy incorporating the safeguards required by Article 6(1) of the Convention.

185. Moreover, there is no rule of law or principle which prevents the Commission from entrusting to the same officials reexamination of a concentration in compliance with a judgment annulling a decision declaring that concentration to be incompatible with the common market.

186. It cannot be stated as a general rule resulting from the obligation to be impartial that an administrative or judicial authority is bound to send the case back to a different authority or to a differently composed branch of that authority (see European Court of Human Rights, judgment in the case of Ringeisen v Austria, 16 July 1971, series A No. 13, paragraph 97).

187. As regards the disciplinary section of the governing board of a professional body, the European Court of Human Rights has accepted that no ground for legitimate suspicion can be discerned in the fact that three of the seven members of the disciplinary section had taken part in a decision in a case referred to it after the setting aside of an earlier decision in the drawing up of which they had been involved (see European Court of Human Rights, judgment in the case of Diennet v France, 26 September 1995, series A No. 325A, paragraph 38).

188. It follows that the fact that the teams of officials responsible for the various stages of investigation of the transaction were composed wholly or partly of the same members does not constitute a sufficiently serious breach by the Commission of a rule of law intended to confer rights on individuals.

189. In those circumstances, Schneider's arguments cannot be upheld.

The intransigence demonstrated by the Commission in determining the procedures for the separation of Schneider and Legrand

- Arguments of the parties

190. Schneider objects that the Commission was unnecessarily intransigent as regards the procedures for the separation of Legrand. The Commission's refusal to authorise Schneider to consider a transfer of its assets in Legrand rather than an outright separation discouraged all the industrial operators for whom the enhanced value of the assets in Legrand resulting from industrial and commercial synergies would undeniably have been higher than the value for financial investors who were the only parties able to participate in the sale procedure under the divestiture conditions imposed by the Commission.

191. The general prohibition imposed on Schneider from retaining or repurchasing certain assets in Legrand prevented the applicant from keeping holdings which would have enabled it to achieve some of the envisaged synergies, thereby undermining its negotiating position as regards potential purchasers.

192. The choice between demerger, transfer or quotation on the stock exchange and the possibility of retaining part of Legrand's capital and temporarily retaining a claim against Legrand or the purchaser thereof should have been examined in the light of all the other requirements imposed by the Commission.

193. Despite extension of the period for divestiture, the constant pressure and systematically negative attitude of the Commission forced Schneider not to interrupt or slow down the divestiture process. That extension was in fact merely apparent since it did not prejudge completion of the stages necessary for the separation process within the period as extended'.

194. The Commission considers, on the contrary, that it displayed great flexibility. Whilst the statement of objections of 24 October 2001 provided for divestiture through allocation of shares in Legrand to the holders of Schneider shares pro rata to their holdings, the divestiture decision

enabled the addressee, at its request, to choose between demerger, transfer or quotation on the stock exchange, retaining a holding in Legrand's capital, or indeed seeking from the Commission prior approval to retain a temporary claim against Legrand or the purchaser thereof.

195. Since the divestiture decision was merely one way of implementing the incompatibility decision, separation of Schneider and Legrand without affecting the latter's size cannot be regarded as an indication of intransigence.

196. The method of proceeding by way of purchase by financial institutions was preferred by Schneider itself. Moreover, the industrial purchasers would not have agreed to the price surcharge required of them by Schneider, as compared with financial institutions.

197. On a proposal from Schneider's investment bankers, the Commission agreed to extend the period for divestiture from six to nine months. The Commission granted an additional extension of three months, until 5 February 2003, and allowed for the possibility of a further extension. Moreover, the divestiture decision enabled that period to be extended, at Schneider's request, in the event of exceptional circumstances arising.

- Findings of the Court

198. In objecting to the procedures for divestiture, Schneider challenges the intrinsic lawfulness, under Article 8(4) of the regulation, of the divestiture decision that was annulled by the Court of First Instance as a result of the unlawfulness of the incompatibility decision of which it was an implementing measure (see paragraphs 44 and 58 above), and therefore without its actual merits having had to be examined.

199. Where a concentration has, as in this case, already been implemented when the Commission declares it incompatible with the common market, Article 8(4) of the regulation enables the Commission to require any action to be taken to restore effective competition.

200. Without its being necessary to decide whether that provision constitutes a rule of law intended to confer rights on individuals, it cannot be taken for granted that the Commission manifestly and seriously infringed it by requiring separation of the two parties to the transaction in such a way that Legrand's size could not be affected and no subsequent retransfer of Legrand's business to Schneider was permitted.

201. Account must be taken in particular of the leading positions of the notifying undertakings in the French sectoral markets in lowvoltage electric equipment affected by the transaction, the difference between their market shares and those of their immediate competitors, the reputation of their brands in France, and the elimination of long-standing rivalry between the two parties concerned.

202. Moreover, the choice of the legal conditions for the divestiture was, as is apparent from recital 105 to the divestiture decision, left to Schneider, provided that they excluded any significant holding by the applicant in Legrand's capital and guaranteed sale of the Legrand group without there being discrete transactions disposing of certain of Legrand's businesses.

203. Moreover, Schneider has not demonstrated that the period for implementation of the divestiture decision was manifestly excessively short. In the contested decision, the Commission extended by three months the initial period of six months set in the statement of objections of 21 October 2001.

204. In recital 122 to the decision, the Commission also declared that it was prepared, first, to grant an additional period of three months during which the trustee would be given irrevocable and exclusive selling authority in order to allow Schneider the requisite room for manoeuvre in its negotiations with potential purchasers or investors and, second, to extend those periods if

it was requested to do so, provided that Schneider or the trustee was in a position to prove that they had used their best endeavours to comply with the timelimit.

205. Following the hearing on 23 April 2002 of an application for interim relief in Case T77/02 R, on 26 April 2002 the Commission granted Schneider an extension of three months, thus deferring the end of the divestiture period until 5 February 2003, representing a period of one year following notification of the divestiture decision, without prejudice to Schneider's right to request, in the event of exceptional circumstances, an additional extension.

206. Even if it is conceded that the transfer of an undertaking of Legrand's size may generally require a period of more than one year, as the comments attributed to Schneider in paragraph 110 of the incompatibility decision suggest, it would then have been the responsibility of the applicant to seek a further extension. However, the file does not show that this was done.

207. Moreover, as is to be inferred from Schneider's response of 7 November 2001 to the Commission's statement of objections of 24 October 2001, Schneider had already contacted potential purchasers even before the divestiture decision.

208. Finally, as is apparent from point 5 of Annex II to the divestiture decision, the latter required only the adoption, in accordance with the arrangements chosen, of an irreversible legal measure which was to be fully implemented within three months following its adoption.

209. It cannot therefore be accepted that the Commission imposed on Schneider, for the purpose of divesting itself of Legrand, arrangements and a period for divestiture which amounted to a manifest and serious failure to observe the limits to which the Commission's discretion is subject.

210. Schneider's argument cannot therefore be upheld.

Exploitation of the tensions arising between the parties to the transaction

- Arguments of the parties

211. Schneider claims that the Commission fostered the tensions which arose between the parties to the transaction following the incompatibility decision, in particular by not allowing it access in due time to information provided by Legrand during the discussions that led to the adoption of the divestiture decision.

212. The Commission allegedly displayed the same attitude following the divestiture decision. The Commission encouraged Legrand to institute legal proceedings against Schneider in France in November 2002, and then made sure that its reasoning concerning the adequacy of Schneider's new corrective measures conformed with the judgment of the Cour d'appel de Versailles, referred to above.

213. The Commission replies that Legrand's change of attitude was in fact attributable to a possible conflict of interest between the parties to the transaction.

214. In particular, Schneider has produced nothing concrete to show that it was not granted access to information in the file provided by Legrand. After receiving the nonconfidential versions of the documents concerned in January 2002, Schneider did not even make a specific request for access to the confidential version of them.

- Findings of the Court

215. Schneider's allegations do not provide sufficient grounds for upholding the complaint that the Commission exploited tensions that arose between the parties to the transaction.

216. It must be observed in particular that the Commission stated in paragraph 88 of its defence, without being challenged by Schneider, that it disclosed to the applicant in January 2002 nonconfidential versions of documents concerning Legrand and a list containing a nonconfidential summary of information

declared inaccessible. There is nothing in the file to show that Schneider made any specific request for access to the confidential version of any of those documents.

217. Moreover, neither the Commission's concern in the divestiture decision to preserve Legrand's size, nor the taking into account of decisions of national courts in assessing the remedies proposed by Schneider, nor any other action taken by the Commission during the investigation of the transaction can be objectively characterised, beyond doubt, as being inspired by an intention to undermine relations between the parties to the transaction.

218. Schneider's claims must therefore be rejected.

The Commission's failure to observe the limits of its exclusive competence

- Arguments of the parties

219. Schneider considers that the Commission seriously and manifestly failed to respect the fact that it had exclusive competence under the regulation in that, when reexamining the transaction, it made its assessment of the validity of the corrective measures proposed by the applicant dependent upon the operative part of the judgment of the Cour d'appel de Versailles of 29 November 2002, which gave a provisional decision on a question confined to national contract law.

220. The Commission does not consider that it gave up its exclusive competence at any time or, a fortiori , committed any sufficiently serious unlawful act.

- Findings of the Court

221. In the exercise of its monitoring powers concerning compatibility with the common market of concentrations having a Community dimension, the Commission cannot disregard binding agreements between the notifying parties, provided that their stipulations are lawful under the applicable national law.

222. Schneider is wrong to maintain that the Commission made the exercise of its powers to assess the validity of Schneider's corrective measures dependent upon the operative part of the judgment of the Cour d'appel de Versailles. There is no issue here of the primacy of Community competition rules over those of national law: the issue is the determination of the effects attached to a private contract by the national law applicable to the contract in conformity with Community law.

223. It does not therefore seem that the Commission committed a sufficiently serious breach of Community law by reaching the conclusion that the proposals for the disposal of Legrand businesses put forward by Schneider were fraught with uncertainty and therefore unacceptable because they ran counter to a private agreement properly governed by national law which, according to the findings of the national court having jurisdiction in the matter, was binding on the parties to the transaction in accordance with the provisions of that law.

224. In those circumstances, Schneider's argument cannot be upheld.

The failure to give effect to the Schneider I judgment in good faith.

- Arguments of the parties

225. The applicant states that the Schneider I judgment set aside the Commission's analysis of all the markets other than the French sectoral markets. The Commission therefore had no reason to resume its reexamination of the transaction in phase I, particularly when it also knew that after 5 December 2002, the date marking the end of the period granted to Schneider by the sale and purchase agreement to invoke the provision allowing it to cancel the Legrand sale, the applicant would lose the benefit of the efforts which it had expended in order to reduce its loss.

226. Thus, Schneider logically insisted that the investigation procedure should be resumed immediately

following the Schneider I judgment on the basis of the six week period laid down under phase I. That period should have allowed the Commission to give effect to the Schneider I judgment in good faith by giving the applicant an opportunity to put forward, if appropriate, suitable corrective measures.

227. The decision of 4 December 2002 to initiate phase II was also vitiated by numerous manifest errors of assessment and departed from the analytical scheme outlined by the Schneider I judgment. The analysis of competition in the relevant markets finally adopted by the Commission was subject to the same kind of serious omissions, errors and contradictions as those which led to annulment of the incompatibility decision.

228. The Commission rejects the view that resumption of the investigation procedure at the phase I stage can be regarded as an indication of bad faith. The course followed, at Schneider's request, was the only one enabling a positive final decision to be adopted in respect of the transaction before 5 December 2002.

229. The economic analysis carried out by the Commission on the basis of updated information provided by Schneider is consistent in every respect with the analysis whose merits were upheld by the Schneider I judgment, after the Commission took steps to give clearer details of the mutual support objection.

- Findings of the Court

230. It is apparent from paragraph 48 of the Order of 9 March 2007 in Schneider Electric v Commission, that, contrary to Schneider's contention, the Commission was legally entitled to choose to resume the investigation of the concentration in phase I, in order to draw the proper inferences from the Schneider I judgment, by taking all necessary precautions to ensure that no breach of Schneider's rights of defence could arise.

231. Moreover, the applicant's assertions do not suffice to establish that the analysis of competition in the relevant French sectoral markets contained in the decision to initiate phase II displays the same defects as those present in the assessment of the impact of the concentration on national sectoral markets outside France contained in the incompatibility decision and condemned by the Schneider I judgment.

232. The errors of analysis condemned by the Schneider I judgment could not have had any influence on the assessment of the impact of the transaction on the French sectoral markets, by reason of the specificity of those markets.

233. A combined reading of paragraphs 413 and 415 of the Schneider I judgment discloses nothing to undermine the conclusion that the proposed transaction would create or strengthen on the French sectoral markets in lowvoltage electric equipment, in which each of the notifying parties was already very powerful, a dominant position which would have the effect, within the meaning of Article 2(3) of the regulation, of significantly impeding effective competition in the common market or, at the very least, in a substantial part of it.

234. Market shares indicative of dominance or a strengthened dominant position of the merged entity, the higher prices of lowvoltage electric equipment at wholesale level, the disappearance of traditional rivalry between the two long-standing main protagonists, and the reputation of the two partners' brands were considered relevant factors in that regard.

235. It is also important to note that serious doubts as to the compatibility of a concentration with the common market are a sufficient basis for taking a decision to initiate phase II under Article 6(1)(c) of the regulation, whilst evidence of the creation or strengthening of a dominant position is required from the Commission by Article 2(3) of the regulation where it declares a concentration incompatible with the common market on the basis of Article 8(3).

236. It does not therefore appear that, in examining, for the purposes of implementing the Schneider

I judgment, the residual problems of competition deriving from the transaction only in the French sectoral markets still regarded as relevant, the Commission manifestly and seriously overstepped the limits imposed on its discretion.

237. In those circumstances, the Court cannot uphold the applicant's arguments.

Breach of the rights of the defence

- Arguments of the parties

238. Schneider maintains that the Commission breached its rights of defence when reexamining the transaction in that it had no access to the results of the market tests carried out by the Commission and could not properly respond to the issues that they might have disclosed.

239. The Commission replies that access by the parties to a concentration to the results of market surveys such as those undertaken in November 2002 is not provided for in the phase of the investigation brought to an end by a decision to initiate phase II and that such access cannot be justified by the principle of respect for the rights of defence of the parties concerned.

- Findings of the Court

240. Whilst observance of the rights of the defence is required before the adoption of any decision liable adversely to affect the undertakings concerned, the decision to initiate phase II, adopted after the market tests in question, does not constitute an act adversely affecting Schneider (order of 31 January 2006 in Schneider Electric v Commission , paragraph 76, confirmed by the order of 9 March 2007 in Schneider Electric v Commission , paragraph 72), the legality of which would depend on observance of those rights.

241. The Commission cannot therefore have committed a sufficiently serious breach of a rule of law intended to confer rights on individuals by not disclosing the results of the market tests to Schneider in phase I of the investigation of the transaction which was resumed immediately following delivery of the Schneider I and Schneider II judgments.

242. Schneider's claims must therefore be rejected.

The incorrect, unfair and discriminatory analysis of the corrective measures proposed by Schneider in November 2002

- Arguments of the parties

243. Schneider criticises the Commission for deciding that serious doubts existed as to the compatibility of the transaction with the common market within the meaning of Article 6(1)(c) of the regulation instead of applying the criterion based on Article 2(3) of the creation or strengthening of a dominant position on which an incompatibility decision should be based by virtue of Article 8(3).

244. Schneider also criticises the Commission for deciding that the corrective measures of November 2002 were insufficient, even though they would have eliminated all overlapping of Schneider's and Legrand's business activities on the affected markets, through transfer to a single purchaser of autonomous and viable undertakings, offered a wide range of products and brands and easier access to distribution, as a result of Schneider's commitments concerning its conduct, eradicated any risk of buttressing on the part of Schneider and limited the list of potential purchasers to industrialists who were capable of developing the transferred entity.

245. Schneider's structural commitments were supplemented by commitments as to conduct, accepted by the Commission in other cases of concentrations, facilitating access to distribution and eliminating any risk of mutual support.

246. The Commission states, in essence, that it concluded that Schneider's corrective measures

would not lead to the elimination of all the competition problems identified in the French lowvoltage electric equipment market and that they raised, in addition to the legal uncertainty deriving from the judgment of the Cour d'appel de Versailles, numerous problems of viability, autonomy and capability of the transferable entities to reestablish effective competition. The Commission evaluated the impact of those corrective measures on the markets concerned in terms of market share, removal of overlapping, the strength of the brands to be assigned and the power of SchneiderLegrand to negotiate with wholesalers.

247. In addition to the fact that every case of concentration raises specific problems of competition, the proposed commitments as to conduct would have had only a very limited effect and monitoring of their application would have raised considerable difficulties, in view of the very large number of products and distributors to which those commitments could have applied.

- Findings of the Court

248. The Court points out that, as is apparent from paragraph 48 of the order of the Court of Justice of 9 March 2007 in Schneider Electric v Commission , the Commission was legally entitled to resume the examination of the transaction in phase I on the day following delivery of the Schneider I judgment.

249. Since it had decided to resume investigation of the transaction at that stage, the Commission had no alternative but to apply, with a view to initiating phase II of the investigation of the transaction by the decision of 4 December 2002, the criterion laid down in Article 6(1)(c) of the regulation of the existence of serious doubts as to the compatibility of the transaction with the common market.

250. Schneider is therefore wrong to object that the Commission did not apply the criterion of the creation or strengthening of a dominant position within the meaning of Article 2(3) of the regulation, on which the Commission must rely when adopting a decision declaring a concentration incompatible with the market under Article 8(3).

251. As regards the capability of Schneider's corrective measures to resolve the residual problems of competition identified by the Commission in the French lowvoltage electric equipment sectoral markets, it is common ground that the transfers of Legrand businesses proposed by Schneider were a core feature of the suggested corrective measures.

252. It follows that the withdrawal, required of Schneider by the Cour d'appel de Versailles, of its proposals for divestiture of Legrand businesses which had been put forward without Legrand's approval provided support for the doubts which the Commission states it continued to entertain as to the compatibility of the transaction with the common m arket.

253. Moreover, in view in particular of the strength in France of the SchneiderLegrand group, on account of its strong presence in all the various sectors of products relating to lowvoltage electricity distribution, the disappearance of the long-standing rivalry between the two parties to the transaction and the parties' ownership of wellknown brands, it does not appear that the Commission seriously and manifestly overstepped its discretion in taking the view that Schneider's corrective measures were not sufficient to remove every material doubt as to the compatibility of the concentration with the common market.

254. It has not therefore been established that the Commission's refusal to accept that those measures were capable of dispelling the serious doubts it continued to entertain as to the compatibility of the concentration with the common market derives, as claimed by Schneider, from an incorrect, unfair and discriminatory analysis of those measures.

255. Schneider's arguments in that regard must therefore be rejected.

256. It is clear from the foregoing that none of the complaints concerning the Commission's conduct as a whole in the investigation of the transaction discloses any sufficiently serious breach of a rule of law intended to confer rights on individuals.

257. In those circumstances, the Commission cannot be held, as a result of that general conduct, either to be guilty of exacerbating the damage Schneider claims to have suffered as a result of sufficiently serious breaches of Community law vitiating the incompatibility decision or to be liable for such costs as Schneider may have incurred in the divestiture procedure or before the French courts.

258. Consequently, only the fact that Schneider was deprived, because of the discrepancy between the statement of objections of 3 August 2001 and the incompatibility decision, of an opportunity to put forward corrective measures conducive to resolution of the problem of the mutual support between its positions and those of Legrand in the relevant French sectoral markets gives the applicant any right to secure reparation for the damage suffered by it as a result of that misconduct.

259. The Court must therefore consider whether the defect in the incompatibility decision, which constitutes a fault of such a kind as to cause the Community to incur noncontractual liability, may be regarded as displaying a sufficiently direct causal link to the heads of damage pleaded in that regard.

The alleged causal link between the sufficiently serious breach of Community law vitiating the incompatibility decision and the heads of damage relating thereto

The loss of value of the assets in Legrand held by Schneider

260. The main damage claimed by Schneider derives from the financial loss suffered by it through having to sell the assets in Legrand at a lower price than it paid to acquire them.

261. The divestiture decision, which was unlawful because it was a measure implementing an incompatibility decision that was itself unlawful, set a timelimit for Schneider to dispose of the assets in Legrand and prohibited it from disposing of certain of those assets separately.

262. Consequently, if, within the period set by the Commission in a decision lacking a legal basis, Schneider was unable to dispose of the assets of which it was required to divest itself without suffering loss, as a result of the drop in the value of those assets between the date of their purchase and the date of their forced disposal, it must be held that those losses derive directly from the obligation to implement an unlawful decision, regardless, moreover, of any other reasons for which the assets in question lost value during the period concerned.

263. However, in order to determine the harm attributable to a wrongful act of a Community institution, account must be taken of the effects of the failure which caused liability to be incurred and not of the effects of the measure of which it forms part, provided that the institution could or should have adopted a measure having the same effect without breaching any rule of law.

264. In other words, the analysis of the causal link cannot start from the incorrect premise that, in the absence of an unlawful measure, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful measure and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law.

265. Where the unlawful circumstance on which the claim for compensation is based is associated with a decision whose effect is to withhold from an applicant an authorisation or other favourable measure, it cannot be presumed, for the purpose of analysing the effects of the wrongful measure and the comparison between the real situation and the reconstructed legal situation, that, in the

absence of the defect identified, the applicant would necessarily have been granted the authorisation or other favourable measure sought by it.

266. Similarly, it is necessary, where there has been a breach of the rights of the defence affecting a decision declaring a merger of undertakings incompatible with the common market, not to postulate that, in the absence of that breach, the notified concentration would have been declared compatible, explicitly or implicitly, but rather to assess the effects which the defect identified may have had on the decision that was reached.

267. Thus, in this case, the loss attributable to the Community cannot be assessed on the basis of a comparison between the situation brought about by the incompatibility decision and a situation characterised by express or tacit authorisation of the concentration, unless the Community judicature is in a position to find that the incompatibility was declared by the Commission as a direct and certain consequence of an established failure to fulfil its legal obligations.

268. It is therefore necessary, in order to adjudicate on the existence of a sufficient causal link between the failure found and the loss claimed, to assess the impact of the defect identified in the Schneider I judgment on the subsequent procedural stages of the investigation of the transaction.

269. In that regard, whilst it is clear from the Schneider I judgment that the sufficiently serious breach of Schneider's rights of defence had the effect of rendering the incompatibility decision unlawful, it does not thereby follow that in the absence of such a breach the transaction would necessarily have been declared compatible with the common market.

270. The Schneider I judgment found, in paragraph 465, that, so far as concerned the implementing measures made necessary, under Article 233 EC, by the annulment of the incompatibility decision by reason of that unlawfulness (see Schneider I, paragraphs 462 and 463), the Commission was required to place Schneider in such a position that it could put forward a proper defence to the objections made by the Commission in relation to each of the French lowvoltage electrical equipment sectoral markets affected by the transaction and, where appropriate, to propose corrective measures capable of answering those objections, in such a way as to secure, possibly on completion of reexamination of the transaction, a decision upholding its compatibility.

271. As Schneider itself has conceded in its reply, the economic analysis of the impact of the concentration on the French sectoral markets incorporated in the incompatibility decision was not rendered invalid by the Schneider I judgment.

272. By way of measures to implement Schneider I, the Commission was therefore required to resume investigation of the transaction without excluding the possibility of its being declared compatible with the common market and, to that end, to hear the applicant regarding the mutual support objection and to take account of any corrective measures that might be put forward by Schneider and Legrand to resolve the problems of compatibility raised by the mutual buttressing of their positions on the French sectoral markets concerned.

273. The Commission was not therefore, in implementing the Schneider I judgment, bound by any procedural obligation to declare the transaction compatible with the common market.

274. The argument put forward by the applicant at the hearing that there was a presumption that a notified concentration was compatible with the common market must also be rejected.

275. According to Community caselaw, the regulation does not establish a presumption as to the compatibility with the common market of a concentration that has been notified and it is for the Commission in each case to form a clear opinion as to such compatibility and to rule accordingly (Case T210/01 General Electric v Commission [2005] ECR I5575, paragraph 61).

276. It is true that a concentration is tacitly regarded as compatible with the common market where,

in particular, the Commission has neither taken a decision to initiate phase II within the period of one month set by Article 10(1) of the regulation nor ruled as to the compatibility of a concentration with the common market within the period of four months set by Article 10(3).

277. However, it is common ground that neither of those two situations exists in this case, the Commission having duly completed within the prescribed periods the two phases of the investigation of the transaction by adopting measures of the kind provided for by the relevant provisions of the regulation.

278. Accordingly, the defect identified in the incompatibility decision did not deprive Schneider of any right to a decision that the transaction is compatible, whether explicit or implicit, such as to justify treating all the financial consequences of the loss of that right and, in particular, those deriving from the obligation to dispose of the assets in Legrand, as damage attributable to the Community.

279. It follows that Schneider cannot validly claim that, as a result of the defect vitiating the incompatibility decision, it suffered harm equal to the entire loss of value of the assets in Legrand held by it as at 10 October 2001, namely a sum of between EUR 2 483 and 3 326 thousand million, in the absence of a sufficiently direct causal link between that harm and the infringement giving rise to liability on the part of the Community.

280. Although not having a vested right to recognition of the compatibility of the transaction, the applicant might admittedly have had a meaningful chance of securing a favourable decision, and the forfeiture of that chance would amount to certain and compensatable loss.

281. The possibility cannot be ruled out that, as a result of its comments on the mutual support objection and of its divestiture proposals conducive to the reduction or offsetting, in relation to that charge, of the anticompetitive impact of the planned transaction, the applicant might have been in a position to require the Commission to find, on penalty of committing an error of assessment by not doing so, that the transaction was compatible with the common market.

282. However, as moreover is noted in the expert's report produced by Schneider relating to the determination of the alleged loss, it is difficult to determine the nature and amount of the divestiture which would have been necessary to render the transaction compatible with the common market and obtain the Commission's agreement that it should proceed. It is even more difficult to determine the impact on the total value of the assets held by the applicant of the transfers and transactions which those corrective measures would have involved.

283. It follows that an assessment of the changes to the economic parameters which would necessarily have accompanied any decision of compatibility is too uncertain to be a basis for a useful comparison with the situation resulting from the incompatibility decision. Even if it is accepted that Schneider may have lost a real opportunity to secure a decision of compatibility, the materialisation of that opportunity is linked to parameters that are too uncertain to be the subject of any convincing quantification.

284. It must be noted in that connection, first, that disposal of the assets in Legrand might have proved unachievable for reasons of domestic law and, second, that it is impossible to decide whether or not disposal of assets by Schneider to an extent sufficient to offset the effect of the mutual support between its positions and those of Legrand might have rendered the transaction entirely devoid of interest for the applicant.

285. Consequently, compensation for the loss suffered by Schneider through forfeiture of a real opportunity to be able to retain the assets in Legrand cannot be envisaged.

286. It must therefore be concluded that there is no sufficiently close causal link between the unlawful act committed and the loss of any opportunity of obtaining a decision that the concentration

was compatible for the Community to incur liability as a result of the obligation imposed on Schneider to dispose of its assets in Legrand, or, consequently, for it to be held that damage equal to the total loss of value of those assets between the time of their acquisition by Schneider and their subsequent disposal can be attributed to the Community.

287. For the same reasons, Schneider also has no basis for claiming that the unlawful incompatibility decision denied it any opportunity of achieving the synergies expected from the transaction and consequently destroyed its industrial strategy, or that the decision adversely affected the applicant's image and, therefore, its reputation.

288. On the other hand, there is a sufficiently close causal link to create entitlement to compensation between the wrongful act committed and two types of damage suffered by the applicant. The first type represents the costs incurred by the undertaking in participating in the resumed investigation of the transaction after the annulments pronounced by the Court of First Instance on 22 October 2002. The second corresponds to the reduction of the transfer price which Schneider had to grant to the purchaser of the assets in Legrand in order to secure an agreement that the date on which the disposal was to take effect would be deferred for such time as might be necessary to ensure that the proceedings then pending before the Community judicature would not become devoid of purpose before reaching their conclusion.

The fees and administrative and judicial costs incurred by Schneider

289. As regards the costs incurred by Schneider for the special trustee's fees, it must be observed that the legal basis for the appointment of a trustee is to be found in Article 7 of the regulation, whereby an undertaking which, as in this case, has, before the Commission has given a decision on the compatibility of the notified concentration, acquired ownership of the assets of another company by means of a public bid, is under an obligation, by virtue of the proviso contained in Article 7(3), not to exercise the voting rights attached to the securities deriving from that public bid unless it receives an authorisation from the Commission on the basis of Article 7(4).

290. It was therefore on the basis of that provision that, on 4 December 2001, the Commission gave Schneider, at the latter's request, authorisation to exercise the voting rights attached to its holding in Legrand, through a trustee appointed by Schneider under the conditions laid down in a contract of appointment approved by the Commission.

291. Schneider therefore has no basis for claiming, as it does in paragraph 149 of its application, that the trustee's intervention was made necessary by the adoption of the incompatibility decision or, as claimed in paragraph 252 of the reply, that, if the transaction had not been wrongly prohibited on 10 October 2001, Schneider would never have needed to use a trustee to exercise its rights at the general meeting of Legrand in December 2001, since by that time it directly exercised sole control over Legrand.

292. As has already been held, the annulment of the incompatibility decision did not automatically entail a finding that the transaction was compatible with the common market, in view of the fact that residual problems of competition deriving from the transaction persisted in the French lowvoltage electric equipment sectoral markets.

293. As regards the fees of legal, tax and banking consultants and other administrative costs incurred in carrying out the divestiture in accordance with the conditions laid down by the Commission, they likewise cannot be accepted as flowing from the unlawfulness of the Commission's incompatibility decision.

294. First, the unlawfulness of the incompatibility decision and, consequently, of the divestiture decision does not, as already noted, imply that the transaction should be recognised as compatible

or that the undertakings were entitled to continue as a merged entity. It cannot therefore be presumed that the administrative costs normally incurred by Schneider with a view to divesting itself of the assets would not have had to be borne by the applicant if the Commission had adopted a lawful decision.

295. Second, although Schneider alleges that it had to incur exceptional costs on account of the improper divestiture arrangements imposed on it by the divestiture decision and by reason of the Commission's intransigence in that regard, that element of the alleged damage is linked not to the breach of the rights of the defence found in the Schneider I judgment but to entirely separate complaints which have not been held in the present judgment to constitute sufficiently serious breaches to give rise to entitlement to compensation.

296. As regards the costs incurred for the purpose of the domestic proceedings initiated by Legrand, it need merely be pointed out that the applicant itself considers that they were caused not by the unlawful incompatibility decision but b y the attitude imputed to the Commission whereby it exploited the tensions between the parties to the transaction, which has not been held in this judgment to constitute a claim on the basis of which Community liability might be incurred.

297. The costs incurred in relation to judicial review proceedings before the Community judicature must be regarded as covered by the decisions given on costs, under the specific procedural rules applicable to that type of expenditure, in the decisions bringing the proceedings to an end and on conclusion of the special proceedings provided for in cases where the amount of the costs is challenged (see, in this case, the orders of 29 October 2004 in Cases T310/01 DEP and T77/02 DEP Schneider Electric v Commission). Those proceedings exclude any claim for the same sums, or sums expended for the same purposes, in connection with proceedings alleging noncontractual liability of the Community, including those incurred by litigants who, having been unsuccessful, have had to pay the costs, as Schneider did in Cases T48/03 and C188/06 P.

298. As regards, finally, the consultancy fees and administrative expenses of various kinds incurred by Schneider in participating in the resumed investigation of the transaction made necessary by the Schneider I and Schneider II judgments, it must by contrast be accepted that there is a direct and certain causal link between them and the unlawful conduct of the institution.

299. It was because the Commission failed to give details, in the statement of objections of 3 August 2001, of a problem of competition underlying the incompatibility decision that the applicant was deprived of an opportunity to give its views on the subject and to put forward appropriate countermeasures, a circumstance which gave rise to annulment of the decision in question. That annulment made it necessary to resume the procedure specifically in order to enable the applicant to be heard regarding the objection at issue and, if appropriate, to submit proposals for measures to remedy the effects of the transaction in that regard, whereas it should have been put in a position to do so before the Commission gave a decision on the compatibility of the transaction with the common market.

300. The costs incurred by the applicant in participating in the administrative investigation procedure resumed following the Schneider I and Schneider II judgments would not have had to be incurred if the Commission had from the outset adopted a decision observing the rights of the defence, which would not have had to be annulled as being defective in that regard and could have definitively brought the investigation to an end by a declaration that the transaction was either compatible or incompatible.

301. Admittedly, if the mutual support objection had been set out in the statement of objections of 3 August 2001, Schneider would have had to give its views on that subject and, if appropriate, prepare adequate corrective measures before the Commission adopted its decision on the compatibility of the transaction, as it had to do after the annulment of that decision and subsequent resumption

of the investigation of the transaction. But it can hardly be denied that the fact of resuming, on new legal bases, an administrative procedure suspended 12 months earlier necessarily represented, for the party dealing with the regulatory institution, an incomparably greater burden than that which the undertaking and its advisers, who were already fully involved in meetings and contacts with the relevant Commission staff, would have had to bear in responding to the same objection during the initial investigation procedure.

302. It follows that there is a sufficient causal link between the costs incurred by Schneider in participating in the investigation of the transaction when it was resumed after the Schneider I and Schneider II judgments and the improper conduct of the institution for entitlement to compensation to arise.

The reduction of the Legrand sale price granted to WendelKKR to enable the date of the transfer to be deferred.

303. The Court must consider whether the illegality of the incompatibility decision resulted in a reduction of the figure at which Schneider's shareholding in Legrand was valued in the sale and purchase agreement entered into with WendelKKR.

304. It is common ground that the commencement of negotiations for the transfer of Legrand and conclusion of the sale and purchase agreement between Schneider and WendelKKR on 26 July 2002 both derived directly from the incompatibility decision of 10 October 2001, which, although unlawful, nevertheless produced full legal effects until its annulment by the Schneider I judgment on 22 October 2002.

305. As a result of that decision, Schneider was obliged to commence and conclude negotiations with WendelKKR for the transfer of its holding in Legrand, even before delivery of the judgment on its application for the annulment of that decision, in order to avoid exposing itself to the further obligation, in the event of an adverse judgment, to open and conclude transfer negotiations which at the outset were inimical to the defence of its interests, since they would then have had to have been brought to a conclusion in a very short time, in view of the fact that the divestiture period ended on 5 February 2003 and there was no certainty that the Commission would grant a further extension of that timelimit.

306. It follows that Schneider was compelled, because of the existence of the incompatibility decision, to fix a price for the transfer of Legrand in the sale and purchase agreement concluded on 26 July 2002 and, at the same time, to make certain that it would be able to suspend actual implementation of the transfer until 10 December 2002.

307. That date fell sufficiently beyond the foreseeable date of delivery of the Schneider I judgment, which was due to be given following an expedited procedure, to enable Schneider both to obtain confirmation, in the event of dismissal of its application for annulment, of the lawfulness of the contested decision or, in the contrary case of annulment, which subsequently came about, to ensure that it would still be possible to secure reexamination of the transaction by the Commission on the basis of a new proposal for corrective measures, with a view to the adoption of a final decision giving a lawful ruling as to the compatibility of the transaction with the common market.

308. It was therefore because the incompatibility decision was vitiated by two irregularities which could be perceived by Schneider as manifest irregularities and because it legitimately sought a lawful decision as to the compatibility of the transaction that Schneider found itself constrained both to negotiate and to conclude, on 26 July 2002, the agreement for the transfer of Legrand and to put back the effective date of that transfer to 10 December 2002.

309. Furthermore, it does not appear from the file that the sale and purchase agreement could have

been signed earlier than 26 July 2002, even if the contested decision had not appeared to Schneider to be vitiated by manifest irregularities which the applicant wished to have condemned by the Court of First Instance.

310. Account must be taken, as from 10 October 2001, of the irreducible period needed to devise and put into place complex financial mechanisms for a sale of assets on the scale of Legrand, as demonstrated by the efforts made by Schneider to persuade the Commission to extend the initial divestiture period by 6 months.

311. That obligation to defer effective completion of the sale of Legrand, stemming from Schneider's legitimate attempts to obtain a decision giving a lawful ruling on the compatibility of the transaction with the common market, necessarily prompted the applicant to offer to sell Legrand to WendelKKR at a lower price than the applicant would have obtained in the event of a firm sale accomplished in the absence of an incompatibility decision which, from the outset, appeared to be tainted by two manifest irregularities.

312. It must be accepted that deferral of the completion of the sale of the assets in Legrand until 10 December 2002 meant that WendelKKR had to be paid for accepting the risk of depreciation of the assets in Legrand to which it exposed itself by accepting that deferral, if only because of the possibility of an adverse variation in the prices of industrial stocks over the period between signature of the sale and purchase agreement and the final date agreed between the parties for the sale to take effect.

313. It must be observed in that regard that the expert's report produced as Annex 29 to the application specifically refers to an opportunity cost suffered by Schneider, in that it was unable to choose the date for the resale of Legrand.

314. That compensatory reduction of the transfer price appears to have no connection with the compensation provided for in the agreement in the event of the transfer not being proceeded with, which corresponded to what Schneider would have had to pay in the event of its declining to complete the transfer.

315. In those circumstances, the breach of the rights of the defence vitiating the incompatibility decision must be regarded as being sufficiently directly linked to the deferral to 10 December 2002, in the sale and purchase agreement, of the final date for completion of the Legrand sale, because that deferral was essential to enable Schneider properly to exercise the right available to all companies in its position to obtain a lawful decision as to the compatibility with the common market of a duly notified concentration and, possibly, to be heard in a procedure offering it the requisite safeguards.

316. Consequently, the serious infringement of Community law found by the Court of First Instance is to be regarded as displaying a sufficiently direct causal link with the damage suffered by Schneider as a result of the reduction in the Legrand transfer price associated with the deferral of completion of the transfer to WendelKKR.

317. It follows from all the foregoing considerations that the sufficiently serious breach of Community law vitiating the incompatibility decision must be regarded as displaying a sufficiently direct causal link with, first, the costs incurred by Schneider in participating in the administrative procedure for investigation of the transaction resumed on the day following the Schneider I and Schneider II judgments and, second, with the reduction of the Legrand transfer price granted to WendelKKR to secure a deferral of the final date for the transfer.

The two heads of damage and their quantification

318. It must be borne in mind that, by order of 11 December 2003, the Court adopted a measure of organisation of procedure limiting the pleadings to the principle of the establishment of noncontractual

liability of the Community and the methods for evaluating the damage.

319. With regard to the costs incurred by Schneider through its participation in the resumed investigation of the transaction, it must be observed that, in connection with the administrative divestiture procedure, with the applications in Cases T310/01, T77/02 and T77/02 R, and finally, with resumption of the investigation of the transaction, the applicant incurred costs of which it gives a total estimated amount in paragraph 150 of its application.

320. In order to determine the amount of compensation the Commission must pay to Schneider in respect of the costs relating to resumption of the investigation procedure, it will therefore be necessary to deduct from the sum of the costs referred to in the foregoing paragraph the total costs incurred by Schneider in Cases T310/01, T77/02 and T77/02 R, the costs referred to in paragraph 293 above, and, finally, the costs that Schneider would necessarily have incurred in respect of the corrective measures relating to mutual support which it would in any event have had to propose before the adoption of the incompatibility decision, if that decision had been adopted without any breach of its rights of defence.

321. It will be necessary for the parties either to communicate to the Court within a period of three months following the date of delivery of this judgment a figure for this head of damage agreed on in accordance with the calculation procedures indicated in the foregoing paragraph or, within the same period, to lodge their own calculations.

322. The loss corresponding to the reduction in the Legrand transfer price, granted to WendelKKR because of deferment of completion of the sale of Legrand to the transferee until 10 December 2002, is equal to the difference between the Legrand transfer price agreed in this case between the parties to the agreement and the price that Schneider could have obtained from the transferee if, at the end of the first investigation of the transaction, on 10 October 2001, it had been given a lawful decision as to the compatibility of the transaction.

323. The Community must therefore be ordered to make good the certain and assessable damage suffered in that regard by the applicant.

324. In order to assess the amount of damage suffered by the applicant on account of the reduction in the Legrand transfer price that the applicant had to grant to WendelKKR in consideration of the deferment to 10 December 2002 of the date for completion of the sale of Legrand to the transferee, it is appropriate to order that an expert's report be drawn up, in accordance with Articles 65(d), 66(1) and 70 of the Rules of Procedure, after the parties have submitted their observations and been invited to give their views on the choice of an expert.

325. To that end, the expert is to be given a certified copy of the sale and purchase agreement of 26 July 2002 and of the expert's report of 1 October 2003 on the determination of the loss alleged by Schneider, which are contained in Annexes 8 and 29 to the application respectively.

Schneider's own contribution to the damage suffered by it

Arguments of the parties

326. The Commission considers that Schneider resorted to a highrisk legal remedy in relation to the investigation of concentrations by the Community, whereas, under French law, approaches to Legrand were possible which, although notifiable to the Commission, would not trigger any obligation to launch a public bid.

327. Schneider replies that the legal remedy chosen was the only one available that would not undermine the economic effects and the security of the transaction and that nothing could have forewarned it of the fact that the Commission would oppose the transaction in principle or that its rights of defence would be infringed.

Findings of the Court

328. It is common ground that Schneider acquired Legrand's shares by means of a public bid in reliance on the derogation provided for in Article 7(3) of the regulation from the principle of the suspensive effect of concentrations deriving from the provisions of the regulation.

329. Although thus acquiring control of Legrand, within the meaning of Article 3(1)(b) of the regulation, in a manner that was entirely lawful under French and Community competition law, Schneider nevertheless assumed the risk that the investigation of the transaction would, on expiry of the periods laid down by the regulation, result in a decision declaring to be incompatible with the common market a transaction which had been legally perfected, and the imposition of a corresponding obligation for the assets of undertakings already merged to be separated.

330. In view of the extent of the merger carried out and the appreciable increase of economic strength accruing to the only two protagonists present on the French lowvoltage electric equipment sectoral markets, Schneider could not have been unaware that the merger at the very least entailed the risk of creating or strengthening a dominant position in a substantial part of the common market and that, accordingly, the transaction would be prohibited by the Commission on the basis of Article 2(3) of the regulation.

331. The strength of the parties to the transaction in the French sectoral markets and the strengthening of the positions of the two partners following the merger was apparent from Annexes 7 to 17 of the draft Form CO of 12 December 2000, which no longer enjoy confidential status (order of the President of the Fourth Chamber of the Court of First Instance of 21 February 2006 in this case, not published in the European Court Reports, paragraph 25) and in which the notifying parties reproduced as follows the percentage shares of the French sectoral markets held by the main operators in the sector during 1999:

>lt>2

332. It may thus be inferred that Schneider itself contributed to its own loss by assuming the real risk of a subsequent declaration of incompatibility of a concentration that had been brought about legally and, consequently, the possibility of a forced sale of the assets acquired (see to that effect Case 145/83 Adams v Commission [1985] ECR 3539, paragraph 54).

333. That consideration does not however apply to the loss caused to Schneider by its participation in the resumed administrative investigation of the transaction, such participation having no connection with the date on which the concentration came into being.

334. In those circumstances, on a fair assessment of the facts of the case, it is appropriate to hold the applicant responsible for onethird of the compensatable loss suffered by it as a result of the reduction of the transfer price granted to WendelKKR.

335. It follows from all the foregoing considerations that the Commission must be ordered to make good, in the terms set out above, first, the costs incurred by Schneider in participating in the resumed investigation of the transaction following the Schneider I and Schneider II judgments and, second, twothirds of the loss suffered by Schneider as a result of the reduction of the Legrand transfer price granted to WendelKKR.

Interest

Arguments of the parties

336. Schneider claims that it should be awarded interest at the annual rate of 4% to compensate for the interest which the amount of compensation granted will have generated since 4 December 2002, the date of the decision initiating phase II, until delivery of the judgment bringing the

present proceedings to an end.

337. The rate of 4% should in its view also be applied to the calculation of default interest on the amount of compensation awarded as from delivery of the forthcoming judgment.

338. The Commission contends that Schneider has not shown that it has been the victim of an exceptional situation giving rise to entitlement to compensatory interest. The compensation could at most bear default interest as from the date of delivery of the judgment.

339. The Commission also reserves the right to contest the excessive rate of 4% claimed by the applicant.

Findings of the Court

340. The Court finds that, as is apparent from the principles common to the laws of the Member States, referred to in the second paragraph of Article 288 EC, a claim for interest is generally admissible in proceedings for damages (Dumortier Frères and Others v Council, paragraph 25).

341. Reparation for damage suffered as a result of unlawful conduct on the part of the Community authorities is intended, so far as possible, to provide restitution for the victim.

342. Consequently, provided that the conditions for noncontractual liability of the Community are fulfilled, as they are in this case, the Community judicature cannot disregard the unfavourable consequences of the time lapse between the date of materialisation of the loss, namely 10 December 2002, the effective date of the transfer of Legrand to WendelKKR, and that of payment of the compensation, in so far as account must be taken of inflation recorded (judgment of 3 February 1994 in Case C308/87 Grifoni v EAEC [1994] ECR I341, paragraph 40, and Case T260/97 Camar v Council and Commission [2005] ECR II2741, paragraph 138).

343. The end of the period for which such monetary revaluation is available must, in principle, coincide with the date of delivery of the judgment establishing the obligation to make good the damage suffered by the applicant (Joined Cases C104/89 and C37/90 Mulder and Others v Council and Commission [1992] ECR I3061, paragraph 35, and Camar v Council and Commission, paragraphs 142 and 143).

344. Nevertheless, since the amount of the claim for compensation is, at the date of delivery of that judgment, neither certain nor determinable on the basis of objective findings, default interest cannot begin to run from that date but only, in the event of delay and until full payment, from the date of delivery of the judgment determining the amount of the damage suffered.

345. It follows that the amount of compensation due to the applicant as from 10 December 2002 will have to be adjusted for the period ending on the date of delivery of the judgment determining the amount of the damage, and then increased by default interest as from the latter date until full payment.

346. The rate of interest to be applied is to be calculated on the basis of the rates set by the European Central Bank for principal refinancing operations, successively applicable during each of the two periods concerned, plus two points, provided that it does not exceed the 4% claimed by the applicant in its pleadings (Mulder and Others v Council and Commission, cited in paragraph 342, paragraph 35).

The claim for increase of the compensation on account of national tax

Arguments of the parties

347. Schneider seeks an increase of the compensation awarded so as to cover the tax it will be liable to pay on that amount.

348. The Commission replies that, in the absence of a taxable amount, compensation for costs of a fiscal nature is inconceivable: such costs do not fall within the scope of the criteria for calculating damage but should be examined as a matter of substance.

Findings of the Court

349. The Court considers that the compensation awarded cannot be increased in respect of national taxation liable to be charged on it in the future.

350. It must be observed that, according to the expert's report produced by Schneider as Annex 29 to its application, it is not certain that the compensation awarded by the Court would give rise to taxation.

351. In any event, the claim for such an increase must be regarded as premature in the absence of any indication as to the amount awarded or to any tax rate that will be applied if tax is collected by the national tax authorities.

352. Therefore, the claim for increase of the compensation on account of national tax to which it might be subject must be rejected.

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61999A0219 : N 132
62000A0170 : N 120
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DEFENDA	Commission ; Institutions
NATIONA	France
NOTES	Steinle, Christian ; Schwartz, Simone: Schadensersatz wegen Fehlern im Fusionskontrollverfahren: das Urteil Schneider III, Betriebs-Berater 2007 p.1741-1744 ; Berg, Werner: Teure Fehler? Das EuG verurteilt die Europäische Kommission zu Schadensersatz wegen rechtswidriger Untersagung des Schneider/Legrand-Zusammenschlusses, Europäisches Wirtschafts- & Steuerrecht - EWS 2007 p.I ; Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (juin-août 2007), Petites affiches. La Loi / Le Quotidien juridique 2007 no 222 p.6-8 ; Cot, Jean-Mathieu: La Commission engage sa responsabilité non-contractuelle du fait d'une violation caractérisée du droit communautaire lors de l'examen d'une concentration, Concurrences : revue des droits de la concurrence 2007 no 4 p.94-96 ; Uyen Do, T.: La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt "Schneider III", Revue du droit de l'Union européenne 2007 no 3 p.747-751 ; X: Responsabilità extracontrattuale della CE, Giurisprudenza italiana 2007 p.2607-2610 ; Van Dam, C.C.: Aansprakelijkheid van de Europese Commissie en de NMa voor falend toezicht op fusies en overnames, Nederlands tijdschrift voor Europees recht 2007 p.272-283 ; Pesce, Celeste: Il potere discrezionale della Commissione e i diritti delle parti nel procedimento di controllo delle concentrazioni, Diritto pubblico comparato ed europeo 2007 p.1912-1917 ; Pizzanelli, Giovanna: Tutela della concorrenza e garanzia del giusto procedimento: il ruolo della Commissione come autorità antitrust e l'apertura del giudice comunitario alla responsabilità delle Istituzioni comunitarie ed alla risarcibilità del danno per cattivo uso di potere. Il caso Schneider, Rivista italiana di diritto pubblico comunitario 2007 p.1419-1443
PROCEDU	Action for damages
DATES	of document: 11/07/2007 of application: 10/10/2003

Case C-202/06 P

Cementbouw Handel & Industrie BV

v

Commission of the European Communities

(Appeals – Competition – Regulation (EEC) No 4064/89 – Competence of the Commission – Notification of a concentration having a Community dimension – Commitments proposed by the parties – Effect on the Commission's competence – Authorisation subject to certain commitments – Principle of proportionality)

Summary of the Judgment

1. *Competition – Concentrations – Competence of the Commission – Determination, for the whole duration of the proceedings, at a date closely related to the notification*

(Council Regulation No 4064/89, Arts 1(2) and 3, 5 and 8(2), second para.)

2. *Competition – Concentrations – Examination by the Commission – Proportionality of conditions and obligations imposed on undertakings for the purposes of making the notified operation compatible with the common market*

(Council Regulation No 4064/89, Arts 2 and 8(2))

3. *Competition – Concentrations – Examination by the Commission – Duty to take account of decisions of the national authorities – None)*

(Council Regulation No 4064/89)

1. The competence of the Commission to make findings in relation to a concentration in the context of Regulation No 4064/89 on the control of concentrations between undertakings must be established, as regards the whole of the proceedings, at a fixed time. Having regard to the importance of the obligation of notification in the system of control put in place by the Community legislature, that time must necessarily be closely related to the notification of the concentration. Both the concern for legal certainty, which implies that the authority having competence to examine a concentration must be able to be identified in a way which is foreseeable, and the need for speed, which characterises the general scheme of Regulation No 4064/89 and which requires the Commission to comply with strict time-limits for the adoption of the final decision, failing which the operation is deemed compatible with the common market, require that, where the Commission has established, in relation to a particular concentration, its competence in the light of the criteria laid down under Articles 1 (2) and (3) and 5 of Regulation No 4064/89, that competence cannot be challenged at any time or be in a state of constant flux.

Thus, whilst it goes without saying that the Commission loses its competence to examine a concentration where the undertakings concerned completely abandon the proposed concentration, the position is otherwise where the parties do no more than propose partial amendments to the draft. Proposals of that kind cannot have the effect of requiring the Commission to re-examine its competence without allowing the undertakings concerned significantly to disturb the course of the proceedings and the effectiveness of the control which the legislature sought to put in place by obliging the Commission to verify its competence on a regular basis to the detriment of the examination of the substance of the case. That interpretation is supported by the wording of the second subparagraph of Article 8 (2) of Regulation No 4064/89, which clearly shows that the commitments proposed or adopted by undertakings are not only matters which the Commission must take into account in its examination of the substantive question, that is to say, that of the compatibility or incompatibility of the concentration with the common market, but also, conversely, that those commitments cannot strip the Commission of its competence, since that is a matter which will have been determined in the first phase of the proceedings.

(see paras 38-43)

2. The substantive rules of Regulation No 4064/89 on the control of concentrations between undertakings, and in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

   In particular, it is necessary, when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration, not to determine whether the concentration still has a Community dimension after those conditions or obligations have been complied with, but to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified.

(see paras 53-54)

3. Having regard to the clear division of powers on which Regulation No 4064/89 on the control of concentrations between undertakings is based, decisions taken by the national authorities cannot bind the Commission in proceedings for the control of concentrations.

(see para. 56)

Judgment of the Court (First Chamber)
of 18 December 2007
Cementbouw Handel & Industrie BV v Commission of the European Communities. Appeals - Competition - Regulation (EEC) No 4064/89 - Competence of the Commission - Notification of a concentration having a Community dimension - Commitments proposed by the parties - Effect on the Commission's competence - Authorisation subject to certain commitments - Principle of proportionality. Case C-202/06 P.

In Case C202/06 P,

APPEAL pursuant Article 56 of the Statue of the Court of Justice, brought on 3 May 2006,

Cementbouw Handel & Industrie BV , represented by W. Knibbeler, O. Brouwer and P. Kreijger, advocaten,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilei and E. Levits, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 March 2007,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2007,

gives the following

Judgment

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

1. Dismisses the appeal;

2. Orders Cementbouw Handel & Industrie BV to pay the costs.

1. By its appeal, Cementbouw Handel & Industrie BV asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 23 February 2006 in Case T-282/02 Cementbouw Handel & Industrie v Commission [2006] ECR II-319 (the judgment under appeal'), dismissing its application for the annulment of Commission Decision 2003/756/EC of 26 June 2002 declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 - Haniel/Cementbouw/JV (CVK)) (OJ 2003 L 282, p. 1, and corrigendum OJ 2003 L 285, p. 52) (the contested decision').

Legal context

2. Article 1(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395 p. 1, and corrigendum OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), (Regulation No 4064/89') defines its material scope as follows:

... this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2 and 3.'

3. Article 3(1)(b) of Regulation No 4064/89 defines concentration' so as to include a situation where one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

4. In order for a concentration to have a Community dimension, the aggregate worldwide and Community-wide turnover of the undertakings concerned must exceed certain thresholds, expressed in terms of turnover, set out in Article 1(2) and (3) of Regulation No 4064/89. Article 5 of that regulation lays down the method for calculating those thresholds.

5. Concentrations with a Community dimension must be notified to the Commission of the European Communities. In that regard, Article 4(1) of Regulation No 4064/89 provides that that notification must be made not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest'.

6. Article 7 of that Regulation provides that such concentrations are not to be put into effect either before their notification or until they have been declared compatible with the common market pursuant to a decision.

7. The first sentence of Article 6(1) of Regulation No 4064/89 states that the Commission shall examine the notification as soon as it is received'. In accordance with Article 6(1)(c), where the Commission finds that the concentration notified has a Community dimension and raises serious doubts as to its compatibility with the common market, it must decide to initiate formal control proceedings.

8. In that regard, Article 8(1) to (4) of Regulation No 4064/89 confers the following decision-making powers on the Commission:

1. ...

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2)... it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market....

3. ...

4. Where a concentration has already been implemented, the Commission may... require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.'

9. Article 10(1) of Regulation No 4064/89 provides that the decision to institute formal control proceedings must, subject to an exception which does not apply in the present case, be taken within one month at most, beginning on the day following the receipt of a notification. Article 10(2) and (3) states that decisions making a finding as to the compatibility or incompatibility of a concentration with the common market must, save in exceptional cases, be taken within not more than four months of the date on which the proceedings are initiated. By virtue of Article 10(6), where the Commission has not taken a decision within those periods, the concentration is to be deemed to be declared compatible with the common market.

10. The division of powers in relation to the control of concentrations is provided for in Article 21(1) and (2) of Regulation No 4064/89, in the following manner:

1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

11. Recital 29 in the preamble to Regulation No 4064/89 states that concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States'.

Background to the dispute

12. The findings of the Court of First Instance in paragraphs 1 to 15 and 295 to 298 of the judgment under appeal allow the background to the case to be summarised as set out below.

13. Before the putting into effect of the concentration which underlies the dispute, Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten (CVK'), a cooperative established under Netherlands law, comprised 11 Dutch producers of sand-lime bricks. Of those 11 members of the undertaking, five were subsidiaries of the German undertaking Franz Haniel & Cie GmbH (Haniel'), three were subsidiaries of the appellant and two were subsidiaries of the German undertaking RAG AG (RAG'). The 11th of those undertakings was owned jointly by Haniel, the appellant and RAG (paragraph 5 of the judgment under appeal).

14. In 1998, the Nederlandse Mededingingsautoriteit (Netherlands competition authority) (the NMa') was notified of a proposed concentration whereby CVK was to acquire control of its member undertakings. Control was to be transferred by way of a pooling agreement and by amending CVK's articles of association. By decision of 20 October 1998, the NMa authorised the proposed concentration (paragraph 6 of the judgment under appeal).

15. Before that transaction was put into effect, RAG decided to sell its shares in the member undertakings of CVK to Haniel and the appellant. In March 1999, the parties informed the NMa of their intentions. By letter of 26 March 1999, the NMa informed the parties that the proposed transfer would not constitute a concentration within the meaning of the Netherlands legislation, provided that the transaction authorised by the decision of 20 October 1998 was completed no later than the time of the transfer (paragraph 7 of the judgment under appeal).

16. On 9 August 1999, CVK and its member undertakings concluded a number of transactions. First, they concluded the pooling agreement referred to in paragraph 14 of this judgment and CVK's articles of association were amended to take account of the provisions of that agreement (the first group of transactions'). Secondly, RAG transferred its shares in three of the member undertakings of CVK to Haniel and the appellant, while Haniel and the appellant concluded a cooperation agreement governing their collaboration within CVK (the second group of transactions') (paragraph 8 of the judgment under appeal).

17. The Commission became aware of the transactions concluded on 9 August 1999 when it examined two other concentrations notified by Haniel and, by letter of 22 October 2001, it informed the appellant and the other participating undertakings that the concentration had to be notified to it. On 24 January 2002, Haniel and the appellant notified the concentration pursuant to Article 4 of Regulation No 4064/89 (paragraphs 9 and 10 of the judgment under appeal).

18. On 25 February 2002, the Commission initiated the formal control proceedings referred to in Article 6(1)(c) of Regulation No 4064/89 (paragraph 11 of the judgment under appeal).

19. Once the Commission had sent the statement of objections and had heard the parties concerned, Haniel and the appellant submitted a first set of draft commitments on 28 May 2002. These provided that Haniel and the appellant would end their cooperation agreement and would sell the shares they had acquired from RAG in 1999 to an independent third party. The Commission took the view that

that draft was insufficient to dispel the doubts about the competition on the market in question (paragraphs 12, 14 and 295 of the judgment under appeal).

20. Thereupon, on 5 June 2002 Haniel and the appellant offered final commitments, in which they also undertook to revoke the pooling agreement, to undo the amendment to CVK's articles of association and to dissolve CVK (paragraphs 14, 15 and 298 of the judgment under appeal).

21. On 26 June 2002, the Commission adopted the contested decision, whereby it considered that the notified concentration constituted by the first and second groups of transactions was compatible with the common market, subject to the condition that the commitments set out in that decision were complied with in full by Haniel and the appellant. Those commitments included, in particular, the dissolution of CVK (paragraph 15 of the judgment under appeal).

The proceedings before the Court of First Instance and the judgment under appeal

22. By application lodged at the Registry of the Court of First Instance on 11 September 2002, and registered under number T-282/02, the appellant brought an action seeking the annulment of the contested decision.

23. In support of its application, the appellant relied on three pleas in law.

24. The first plea alleged that the Commission was not competent to examine the transactions in question by virtue of Article 3 of Regulation No 4064/89. The Court of First Instance rejected that plea, holding in paragraph 109 of the judgment under appeal that a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings'.

25. The second plea alleged errors of assessment by the Commission relating to the creation of a dominant position by the concentration, in breach of Article 2 of Regulation No 4064/89. The Court of First Instance rejected that plea as unfounded.

26. The third plea alleged breach of Articles 3 and 8(2) of Regulation No 4064/89 and of the principle of proportionality. As regards that plea, the Court of First Instance held:

301 ...the applicant's claims are once again based on an incorrect premiss, which was rejected by the Court.... In effect, there is only one concentration, concluded on 9 August 1999, comprising the first and second groups of transactions, which comes within the competence of the Commission under Regulation No 4064/89. Consequently, contrary to the applicant's contention, the first draft commitments do not alter the concentration in such a way that it no longer exists.

...

304 ... it must be noted that the applicant has not explained how the first draft proposals... could have allowed the Commission to conclude that the concentration was compatible with the common market, when it is common ground that, in the context of those draft proposals, CVK's dominant position as resulting from the concentration concluded on 9 August 1999 would have remained unaltered. In effect, in particular, in spite of the fact that joint control of CVK would have been abandoned, it would have continued, depending on the definition of the market, to hold at least [50 to 60]% of the relevant market, with no increase in the market shares of its main competitors.

305 Contrary to the applicant's contention, therefore, the Commission was not required to accept the first draft commitments, in application of Article 8(2) of Regulation No 4064/89, since they did not allow it to conclude that the concentration of 9 August 1999 would not create a dominant

position within the meaning of Article 2(2) of that regulation.

...

307 ... in order to be accepted by the Commission with a view to the adoption of a decision under Article 8(2) of Regulation No 4064/89, the parties' commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it entirely; and that objective was clearly not achieved in the present case by the first draft commitments proposed by the notifying parties.'

27. The Court of First Instance rejected the third plea, and, accordingly, dismissed the action in its entirety.

The appeal

28. The appellant claims that the Court should set aside the judgment under appeal and, if appropriate, refer the case back to the Court of First Instance and order the Commission to pay the costs.

29. The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

30. In support of its claims, the appellant relies on two grounds of appeal.

The first ground of appeal, alleging the incorrect interpretation and incorrect application of Articles 1, 2 and 3(1) of Regulation No 4064/89

Arguments of the parties

31. The appellant submits that the competence of the Commission under Regulation No 4064/89 is not determined exclusively by the concentration in the form in which it is notified, but by the concentration in the form in which it is actually put into effect. That approach applies where changes are made to the concentration by the parties after notification; those changes may arise from commitments that are proposed. The fact that the concentration was implemented prior to notification, in the form in which it was notified, is irrelevant.

32. According to the appellant, the concentration at issue in the present case acquired a Community dimension only on the conclusion of the second group of transactions, by which the appellant and Haniel acquired control of CVK. According to its reading of the judgment under appeal, the Court of First Instance acknowledged, in paragraph 304 of the judgment under appeal, that the first draft proposals would have resulted in the abandonment of joint control of CVK by the notifying parties. By contrast, the Court of First Instance failed to take into account the fact that that draft would also have had the result that the notified concentration ceased to exist, and only a concentration without a Community dimension would remain.

33. In reply to those arguments, the Commission argues that, by virtue of Regulation No 4064/89, its competence in relation to a concentration fell to be determined at the time at which that concentration should have been notified to it. Emphasising that it must accept or reject competence at the latest at the end of the first examination of the notified concentration, it adds that, in the interest of sound administration, it is not possible for the Community dimension of a concentration to be under constant review throughout the course of the proceedings.

34. According to the Commission, the appellant misconstrues the function and the nature of the commitments which the parties can adopt. Those commitments could not deprive the Commission of the competence conferred on it by Regulation No 4064/89, but are intended to enable it to exercise its power to authorise, subject to conditions, the implementation of the notified concentration.

Findings of the Court

35. As is clear from recital 29 in its preamble and Article 21(1), Regulation No 4064/89 is based on the principle of a clear division of powers between the national and Community supervisory authorities in relation to concentrations (Case C170/02 P Schlüsselverlag J.S. Moser and Others v Commission [2003] ECR I-9889, paragraph 32, and Case C-42/01 Portugal v Commission [2004] ECR I-6079, paragraph 50).

36. The regulation also contains provisions, including in particular Article 10(1) and (2), the purpose of which is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission (Schlüsselverlag J.S. Moser and Others , paragraph 33, and Portugal v Commission , paragraph 51).

37. That demonstrates that the Community legislature intended to make a clear allocation between the interventions to be made by the national and by the Community authorities, and that it wished to ensure a control of mergers within deadlines compatible with both the requirements of sound administration and the requirements of the business world (Schlüsselverlag J.S. Moser and Others , paragraph 34, and Portugal v Commission , paragraph 53).

38. That concern for legal certainty implies that the authority having competence to examine a concentration must be able to be identified in a way which is foreseeable. That is the reason for which the Community legislature laid down, in Articles 1(2) and (3) and 5 of Regulation No 4064/89, precise and objective criteria which allow it to be determined whether a concentration has the economic size necessary for it to have a Community dimension' and, accordingly, to fall within the exclusive competence of the Commission.

39. The need for speed, which characterises the general scheme of Regulation No 4064/89 and which requires the Commission to comply with strict time-limits for the adoption of the final decision, failing which the operation is deemed compatible with the common market, also means that where the Commission has established, in relation to a particular concentration, its competence in the light of the criteria laid down under Articles 1(2) and (3) and 5 of the regulation, that competence cannot be challenged at any time or be in a state of constant flux.

40. As the Advocate General stated in point 48 of her Opinion, it goes without saying that the Commission loses its competence to examine a concentration where the undertakings concerned completely abandon the proposed concentration.

41. However, the position is otherwise where the parties do no more than propose partial amendments to the draft. Proposals of that kind could not have the effect of requiring the Commission to re-examine its competence, without allowing the undertakings concerned significantly to disturb the course of the proceedings and the effectiveness of the control which the legislature sought to put in place, by obliging the Commission to verify its competence on a regular basis to the detriment of the examination of the substance of the case.

42. That interpretation is supported by the wording of the second subparagraph of Article 8(2) of Regulation No 4064/89, which provides that [the Commission] may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market'. As the Advocate General stated at point 52 of her Opinion, that wording clearly shows that the commitments proposed or adopted by undertakings are not only matters which the Commission must take into account in its examination of the substantive question, that is to say, that of the compatibility or incompatibility of the concentration with the common market, but also, conversely, that those commitments cannot strip the Commission of its competence, since that is a matter which will have been determined in the first phase of the proceedings.

43. It follows that the competence of the Commission to make findings in relation to a concentration must be established, as regards the whole of the proceedings, at a fixed time. Having regard to the importance of the obligation of notification in the system of control put in place by the Community legislature, that time must necessarily be closely related to the notification of the concentration.

44. In the present appeal, the appellant does not challenge the Commission's analysis, confirmed by the judgment under appeal, that there is only one concentration, comprising the first and second groups of transactions. Nor does it deny that, both on the date of conclusion of the two groups of transactions and on the date of the notification made at the Commission's request, that concentration had a Community dimension. Consequently, without it being necessary to give a ruling on the question whether the time to be taken for the purposes of determining the Commission's competence is the time at which the obligation to notify arose or the time at which the notification should have been made or even the time at which it was actually made, it is not a matter of dispute in the present case that the Commission had acquired competence to give a ruling on the concentration in question.

45. As regards the question whether, as the appellant claims, the first draft commitments which it submitted with Haniel could have an effect on the competence acquired in that manner, it must be pointed out first of all that the concentration had, in the present case, already been implemented. It should next be pointed out that, as is clear from the findings of the Court of First Instance at paragraph 295 of the contested judgment, which are unchallenged by the appellant, that draft provided that the cooperation agreement concluded between the appellant and Haniel was to be ended and that the shares they had acquired in three of the member undertakings of CVK were to be sold to an independent third party, that is to say, that the second group of transactions would not proceed. However, that draft provided that the pooling agreement and the amendment of CVK's articles of association, which formed the subject-matter of the first group of transactions, would be maintained. It follows that, for the purposes of the concentration which was the subject of the control proceedings initiated by the Commission, the draft in question comprised separate measures.

46. Accordingly, the Court of First Instance did not commit an error of law in holding, in paragraph 301 of the judgment under appeal, that the first draft commitments proposed by the appellant and Haniel did not change the concentration in such a way that it no longer existed.

47. Nor did the Court of First Instance commit an error of law in holding, in paragraphs 305 and 306 of that judgment, that in exercising the powers that were vested in it the Commission was entitled to take the view that the first draft commitments were not sufficient to resolve the competition problem which it had established.

48. The first ground of appeal must therefore be rejected as unfounded.

The second ground of appeal, alleging the incorrect interpretation and application of Article 8(2) of Regulation No 4064/89 and of the principle of proportionality

Arguments of the parties

49. The appellant argues that, in taking the view that the first draft commitments were insufficient, the Commission took no account of the fact that those commitments reduced the transaction to a concentration without a Community dimension which was no longer within its competence. It adds that, in holding that the Commission was not required to accept the first draft commitments, the Court of First Instance infringed the principle of proportionality. It also objects that the Court of First Instance failed to explain the reason for which the Commission could have come to a diametrically opposite conclusion from that of the Netherlands national competition authority, the NMa, as regards the anti-competitive effects of the first group of transactions.

50. The Commission states that these arguments are essentially no more than a reformulation of

those put forward in support of the first ground. It denies that it acted disproportionately and submits that, in the absence of further precision, the argument relating to the differing assessments made by it and the NMa is inadmissible.

Findings of the Court

51. As regards, in the first place, the argument alleging a lack of competence on the Commission's part, it must be held that it represents a repetition of the arguments put forward under the first ground of appeal. Like the latter, it must accordingly be rejected as unfounded.

52. As regards, in the second place, the alleged infringement of the principle of proportionality, it is necessary to acknowledge that decisions taken by the Commission in proceedings for the control of concentrations must satisfy the requirements of the principle of proportionality, which is one of the general principles of Community law (see, inter alia, Case C-380/03 Germany v Parliament and Council [2006] ECR I-11573, paragraph 144).

53. However, it must be pointed out that the substantive rules of Regulation No 4064/89, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraphs 223 and 224, and Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraph 38).

54. In particular, as the Advocate General stated at point 73 of her Opinion, and contrary to what the appellant submits, it is necessary, when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration, not to determine whether the concentration still has a Community dimension after those conditions or obligations have been complied with, but to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified.

55. Consequently, the Court of First Instance did not commit an error of law in holding, in paragraphs 304 and 305 of the judgment under appeal, that the Commission was not required to accept the first draft commitments since it considered that they were insufficient to resolve the competition problem it had identified.

56. As regards, in the third place, the differences between the assessment made by the NMa, on the one hand, and the Commission, on the other, of an allegedly identical situation, it must first of all be held that, having regard to the clear division of powers on which Regulation No 4064/89 is based, decisions taken by the national authorities cannot bind the Commission in proceedings for the control of concentrations.

57. It must also be pointed out that the NMa and the Commission gave their decisions, in their respective fields of competence, in the light of different criteria. While the NMa analysed the first group of transactions by having regard to the situation on the national market, the Commission assessed its compatibility with the common market. Accordingly, while the Court of First Instance had jurisdiction to review, within the limits noted in paragraph 53 of this judgment, the Commission's assessment, it was not under a duty to explain why the Commission reached a result that was different from that of the NMa.

58. It follows from the above considerations that the second ground of appeal must also be rejected as unfounded.

59. It follows that the appeal must be dismissed in its entirety.

Costs

60. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought to that effect by the Commission.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/12/18
LODGED	2006/05/03
JURCIT	31989R4064 : N 1 - 59 31989R4064-A01P1 : N 2 31989R4064-A01P2 : N 4 38 39 31989R4064-A01P3 : N 4 38 39 31989R4064-A02 : N 53 31989R4064-A03P1LB : N 3 31989R4064-A04P1 : N 5 31989R4064-A05 : N 4 38 39 31989R4064-A06P1 : N 7 31989R4064-A06P1LC : N 7 31989R4064-A07 : N 6 31989R4064-A08P1 : N 8 31989R4064-A08P2 : N 8 42 54 31989R4064-A08P3 : N 8 31989R4064-A08P4 : N 8 31989R4064-A10P1 : N 9 36 31989R4064-A10P2 : N 9 36 31989R4064-A10P3 : N 9 31989R4064-A10P6 : N 9 31989R4064-A21P1 : N 10 35 31989R4064-A21P2 : N 10 31989R4064-C29 : N 11 35 31997R1310 : N 2

	32003D0756 : N 1 - 59 61994J0068 : N 53 62001J0042 : N 35 - 37 62002A0282 : N 1 - 59 62002J0170 : N 35 - 37 62003J0012 : N 53 62003J0380 : N 52
CONCERNS	Confirms 62002A0282 -
SUB	Competition ; Rules applying to undertakings ; Dominant position
AUTLANG	English
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Netherlands
NOTES	Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (3e trimestre 2007), Petites affiches. La Loi / Le Quotidien juridique 2008 no 30 p.19-21 ; Idot, Laurence: Applicabilité du règlement communautaire, Europe 2008 Février Comm. no 58 p.27 ; Girgenson, Ianis: La Cour de justice confirme l'arrêt Cementbauw, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 15 p.12
PROCEDU	Action for annulment;Appeal - unfounded
ADVGEN	Kokott
JUDGRAP	Jann
DATES	of document: 18/12/2007 of application: 03/05/2006

ARRÊT DE LA COUR (troisième chambre)

6 mars 2008 (*)

«Manquement d'État – Politique de la concurrence – Concentrations – Non-exécution de certaines obligations imposées par la Commission – E.ON/Endesa»

Dans l'affaire C‑196/07,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 11 avril 2007,

Commission des Communautés européennes, représentée par MM. V. Di Bucci et E. Gippini Fournier, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

Royaume d'Espagne, représenté par M^me^ N. Díaz Abad, en qualité d'agent, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. J. N. Cunha Rodrigues, J. Klučka, M^me^ P. Lindh et M. A. Arabadjiev (rapporteur), juges,

avocat général: M^me^ J. Kokott,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en n'ayant pas supprimé:

– sans délai un certain nombre de conditions posées par la décision de la Commission nationale de l'énergie (ci-après la «décision de la CNE») (conditions n^os^ 1 à 6, ainsi que 8 et 17), qui ont été déclarées incompatibles avec le droit communautaire par l'article 1^er^ de la décision de la Commission du 26 septembre 2006 [affaire n° COMP/M.4197 – E.ON/Endesa – C(2006) 4279 final, ci-après la «première décision de la Commission»], et

– au plus tard le 19 janvier 2007 un certain nombre de conditions posées par la décision du ministre de l'Industrie, du Tourisme et du Commerce (conditions modifiées n^os^ 1, 10, 11 et 15), qui ont été déclarées incompatibles avec le droit communautaire par l'article 1^er^ de la décision de la Commission du 20 décembre 2006 [affaire n° COMP/M.4197 – E.ON/Endesa – C

(2006) 7039 final, ci-après la «seconde décision de la Commission»],

le Royaume d'Espagne a manqué aux obligations qui lui incombent en vertu de l'article 2 de chacune de ces décisions.

Le cadre juridique

2 L'article 21 du règlement (CE) n° 139/2004 du Conseil, du 20 janvier 2004, relatif au contrôle des concentrations entre entreprises (JO L 24, p. 1, ci-après le «règlement sur les concentrations») prévoit:

«[...]

2. Sous réserve du contrôle de la Cour de justice, la Commission a compétence exclusive pour arrêter les décisions prévues au présent règlement.

3. Les États membres n'appliquent pas leur législation nationale sur la concurrence aux concentrations de dimension communautaire.

Le premier alinéa ne préjuge pas du pouvoir des États membres de procéder aux enquêtes nécessaires à l'application de l'article 4, paragraphe 4, de l'article 9, paragraphe 2, et de prendre, après renvoi, conformément à l'article 9, paragraphe 3, premier alinéa, [sous] b), ou paragraphe 5, les mesures strictement nécessaires en application de l'article 9, paragraphe 8.

4. Nonobstant les paragraphes 2 et 3, les États membres peuvent prendre les mesures appropriées pour assurer la protection d'intérêts légitimes autres que ceux qui sont pris en considération par le présent règlement et compatibles avec les principes généraux et les autres dispositions du droit communautaire.

Sont considérés comme intérêts légitimes, au sens du premier alinéa, la sécurité publique, la pluralité des médias et les règles prudentielles.

Tout autre intérêt public doit être communiqué par l'État membre concerné à la Commission et reconnu par celle-ci après examen de sa compatibilité avec les principes généraux et les autres dispositions du droit communautaire avant que les mesures visées ci-dessus puissent être prises. La Commission notifie sa décision à l'État membre concerné dans un délai de vingt-cinq jours ouvrables à dater de ladite communication.»

Les faits à l'origine du litige

3 Le 21 février 2006, E.ON AG (ci-après «E.ON»), entreprise exerçant son activité dans le secteur de l'énergie, dont le siège social se trouve à Düsseldorf (Allemagne) a présenté une offre publique d'achat portant sur la totalité des actions d'Endesa SA (ci-après «Endesa»), entreprise intervenant dans ce même secteur d'activité, dont le siège social est situé à Madrid (Espagne).

4 Le 24 février 2006, le Royaume d'Espagne a adopté le décret-loi royal 4/2006, du 24 février 2006, modifiant les compétences de la CNE. Conformément à ce décret-loi, l'offre d'E.ON était subordonnée à l'autorisation de l'autorité de régulation du secteur de l'énergie, à savoir la CNE.

5 Par une lettre du 27 mars 2006, la Commission a fait part au Royaume d'Espagne de ses doutes quant à la possibilité de soumettre l'opération de concentration envisagée à des conditions et lui a rappelé les obligations découlant des articles 21, paragraphe 4, dernier alinéa, du règlement sur les concentrations ainsi que 10 CE.

6 Dans sa réponse du 24 avril 2006, le Royaume d'Espagne a fait valoir que les mesures susceptibles d'être adoptées par la CNE n'étaient pas soumises à l'obligation de communication à la Commission et de contrôle préalable par cette dernière.

7 Le projet de concentration entre E.ON et Endesa constituant une opération de concentration de dimension communautaire, la Commission a adopté, le 25 avril 2006, en vertu de l'article 6, paragraphe 1, sous b), du règlement sur les concentrations, une décision (affaire n° COMP/M.4110 – E.ON/Endesa) autorisant sans conditions l'opération notifiée.

8 Le 27 juillet 2006, la décision de la CNE, subordonnant l'autorisation du projet de concentration entre E.ON et Endesa au respect de 19 conditions, a été adoptée.

9 Le 26 septembre 2006, la Commission a pris sa première décision. L'article 1er de celle-ci dispose que le Royaume d'Espagne a enfreint l'article 21 du règlement sur les concentrations en adoptant, sans communication préalable à la Commission ni autorisation de cette dernière, la décision de la CNE soumettant l'acquisition du contrôle d'Endesa par E.ON à une série de conditions (nos 1 à 17 et 19) incompatibles avec le droit communautaire. L'article 2 de la première décision de la Commission enjoint au Royaume d'Espagne de supprimer «sans délai» les conditions déclarées incompatibles avec le droit communautaire à l'article 1er de celle-ci.

10 N'ayant pas été informée de l'adoption d'une quelconque mesure concrète destinée à supprimer les conditions posées par la décision de la CNE, la Commission a adressé au Royaume d'Espagne, le 18 octobre 2006, une lettre de mise en demeure faisant état d'un manquement de cet État membre à l'article 2 de la première décision de la Commission.

11 Le 25 octobre 2006, en réponse à cette lettre de mise en demeure, le Royaume d'Espagne a fait valoir qu'il n'avait pas enfreint ledit article 2, qui ne fixait pas de délai précis pour le retrait des conditions déclarées incompatibles avec le droit communautaire dont était assortie la décision de la CNE. Cet État membre soulignait que les recours administratifs formés devant le ministre de l'Industrie, du Tourisme et du Commerce (ci-après le «ministre») contre la décision de la CNE constituaient l'instance adéquate pour que soit assurée la conformité de cette décision avec le droit communautaire. Le 7 novembre 2006, le Royaume d'Espagne a adressé à la Commission, en complément à sa réponse à ladite lettre de mise en demeure, une copie de la décision prise par le ministre à la suite du recours administratif formé par E.ON à l'encontre de la décision de la CNE.

12 La décision du ministre a modifié partiellement la décision de la CNE en:

– supprimant quelques-unes des conditions;

– réduisant la durée ou le champ d'application de certaines autres conditions;

– clarifiant le contenu et la portée de certaines conditions, et

– modifiant d'autres conditions ou en leur substituant des obligations différentes ou supplémentaires en vue de l'autorisation de l'opération (ci-après les «nouvelles obligations»).

La décision de la CNE demeurait ainsi soumise à seize conditions.

13 Le 20 décembre 2006, la Commission a pris sa seconde décision, relative aux nouvelles obligations imposées par la décision du ministre. L'article 1er de la seconde décision de la Commission énonce que le Royaume d'Espagne a enfreint l'article 21 du règlement sur les concentrations en adoptant, sans communication préalable à la Commission ni autorisation de cette dernière, la décision du ministre soumettant l'acquisition du contrôle d'Endesa par E.ON à une série de conditions incompatibles avec le droit communautaire (conditions modifiées nos 1, 10, 11 et 15). L'article 2 de la seconde décision de la Commission enjoint au Royaume d'Espagne de supprimer celles-ci avant le 19 janvier 2007.

14 Le 22 janvier 2007, le Royaume d'Espagne a adressé à la Commission ses observations, dans lesquelles il a fait valoir que les nouvelles obligations étaient, selon lui, compatibles avec le droit communautaire.

15 En l'absence d'information de la part du Royaume d'Espagne relatives aux démarches ou aux mesures adoptées ou prévues par celui-ci en vue de se conformer à la seconde décision de la Commission, cette dernière a adressé audit État membre, le 1er février 2007, une lettre de mise en demeure complémentaire. Dans cette lettre de mise en demeure, la Commission faisait valoir que la décision du ministre ne suffisait pas à assurer la pleine exécution de la première décision de la Commission en ce qui concerne les conditions n° 1 à 6 ainsi que 8 et 17 figurant dans la décision de la CNE et que le Royaume d'Espagne avait enfreint la seconde décision de la Commission, notamment en ne supprimant pas les conditions modifiées nos 1, 10, 11 et 15 de la décision du ministre.

16 Dans sa réponse du 22 février 2007, le Royaume d'Espagne a principalement fait valoir que les conditions posées par les décisions de la CNE et du ministre (ci-après les «mesures nationales en cause»), en particulier celles relatives aux obligations en matière d'investissement et aux exigences d'ordre financier, sont essentielles pour garantir la sécurité de l'approvisionnement en énergie.

17 Considérant que le Royaume d'Espagne avait enfreint l'article 2 de chacune de ses deux décisions, la Commission a adressé, le 7 mars 2007, un avis motivé au Royaume d'Espagne enjoignant à ce dernier de supprimer, dans un délai de sept jours ouvrables à compter de la réception dudit avis, les conditions mentionnées dans les mesures nationales en cause et déclarées incompatibles avec le droit communautaire.

18 Le 16 mars 2007, le Royaume d'Espagne a adressé à la Commission une lettre dans laquelle il a réitéré les arguments développés précédemment.

19 Le 10 avril 2007, la Commission nationale du marché des valeurs a indiqué dans une note officielle que l'offre publique d'achat d'E.ON portant sur Endesa n'avait été acceptée que pour un total de 63 638 451 actions, représentant 6,01 % du capital social d'Endesa. Par conséquent, cette offre est restée sans effet, faute d'avoir atteint une fraction minimale de 50,01 % de ce capital social fixée comme condition de sa validité. L'offrant n'ayant pas renoncé à cette condition, les acceptations présentées en réponse à l'offre sont devenues caduques avec effet immédiat.

Sur le recours

Argumentation des parties

20 Le Royaume d'Espagne fait valoir, en premier lieu, que le présent recours est sans objet, puisque l'offre publique d'achat d'E.ON portant sur Endesa est restée sans effet pour les raisons exposées au point 19 du présent arrêt. Les mesures nationales en cause seraient ainsi caduques, car dépourvues d'objet, dès lors qu'elles imposaient une série de conditions au regard d'une opération de concentration d'entreprises qui n'aurait plus lieu. Par conséquent, il ne lui serait plus possible de respecter les première et seconde décisions de la Commission (ci-après ensemble les «décisions de la Commission»).

21 La Commission rétorque que le fait que l'opération de concentration en cause ait été abandonnée postérieurement à la date d'expiration du délai fixé dans l'avis motivé ne fait pas disparaître le manquement reproché, lequel persistait à cette date. Même dans le cas où le manquement serait éliminé postérieurement au délai imparti dans l'avis motivé, la poursuite de l'action engagée conserverait un intérêt.

22 En second lieu, le Royaume d'Espagne estime avoir adopté les mesures nationales en cause en vue de garantir la sécurité de l'approvisionnement en énergie. Il se prévaut, à cet égard, des dispositions de l'article 21, paragraphe 4, du règlement sur les concentrations. La sécurité de cet approvisionnement constituerait une pièce maîtresse de la politique du gouvernement espagnol dans le domaine de l'énergie et devrait être considérée, compte tenu de l'importance prépondérante d'Endesa dans le secteur concerné, comme relevant du concept de sécurité publique.

23 Selon la Commission, cette argumentation revient à soutenir que les conditions posées par la CNE et le ministre n'étaient pas incompatibles avec le droit communautaire. Elle serait, par conséquent, irrecevable dans le cadre d'un recours en manquement, car elle implique une remise en cause de la légalité des décisions de la Commission devenues définitives à l'expiration du délai prévu pour introduire un recours tendant à l'annulation de celles-ci.

Appréciation de la Cour

24 Il y a lieu de constater, tout d'abord, que le Royaume d'Espagne ne conteste pas ne pas avoir supprimé les conditions n^{os} 1 à 6, 8 et 17 posées par la décision de la CNE, ainsi que les conditions modifiées n^{os} 1, 10, 11 et 15 fixées dans la décision du ministre. Toutefois, cet État membre fait valoir, en premier lieu, que le présent recours est sans objet dès lors que l'offre publique d'achat d'E.ON n'a pas produit d'effets et que, en conséquence, il ne lui est plus possible d'assurer le respect des décisions de la Commission.

25 À cet égard, il convient de rappeler que, selon une jurisprudence constante, l'existence d'un

manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai fixé dans l'avis motivé et que les changements intervenus par la suite ne sauraient être pris en compte par la Cour (voir, notamment, arrêts du 15 mars 2001, Commission/France, C-147/00, Rec. p. I-2387, point 26, et du 14 juin 2001, Commission/Italie, C-207/00, Rec. p. I-4571, point 27).

26 Or, il ressort du dossier que l'opération de concentration en cause a été abandonnée le 10 avril 2007, alors que le délai fixé dans l'avis motivé avait expiré le 16 mars 2007. Il s'ensuit que le fait que l'offre publique d'achat d'E.ON sur Endesa est restée sans effet ne prive pas d'objet le présent litige.

27 En outre, il convient de rappeler que même dans l'hypothèse où un manquement a été éliminé postérieurement au délai imparti dans l'avis motivé, la poursuite de l'action conserve un intérêt, en vue d'établir la base d'une responsabilité qu'un État membre peut encourir, en conséquence de son manquement, à l'égard, notamment, de ceux qui tirent des droits en conséquence dudit manquement (voir arrêts du 5 juin 1986, Commission/Italie, 103/84, Rec. p. 1759, point 9; du 24 mars 1988, Commission/Grèce, 240/86, Rec. p. 1835, point 14; du 14 juin 2001, Commission/Italie, précité, point 28, et du 20 juin 2002, Commission/Luxembourg, C–299/01, Rec. p. I–5899, point 11). Cette conclusion s'impose a fortiori dans le cas où l'Etat membre n'a pris aucune mesure pour se conformer à l'avis motivé dans le délai imparti, comme en l'espèce.

28 La procédure en manquement permet en effet de déterminer la portée exacte des obligations des États membres en cas de divergences d'interprétation (voir arrêt du 14 décembre 1971, Commission/France, 7/71, Rec. p. 1003, point 49) et repose sur la constatation objective du non-respect par un État membre des obligations que lui imposent le traité CE ou un acte de droit dérivé (voir arrêts du 18 janvier 2001, Commission/Espagne, C-83/99, Rec. p. I-445, point 23, et du 14 septembre 2004, Commission/Italie, C-385/02, Rec. p. I-8121, point 40). Elle constitue comme telle l'ultima ratio d'imposer le respect du droit communautaire en faisant prévaloir les intérêts communautaires consacrés par le traité en dépit de la résistance des États membres (voir, en ce sens, arrêt du 15 juillet 1960, Pays-Bas/Haute Autorité, 25/59, Rec. p. 723, 761). Pour cette raison, le présent recours conserve également un intérêt.

29 Il s'ensuit que le présent recours n'est dépourvu ni d'objet ni d'intérêt et que la fin de non recevoir soulevée par le Royaume d'Espagne doit être écartée.

30 En ce qui concerne la prétendue impossibilité d'appliquer les décisions de la Commission, le Royaume d'Espagne n'a pas démontré qu'il se trouve dans une impossibilité absolue d'exécuter ces décisions. En effet, le fait que l'offre publique d'achat d'E.ON n'a pas produit d'effets ne se traduit pas nécessairement par une telle impossibilité absolue d'exécution, l'élimination formelle, par exemple, des dispositions contraires aux décisions de la Commission restant possible. Il importe de rappeler à cet égard que les États membres sont tenus de prendre toutes dispositions pour faciliter la réalisation du plein effet du droit communautaire (voir, notamment, arrêt du 19 janvier 1993, C-101/91, Commission/Italie, Rec. p. I-191, point 24).

31 Par conséquant, cet argument ne saurait être accueilli.

32 Le Royaume d'Espagne soutient, en second lieu, que les mesures nationales en cause ont été prises en application de l'article 21, paragraphe 4, deuxième alinéa, du règlement sur les concentrations, soit en vue de la protection d'un intérêt légitime, à savoir la sécurité publique, dont la sécurité de l'approvisionnement en énergie ferait partie intégrante.

33 Cet argument consiste à soutenir, en substance, que les conditions posées par les mesures nationales en cause ne sont pas incompatibles avec le droit communautaire, contrairement à ce qu'énoncent les décisions de la Commission. Il revient ainsi à contester la validité de celles-ci.

34 Force est de souligner à cet égard que le système des voies de recours établi par le traité distingue les recours visés aux articles 226 CE et 227 CE, qui tendent à faire constater qu'un État membre a manqué aux obligations qui lui incombent, et les recours visés aux articles 230 CE et 232 CE, qui tendent à faire contrôler la légalité des actes ou des abstentions des institutions communautaires. Ces voies de recours poursuivent des objectifs distincts et sont soumises à des modalités différentes. Un État membre ne saurait donc utilement, en l'absence d'une disposition du traité l'y autorisant expressément, invoquer l'illégalité d'une décision dont il est destinataire comme moyen de défense à l'encontre d'un recours en manquement fondé sur l'inexécution de cette décision (voir, notamment, arrêts du 30 juin 1988, Commission/Grèce, 226/87, Rec. p. 3611, point 14; du 27

octobre 1992, Commission/Allemagne, C-74/91, Rec. p. I-5437, point 10, et du 27 juin 2000, Commission/Portugal, C-404/97, Rec. p. I-4897, point 34).

35 Il ne pourrait en être autrement que si l'acte en cause était affecté de vices particulièrement graves et évidents, au point de pouvoir être qualifié d'acte inexistant (arrêts du 30 juin 1988, Commission/Grèce, précité, point 16; Commission/Allemagne, précité, point 11; Commission/Portugal, précité, point 35, ainsi que du 5 octobre 2004, Commission/Grèce, C-475/01, Rec. p. I-8923, points 19 et 20).

36 Tel n'est cependant pas le cas en l'espèce. En effet, aucun élément ne permet de conclure que les décisions de la Commission seraient entachées d'un vice de nature à mettre en cause leur existence même.

37 En effet, dans une situation où l'État membre n'a pas communiqué les intérêts protégés par les mesures nationales qu'il a prises, il est inévitable que la Commission examine si lesdites mesures sont justifiées par l'un des intérêts prévus à l'article 21, paragraphe 4, deuxième alinéa, du règlement sur les concentrations (arrêt du 22 juin 2004, Portugal/Commission, C-42/01, Rec. p. I-6079, point 59).

38 Il y a lieu, dès lors, de constater, sans qu'il soit besoin d'examiner si les mesures nationales en cause ont été prises en vue de la protection d'un intérêt légitime, tel que la sécurité publique au sens de l'article 21, paragraphe 4, deuxième alinéa, du règlement sur les concentrations, que la validité des décisions de la Commission ne saurait être remise en cause dans le cadre du présent recours en manquement.

39 Eu égard à l'ensemble des considérations qui précèdent, il convient de constater que, en n'ayant pas supprimé:

– les conditions n^os 1 à 6, 8 et 17 posées par la décision de la CNE, qui ont été déclarées incompatibles avec le droit communautaire par l'article 1^er de la première décision de la Commission, et

– les conditions n^os 1, 10, 11 et 15 modifiées, posées par la décision du ministre, qui ont été déclarées incompatibles avec le droit communautaire par l'article 1^er de la seconde décision de la Commission, dans les délais impartis,

le Royaume d'Espagne a manqué aux obligations qui lui incombent en vertu de l'article 2 de chacune de ces décisions.

Sur les dépens

40 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation du Royaume d'Espagne et celui-ci ayant succombé en ses moyens, il y a lieu de le condamner aux dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1) En n'ayant pas supprimé:

– les conditions n^os 1 à 6, 8 et 17 posées par la décision de la Commission nationale de l'énergie, qui ont été déclarées incompatibles avec le droit communautaire par l'article 1^er de la décision de la Commission du 26 septembre 2006 [affaire n° COMP/M.4197 – E.ON/Endesa – C(2006) 4279 final], et

– les conditions n^os 1, 10, 11 et 15 modifiées, posées par la décision du ministre de l'Industrie, du Tourisme et du Commerce, qui ont été déclarées incompatibles avec le droit communautaire par l'article 1^er de la décision de la

Commission du 20 décembre 2006 [affaire n° COMP/M.4197 – E.ON/Endesa – C (2006) 7039 final], dans les délais impartis,

le Royaume d'Espagne a manqué aux obligations qui lui incombent en vertu de l'article 2 de chacune de ces décisions.

2) Le Royaume d'Espagne est condamné aux dépens.

Signatures

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* Langue de procédure: l'espagnol.

Judgment of the Court (Third Chamber)
of 6 March 2008
Commission of the European Communities v Kingdom of Spain. Failure of a Member State to fulfil its obligations. Case C-196/07.

DOCNUM	62007J0196
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2008 Page 00000
DOC	2008/03/06
LODGED	2007/04/11
JURCIT	11997E226 : N 34 11997E227 : N 34 61959J0025 : N 28 61971J0007 : N 28 61984J0103 : N 27 61986J0240 : N 27 61987J0226 : N 34 35 61991J0074 : N 34 35 61991J0091 : N 30 61997J0404 : N 34 35 61999J0083 : N 28 62000J0147 : N 25 62000J0207 : N 25 27 62001J0042 : N 37 62001J0299 : N 27 62001J0475 : N 35 62002J0385 : N 28
SUB	Competition
AUTLANG	Spanish
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
NOTES	Bure, Frédéric de: Affaire E.ON/Endesa: l'Espagne condamnée en manquement,

	Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 15 p.10
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Kokott
JUDGRAP	Arabadjiev
DATES	of document: 06/03/2008 of application: 11/04/2007

Affaire C-413/06 P

Bertelsmann AG et Sony Corporation of America

contre

Independent Music Publishers and Labels Association (Impala)

«Pourvoi — Concurrence — Contrôle des opérations de concentration d'entreprises — Entreprise commune Sony BMG — Recours à l'encontre de l'annulation d'une décision de la Commission déclarant une opération de concentration compatible avec le marché commun — Contrôle juridictionnel — Portée — Exigences de preuve — Rôle de la communication des griefs — Renforcement ou création d'une position dominante collective — Motivation des décisions autorisant une opération de concentration — Utilisation d'informations confidentielles»

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(Art. 230 CE et 253 CE; règlement du Conseil nº 4064/89, art. 2, 6, § 1, 8, § 1, et 10, § 6)

1. Il ne ressort pas des termes des paragraphes 2 et 3 de l'article 2 du règlement nº 4064/89, relatif au contrôle des opérations de concentration entre entreprises, que celui-ci impose des exigences de preuve différentes en matière de décisions autorisant une opération de concentration, d'une part, et de décisions interdisant une telle opération, d'autre part. En effet, l'analyse prospective nécessaire en matière de contrôle des opérations de concentration, qui consiste à examiner en quoi une telle opération pourrait modifier les facteurs déterminant l'état de la concurrence sur un marché donné afin de vérifier s'il en résulterait une entrave significative à une concurrence effective, requiert d'imaginer les divers enchaînements de cause à effet, afin de retenir celui dont la probabilité est la plus forte. Il ne saurait donc être déduit du règlement une présomption générale de compatibilité ou d'incompatibilité avec le marché commun d'une opération de concentration notifiée.

Cette interprétation du règlement nº 4064/89 n'est pas infirmée par l'article 10, paragraphe 6, de celui-ci, en vertu duquel une opération de concentration notifiée est réputée compatible avec le marché commun lorsque la Commission n'a pas pris dans le délai pertinent une décision statuant sur la compatibilité de cette opération. En effet, cette disposition est une expression spécifique de l'impératif de célérité qui caractérise l'économie générale dudit règlement et qui impose à la Commission de respecter des délais stricts pour l'adoption de la décision finale. Ladite disposition constitue cependant une exception à l'économie générale du règlement, découlant notamment des articles 6, paragraphe 1, et 8, paragraphe 1, de celui-ci, suivant laquelle la Commission statue expressément sur les opérations de concentration qui lui sont notifiées.

Par ailleurs, il est vrai que les décisions de la Commission sur la compatibilité des opérations de concentration avec le marché commun doivent être étayées par des éléments suffisamment significatifs et concordants et, dans le contexte de l'analyse d'une opération de concentration de type «conglomérat», la qualité des éléments de preuve produits par la Commission pour établir la nécessité d'une décision déclarant cette opération incompatible avec le marché commun est particulièrement importante. Toutefois, il ne saurait en être déduit que la Commission doit se conformer, particulièrement lorsque cette dernière s'appuie sur une thèse d'une position dominante collective, à des exigences de preuve plus élevées en matière de décisions interdisant des opérations de concentration qu'en matière de décisions autorisant de telles opérations. En effet, la fonction essentielle de la preuve est de convaincre du bien-fondé d'une thèse ou, comme en matière de contrôle des opérations de concentration, de conforter les appréciations qui sous-tendent les décisions de la Commission. En outre, le fait qu'il s'agisse ou non d'une thèse d'une position dominante collective ne saurait avoir, en soi, d'incidence sur les exigences de preuve applicables. La complexité intrinsèque d'une thèse d'entrave à la concurrence postulée à l'égard d'une opération de concentration notifiée constitue un élément dont il convient de tenir compte lors de l'appréciation de la plausibilité des diverses conséquences de cette opération, en vue d'identifier celle dont la probabilité est la plus forte, mais une telle complexité n'a pas, en tant que telle, d'influence sur le niveau de preuve exigé.

Il découle de ce qui précède que, lorsqu'elle est saisie d'une opération de concentration en application du règlement nº 4064/89, la Commission est, en principe, tenue de prendre position soit dans le sens de l'autorisation de cette opération, soit dans celui de l'interdiction de celle-ci, selon son appréciation de l'évolution économique attribuable à l'opération en cause dont la probabilité est la plus forte.

(cf. points 46-52)

2. Dans le cadre de la procédure de contrôle des opérations de concentration, la communication des griefs est un document de caractère procédural et préparatoire qui, en vue d'assurer l'exercice efficace des droits de la défense, circonscrit l'objet de la procédure administrative engagée par la Commission, empêchant ainsi cette dernière de retenir d'autres griefs dans sa décision mettant fin à la procédure concernée. Il est donc inhérent à la nature de cette communication d'être provisoire et susceptible de modifications lors de

l'évaluation à laquelle la Commission procède ultérieurement sur la base des observations qui lui ont été présentées en réponse par les parties ainsi que d'autres constatations factuelles. En effet, la Commission doit tenir compte des éléments résultant de l'intégralité de la procédure administrative soit pour abandonner des griefs qui seraient mal fondés, soit pour aménager et compléter tant en fait qu'en droit son argumentation à l'appui des griefs qu'elle retient. Ainsi, la communication des griefs n'empêche nullement la Commission de modifier sa position en faveur des entreprises concernées.

Il s'ensuit que la Commission n'est pas tenue de maintenir les appréciations de fait ou de droit portées dans la communication des griefs. Au contraire, elle doit motiver sa décision finale par ses appréciations définitives basées sur les résultats de l'intégralité de son enquête tels qu'ils se présentent au moment de la clôture de la procédure formelle. Par ailleurs, la Commission n'est pas tenue d'expliquer les différences éventuelles par rapport à ses appréciations provisoires contenues dans ladite communication.

Le fait que la Commission soit soumise dans le cadre du contrôle des opérations de concentration, à la différence de ce qui est le cas dans le champ d'application des articles 81 CE et 82 CE, à des délais de procédure stricts ne change rien à la nature provisoire de la communication des griefs. En effet, l'exercice efficace des droits de la défense impose que l'argumentation des parties à une concentration proposée bénéficie, dans la procédure de contrôle des opérations de concentration, de la même prise en compte que celle de l'argumentation des parties concernées dans les procédures intentées en application des articles 81 CE ou 82 CE.

(cf. points 63-66)

3. Le Tribunal ne saurait nécessairement être empêché d'utiliser la communication des griefs pour procéder à l'interprétation d'une décision de la Commission en matière de contrôle des opérations de concentration, particulièrement en ce qui concerne l'examen de la base factuelle de celle-ci, et cela nonobstant le caractère préparatoire et provisoire de ce document et malgré le fait que la Commission n'est pas tenue d'expliquer les éventuelles divergences de la décision finale par rapport à celui-ci.

Cependant le Tribunal commet une erreur de droit lorsque, dans son examen des arguments tirés de l'existence d'erreurs manifestes d'appréciation, il ne se limite pas à l'utilisation de la communication des griefs comme instrument pour vérifier le caractère correct, complet et fiable des faits à la base de la décision litigieuse, mais qu'il attribue à certains éléments figurant dans la communication des griefs un caractère établi sans démontrer les raisons pour lesquelles, en dépit de la position finale adoptée par la Commission dans la décision litigieuse, ces éléments devraient être considérés comme incontestablement établis. Or, à part, éventuellement, des éléments non controversés qui, par exemple, en raison de leur nature empirique et vérifiable, sont à un tel point manifestes qu'ils sont incontestables, il ne saurait être présumé que des affirmations figurant dans une communication de griefs ne sont pas susceptibles d'être modifiées à l'aune des réponses à une telle communication. En effet, il se peut que les parties notifiantes, par leur réponse à la communication des griefs, complètent ou clarifient, à la lumière de cette communication, leur position sur le fonctionnement du ou des marchés en cause, de sorte que de nouveaux éléments peuvent être ajoutés ou que les faits déjà examinés par la Commission peuvent être placés dans une toute autre perspective.

(cf. points 69, 73, 75-76)

4. Il découle des droits de la défense des entreprises notifiant une opération de concentration que celles-ci ont le droit de présenter dans le cadre de leur audition écrite et orale, après la réception de la communication des griefs, tout ce qu'elles estiment être susceptible de réfuter les griefs de la Commission et d'amener celle-ci à autoriser leur opération de concentration proposée. Il ne saurait donc, en principe, leur être reproché de ne présenter certains arguments, faits ou éléments de preuve, éventuellement décisifs, que dans le cadre de leur argumentation en réponse à la communication des griefs. En effet, ce n'est qu'avec cette communication que les parties à l'opération de concentration peuvent obtenir des indications détaillées quant aux réserves émises par la Commission à l'égard de leur projet de concentration ainsi qu'aux arguments et aux éléments de preuve sur lesquels elle s'appuie à cet effet. Une argumentation produite en réponse à la communication des griefs fait partie de l'enquête à entreprendre dans le cadre de la procédure formelle et n'est pas tardive, mais intervient au moment prévu à cet effet dans la procédure de contrôle des opérations de concentration. Compte tenu des exigences des droits de la défense, une telle

argumentation ne saurait être soumise à des exigences plus élevées quant à sa force probante et à son caractère convaincant que celles posées à l'égard de l'argumentation des concurrents, des clients et d'autres tiers interrogés par la Commission au cours de la procédure administrative ou à l'égard des éléments fournis par les entreprises notifiantes à un stade antérieur de l'enquête de la Commission.

Par ailleurs, lorsque la Commission examine dans sa décision l'argumentation développée par les entreprises notifiantes en réponse à la communication des griefs et se saisit de l'occasion pour revoir ses conclusions provisoires figurant dans cette communication pour éventuellement s'en écarter, sans formuler de demande de renseignements ni effectuer d'études de marché supplémentaires, elle ne procède pas à une «délégation» de l'enquête aux entreprises notifiantes.

Certes, la Commission est tenue d'examiner soigneusement l'argumentation des parties à la concentration quant à son exactitude, son caractère complet et convaincant, et de l'ignorer en cas de doutes justifiés. Il est également vrai que, en vertu de l'article 3, paragraphe 1, du règlement nº 447/98, la notification de l'opération de concentration envisagée doit contenir des informations exactes et complètes, et que, conformément à l'article 11 du règlement nº 4064/89, les parties notifiantes sont tenues de répondre de manière complète, exacte et dans les délais prescrits à d'éventuelles demandes de renseignements de la Commission, faute de quoi, lorsque les renseignements en cause ont été demandés par voie de décision, la Commission peut, en vertu des articles 14 et 15 du règlement nº 4064/89, infliger des amendes et des astreintes. Il n'en demeure pas moins que celle-ci doit à l'occasion de la réponse à la communication des griefs, sous peine de dévaloriser les droits de la défense des parties notifiantes, appliquer les mêmes critères que ceux suivis aux fins de l'examen de l'argumentation de tiers ou que ceux retenus à un stade plus précoce de son enquête, tout en pouvant tirer des conséquences appropriées dans l'hypothèse où il s'avère, à un stade très avancé de la procédure, que la notification concernée ne respecte pas les exigences de l'article 3, paragraphe 1, du règlement nº 447/98.

Dans ces conditions, compte tenu en particulier des contraintes de temps qui découlent des délais de procédure prévus par le règlement nº 4064/89, la Commission ne saurait, en principe, être tenue, dans chaque cas individuel, d'envoyer, après la communication des griefs et après l'audition des entreprises concernées, à de nombreux opérateurs économiques des demandes de renseignements étendues peu de temps avant la transmission de son projet de décision au comité consultatif pour le contrôle des concentrations d'entreprises, en application de l'article 19 du règlement nº 4064/89.

(cf. points 89, 91-95)

5. Dans le cadre de son appréciation de la compatibilité avec le marché commun d'une opération de concentration, s'agissant d'une allégation de création ou de renforcement d'une position dominante collective, la Commission est tenue d'apprécier, selon une analyse prospective du marché de référence, si l'opération de concentration dont elle est saisie aboutit à une situation dans laquelle une concurrence effective dans le marché en cause est entravée de manière significative par les entreprises parties à la concentration et une ou plusieurs entreprises tierces qui ont, ensemble, notamment en raison des facteurs de corrélation existant entre elles, le pouvoir d'adopter une même ligne d'action sur le marché en vue de profiter d'une situation de puissance économique collective, et cela sans que les concurrents actuels ou potentiels, ou encore les clients et les consommateurs, puissent réagir de manière effective. De tels facteurs de corrélation incluent en particulier la relation d'interdépendance existant entre les membres d'un oligopole restreint à l'intérieur duquel, sur un marché ayant les caractéristiques appropriées, notamment en termes de concentration du marché, de transparence et d'homogénéité du produit, ils sont en mesure de prévoir leurs comportements réciproques et sont donc fortement incités à aligner leur comportement sur le marché, de façon à maximiser leur profit commun en augmentant des prix, en réduisant la production, le choix ou la qualité des biens et des services, en diminuant l'innovation ou en exerçant, d'une autre manière, une influence sur les facteurs de la concurrence. En effet, dans un tel contexte, chaque opérateur sait qu'une action fortement concurrentielle de sa part provoquerait une réaction de la part des autres, de sorte qu'il ne retirerait aucun avantage de son initiative.

Une situation de position dominante collective entravant de manière significative la concurrence effective dans le marché commun ou une partie substantielle de celui-ci peut donc intervenir à la suite d'une opération de concentration lorsque, compte tenu des caractéristiques mêmes du marché en cause et de la modification qu'apporterait à ces caractéristiques la réalisation de l'opération, celle-ci aurait comme résultat que, prenant conscience des intérêts communs, chaque membre de l'oligopole concerné considérerait possible, économiquement rationnel et donc préférable d'adopter durablement une même ligne d'action sur le marché dans le but de vendre au-dessus des prix concurrentiels, sans devoir procéder à la conclusion d'un accord ou recourir à une pratique concertée au sens de l'article 81 CE, et ce sans que les concurrents actuels ou potentiels, ou encore les clients et les consommateurs, puissent réagir de manière effective. La probabilité d'une telle coordination tacite est plus forte si les concurrents peuvent facilement parvenir à une perception commune de la manière dont doit fonctionner la coordination, notamment des paramètres susceptibles de faire l'objet de la coordination envisagée. En effet, sans pouvoir arriver tacitement à une compréhension partagée des modalités de la coordination, les concurrents devraient éventuellement recourir à des pratiques prohibées par l'article 81 CE pour pouvoir adopter une ligne commune d'action sur le marché. En outre, compte tenu notamment de l'éventuelle tentation qui peut exister pour chaque participant à une coordination tacite d'en dévier afin d'augmenter son profit à court terme, il convient d'apprécier si une telle coordination est susceptible d'être durable. À cet égard, les entreprises qui coordonnent leur comportement doivent être capables de surveiller dans une mesure suffisante si les modalités de la coordination sont respectées. La transparence sur le marché devrait, dès lors, être suffisante pour permettre,notamment, à chaque entreprise concernée de connaître, de manière suffisamment précise et immédiate, l'évolution du comportement sur le marché de chacun des autres participants à la coordination. De plus, la discipline impose qu'il existe une forme de mécanisme de dissuasion crédible qui puisse être mise en œuvre si un comportement déviant est détecté. En outre, les réactions d'entreprises qui ne participent pas à la coordination, telles que les concurrents actuels ou futurs, ainsi que les réactions des clients, ne devraient pas pouvoir remettre en cause les résultats attendus de la coordination.

Or, dans le cadre de l'application de ces critères, il y a lieu d'éviter une démarche mécanique consistant à vérifier séparément chacun desdits critères pris isolément, en ignorant le mécanisme économique global d'une hypothétique coordination tacite. À cet égard, l'appréciation, par exemple, de la transparence sur un marché donné devrait non pas se faire de façon isolée et abstraite, mais s'effectuer à l'aune d'un mécanisme d'une hypothétique coordination tacite. En effet, c'est uniquement en tenant compte d'une telle hypothèse qu'il est possible de vérifier si d'éventuels éléments de transparence existant sur un marché sont effectivement de nature à faciliter la définition tacite d'une ligne de conduite commune et/ou à permettre aux concurrents concernés de surveiller de manière suffisante si les modalités d'une telle ligne de conduite sont respectées. À cet égard, aux fins de l'analyse de la durabilité d'une coordination tacite postulée, il est nécessaire de prendre en compte les mécanismes de surveillance éventuellement accessibles aux participants à la coordination tacite alléguée, afin de vérifier si, en raison de tels mécanismes, il leur serait possible de connaître, de manière suffisamment précise et immédiate, l'évolution du comportement sur le marché de chacun des autres participants à une telle coordination.

Enfin, la recherche d'une position dominante collective préexistante qui se fonde sur une série d'éléments habituellement considérés comme indicatifs de la présence ou de la probabilité d'une coordination tacite entre concurrents ne peut pas, en tant que telle, être remise en cause. Toutefois, il est impératif que cette recherche soit menée avec précaution et, surtout, dans le cadre d'une approche fondée sur l'analyse des éventuelles stratégies plausibles de coordination.

(cf. points 120-123, 125-126, 129)

6. La Commission dispose d'une marge d'appréciation en matière économique aux fins de l'application des règles de fond du règlement nº 4064/89, relatif au contrôle des opérations de concentration entre entreprises, en particulier de son article 2. Il en résulte que le contrôle par le juge communautaire d'une décision de la Commission en matière d'opérations de concentration est limité à la vérification de l'exactitude matérielle des faits et à l'absence d'erreur manifeste d'appréciation. Cela étant, s'il n'appartient pas au juge communautaire de substituer son appréciation économique à celle de la Commission aux fins de l'application des règles de fond du règlement, cela n'implique pas qu'il doit s'abstenir de contrôler la qualification juridique, par la Commission, de données de nature économique. En effet, le juge communautaire doit notamment vérifier non seulement l'exactitude matérielle des éléments de preuve invoqués, leur fiabilité et leur cohérence, mais également contrôler si ces éléments constituent l'ensemble des données pertinentes devant être prises en considération pour apprécier une situation complexe et s'ils sont de nature à étayer les conclusions qui en sont tirées.

(cf. points 144-145)

7. La Commission ne viole pas son obligation de motivation si, lorsqu'elle exerce son pouvoir de contrôle des opérations de concentration, elle n'inclut pas dans sa décision de motivation précise quant à l'appréciation d'un certain nombre d'aspects de la concentration qui lui semblent manifestement hors de propos, dépourvus de signification ou clairement secondaires pour l'appréciation de cette dernière. Une telle exigence serait en effet difficilement compatible avec l'impératif de célérité et les brefs délais de procédure qui s'imposent à la Commission lorsqu'elle exerce son pouvoir de contrôle des opérations de concentration et qui font partie des circonstances particulières d'une procédure de contrôle de ces opérations. Il en résulte que, lorsque la Commission déclare une opération de concentration compatible avec le marché commun sur la base de l'article 8, paragraphe 2, du règlement nº 4064/89, l'exigence de motivation est satisfaite si cette décision expose clairement les raisons pour lesquelles la Commission considère que la concentration en question, le cas échéant après modifications apportées par les entreprises concernées, ne crée pas ou ne renforce pas une position dominante ayant comme conséquence qu'une concurrence effective serait entravée de manière significative dans le marché commun ou une partie substantielle de celui-ci. À cet égard, s'il est vrai que la Commission n'est pas obligée, dans la motivation des décisions adoptées en application du règlement, de prendre position sur tous les éléments et arguments invoqués devant elle, y compris ceux clairement secondaires pour l'appréciation à livrer, il n'en demeure pas moins qu'elle doit exposer les faits et les considérations juridiques revêtant une importance essentielle dans l'économie de la décision. En outre, la motivation doit être logique, ne présentant notamment pas de contradiction interne.

(cf. points 167-169)

8. L'article 10, paragraphe 6, du règlement nº 4064/89, relatif au contrôle des opérations de concentration entre entreprises, qui vise à assurer la sécurité juridique dans l'hypothèse où, exceptionnellement, la Commission n'aurait pas adopté une décision dans le délai prescrit, de sorte que les entreprises concernées seraient libres de mettre en œuvre leur concentration dès qu'une autorisation tacite est intervenue, ne saurait fonder une exception à la possibilité de contester la légalité d'une décision autorisant une telle opération en raison de la violation de l'obligation de motivation, pas plus qu'il ne saurait fonder une présomption générale en faveur de la compatibilité des opérations de concentration avec le marché commun. Cette disposition, qui constitue une exception à l'économie générale dudit règlement, découlant notamment des articles 6, paragraphe 1, et 8, paragraphe 1, de celui-ci, en vertu de laquelle la Commission se prononce expressément sur les opérations de concentration qui lui sont notifiées, et cela que la décision soit négative ou positive, doit être interprétée et appliquée, en effet, à la lumière des articles 230 CE et 253 CE. Or, une insuffisance de motivation de nature à méconnaître l'article 253 CE relève de la violation des formes substantielles au sens de l'article 230 CE, et constitue d'ailleurs un moyen pouvant, voire devant, être soulevé d'office par le juge communautaire.

(cf. points 172, 174-175)

JUDGMENT OF THE COURT (Grand Chamber)

10 July 2008 (*)

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(Appeals – Competition – Control of concentrations between undertakings – Sony BMG joint venture – Appeal against the annulment of a Commission decision declaring a concentration compatible with the common market – Judicial review – Scope – Standard of proof – Role of the statement of objections – Strengthening or creation of a collective dominant position – Statement of reasons for a decision approving a concentration – Use of confidential information)

In Case C-413/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 3 October 2006,

Bertelsmann AG, established in Gütersloh (Germany), represented by P. Chappatte and J. Boyce, Solicitors,

Sony Corporation of America, established in New York (United States of America), represented by N. Levy, Barrister, R. Snelders, avocat, and T. Graf, Rechtsanwalt,

appellants,

the other parties to the proceedings being:

Independent Music Publishers and Labels Association (Impala), established in Brussels (Belgium), represented by S. Crosby and J. Golding, Solicitors, and by I. Wekstein, advocate,

applicant at first instance,

Commission of the European Communities, represented by A. Whelan and K. Mojzesowicz, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Sony BMG Music Entertainment BV, established in Vianen (Netherlands), represented by N. Levy, Barrister, R. Snelders, avocat, and T. Graf, Rechtsanwalt,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, E. Juhász, A. Borg Barthet, M. Ilešič, J. Klučka, E. Levits and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 November 2007,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2007,

gives the following

Judgment

1 By their appeal, Bertelsmann AG ('Bertelsmann') and Sony Corporation of America ('Sony') request the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-464/04 *Impala* v *Commission* [2006] ECR II-2289 ('the judgment under appeal'), in which the Court of First Instance annulled Commission Decision 2005/188/EC of 19 July 2004 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3333 – Sony/BMG) (OJ 2005 L 62, p. 30) ('the contested decision').

Legal context

2 Article 2(2) and (3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, and Corrigendum (OJ 1990 L 257, p. 13)), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1, and Corrigendum (OJ 1998 L 40, p. 17)) ('the Regulation') states:

'2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'

3 Article 6(1) of the Regulation provides as follows:

'The Commission shall examine the notification as soon as it is received.

...

(c) ... where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.'

4 Article 8 of the Regulation empowers the Commission, in the formal proceedings for assessing the compatibility of the concentration with the common market initiated under Article 6(1)(c) of the Regulation ('the formal proceedings'), to adopt a decision pursuant to Article 8(2) declaring the concentration compatible, where appropriate following modification by the undertakings concerned to the proposed concentration as notified, or a decision pursuant to Article 8(3) declaring the concentration incompatible. Under Article 8(5)(a) of the Regulation, the Commission may revoke the decision it has taken pursuant to Article 8(2) where the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit.

5 Article 10(1) of the Regulation allows the Commission, except in certain circumstances which are not relevant to the present appeal, a period of one month in which to decide whether to initiate the formal proceedings. Article 10(3) provides that a decision declaring the notified concentration incompatible with the common market is to be taken within not more than four months of the date on which the formal proceedings are initiated. Under Article 10(6) of the Regulation, a notified concentration is to be deemed compatible with the common market where the Commission has not taken a decision either to initiate the formal proceedings or a decision on the compatibility of the concentration with the common market within the periods laid down in Article 10(1) and (3), respectively.

6 Article 11 of the Regulation concerns the requests for information which the Commission, in carrying out the duties assigned to it by the Regulation, may send to, among others, the notifying parties and to other undertakings or associations of undertakings, where appropriate by way of decision. Articles 14 and 15 of the Regulation provide for the imposition of fines or periodic penalty payments where incorrect or misleading information is supplied.

7 Article 18(3) of the Regulation provides:

'The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.'

8 Article 19 of the Regulation concerns liaison between the Commission and the competent authorities of the Member States. Under Article 19(3), an Advisory Committee on concentrations is to be consulted before any decision is taken pursuant to Article 8(2) to (5) of the Regulation. Article 19(6) provides that the Advisory Committee is to deliver an opinion on the Commission's draft decision, if necessary by taking a vote.

9 Under Article 3(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1) ('the Implementing Regulation'), the notification of the proposed concentration must contain the information, including documents, requested by form CO annexed to that regulation.

10 Article 13(2) of the Implementing Regulation provides, among other things, that the Commission is to address its objections in writing to the notifying parties and to set a time-limit within which they may inform the Commission of their views in writing.

Facts

11 The facts of the dispute were set out as follows by the Court of First Instance in paragraphs 1 to 11 of the judgment under appeal:

'1 The Independent Music Publishers and Labels Association (Impala) is an international association, incorporated under Belgian law, whose members are 2 500 independent music production companies.

2 On 9 January 2004 the Commission received notification pursuant to [the Regulation] of a proposed concentration by which the undertakings Bertelsmann … and Sony … proposed to merge their global recorded music businesses.

3 Bertelsmann is an international media company … active in recorded music through its wholly-owned subsidiary Bertelsmann Music Group "BMG". …

4 … In the recorded music sector [Sony] acts through Sony Music Entertainment. ….

5 The proposed operation consisted in the integration of the global recorded music businesses of the parties to the concentration (with the exception of Sony's activities in Japan) into three or more newly-created companies pursuant to a Business Contribution Agreement dated 11 December 2003. In the aggregate, these joint venture companies were to be operated under the name Sony BMG.

6 Under the agreement, Sony BMG would be active in the discovery and development of artists (the so-called A & R ("Artist and Repertoire") activity) and the marketing and sale of the resulting discs. Sony BMG would not be involved in related activities such as music publishing, manufacturing and distribution.

7 On 20 January 2004, the Commission sent out questionnaires to a number of players on the market. [Impala] replied to that questionnaire and lodged a separate submission on 28 January 200[4] in which it set out the reasons why in its view the Commission should declare the operation incompatible with the common market. [Impala] set out its concerns about further concentration in the market and the impact that this would have on market access, including in the retail sector, the media, the internet and consumer choice.

8 By decision dated 12 February 2004, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and the functioning of the Agreement on the European Economic Area ("the EEA Agreement"). It therefore initiated [the formal proceedings].

9 On 24 May 2004 the Commission sent a statement of objections to the parties to the concentration, in which it provisionally concluded that the notified operation was incompatible with the common market and the functioning of the EEA Agreement, since it would strengthen a collective dominant position in the recorded music market and in the wholesale market for licences for online music and would coordinate the parent companies' behaviour in a way

incompatible with Article 81 EC.

10 The parties to the concentration replied to the statement of objections and a hearing took place before the Hearing Officer on 14 and 15 June 2004 in the presence of, among others, [Impala].

11 By [the contested decision], the Commission declared the concentration compatible with the common market pursuant to Article 8(2) of [the Regulation] …'

The proceedings before the Court of First Instance and the judgment under appeal

12 By application lodged at the Registry of the Court of First Instance on 3 December 2004, Impala brought an action for the annulment of the contested decision. In support of that action, Impala put forward five pleas in law, divided into a number of parts.

13 As regards the first plea, relating to the strengthening of a pre-existing collective dominant position, the Court of First Instance, after having first set out a number of observations regarding the concept of a 'collective dominant position', examined the argument according to which, in essence, the contested decision did not explain to the requisite legal standard the reasons for which discounts, in particular campaign discounts, undermine the transparency necessary to allow the development of such a position.

14 Having reached the conclusion set out in paragraph 325 of the judgment under appeal that, in essence, the contested decision should be annulled on the ground that it was inadequately reasoned, in paragraphs 327 to 458 of the judgment under appeal the Court of First Instance none the less examined, in the interest of completeness, Impala's arguments that the elements put forward by the Commission in order to demonstrate insufficient transparency in the recorded music markets at issue were vitiated by manifest errors of assessment.

15 In that regard, the Court of First Instance found in particular, in paragraph 373 of the judgment under appeal, that it followed both from the contested decision and from the arguments advanced by the Commission before it that the only alleged element of opacity of the market resulted from the lesser transparency of the campaign discounts. In paragraphs 377 and 378 of the judgment under appeal, it held, first, that the evidence, as mentioned in the contested decision, did not support the conclusions drawn from it by the Commission and, secondly, that those conclusions were also markedly different from the findings made in the statement of objections.

16 In paragraphs 475 and 476 of the judgment under appeal, the Court of First Instance set out its conclusions relating to the first plea as follows:

'475 … the assertion that the markets for recorded music are not sufficiently transparent to permit a collective dominant position is not supported by a statement of reasons of the requisite legal standard and is vitiated by a manifest error of assessment in that the elements on which it is based are incomplete and do not include all the relevant data that ought to have been taken into consideration by the Commission and are not capable of supporting the conclusions which are drawn from them. As that assertion constitutes … an essential ground on which the Commission concluded … that there was no collective dominant position, the [contested decision] must be annulled on that ground alone.

476 Likewise, as the analysis in respect of retaliation is vitiated by an error of law, or at the very least by a manifest error of assessment, and as that analysis constitutes the other essential ground on which the Commission concluded in the [contested decision] that there was no collective dominant position, that defect also provides a ground for annulment of the [contested decision].'

17 By its second plea raised before the Court of First Instance, Impala claimed that, by not taking the view that the proposed concentration would create a collective dominant position on the market for recorded music, the Commission had infringed Article 253 EC and made a manifest error of assessment and an error of law.

18 In paragraph 527 of the judgment under appeal, the Court of First Instance set out the terms of the analysis in the contested decision as regards the risk that a collective dominant position might be created and went on to hold as follows in paragraph 528 of the judgment:

'... these few observations, which are so superficial, indeed purely formal, cannot satisfy the Commission's obligation to carry out a prospective analysis ... particularly where, as in the present case, the concentration raises serious problems. Independently of the Court's findings in respect of the first plea in law, it follows both from the fact that the Commission had to engage in lengthy discussion in the [contested decision] in order to conclude that there was no collective dominant position before the concentration and from the fact that it had concluded in the statement of objections, after an investigation lasting five months, that such a position did exist before the concentration, that the question whether the fusion between two of the five [major record companies ('the majors')] might create a collective dominant position raises, for even stronger reasons, serious problems requiring a thorough examination. As that examination was not carried out, it follows, on that ground alone, that the second plea in law is well founded.'

19 In the interest of completeness, the Court of First Instance held in paragraph 539 of the judgment under appeal that the Commission could not, without making an error, rely on the fact that there was no evidence that retaliatory measures had been used in the past to conclude that the concentration in question was not likely to give rise to a collective dominant position.

20 In those circumstances, the Court of First Instance held that the first and second pleas in law were well founded and annulled the contested decision without examining the third to fifth pleas raised before it.

Forms of order sought and positions of the parties

21 By their appeal, the appellants request that the Court of Justice should:

– set aside the judgment under appeal;

– dismiss Impala's application for annulment of the contested decision or, alternatively, refer the case back to the Court of First Instance for reconsideration; and

– order Impala to pay the costs of the present proceedings.

22 By the seven grounds of appeal put forward by the appellants, some of which are divided into a number of parts, the appellants allege errors of law in that in the judgment under appeal the Court of First Instance:

– relied on the statement of objections as a benchmark for its review of the substance of the contested decision;

– required the Commission to undertake new market investigations following the response to the statement of objections;

– applied an excessive and incorrect standard of proof for decisions approving a concentration;

– exceeded the scope of its role in carrying out judicial review;

– misconstrued the relevant legal criteria applying to the creation or strengthening of a collective dominant position;

– applied an incorrect standard of reasoning as regards decisions approving a concentration; and

– relied on evidence that was not disclosed to the parties to the concentration.

23 Sony BMG Music Entertainment BV adopts in full both the appeal and the forms of order sought by the appellants.

24 The forms of order sought by the Commission are, in substance, the same as those of the appellants. The Commission supports the first, second and fourth grounds of appeal, together with the first part of the third ground.

25 Impala requests the Court to dismiss the appeal and to order the appellants to pay the costs. As a preliminary point, it pleads that the appeal is inadmissible in whole or in part. It also argues that the appeal could not in any event lead to the setting aside of the judgment under appeal, since the appellants have failed to challenge paragraph 528 of the judgment, which is itself sufficient justification for the annulment of the contested decision.

26 The appellants and the Commission claim that both the plea of inadmissibility and the line of argument relating to paragraph 528 of the judgment under appeal summarised in the preceding paragraph of this judgment should be rejected.

27 At the end of its response, the Commission made some 'additional observations on the "essential grounds" of the [contested] decision'. Those observations are challenged by Impala, relying on Article 117(2) of the Rules of Procedure of the Court of Justice. The appellants support those observations.

The appeal

Admissibility

The general plea of inadmissibility

28 As a preliminary point, Impala pleads that the appeal is inadmissible in that it constitutes an attempt to reopen questions of fact relating to the inadequacy of reasoning in the contested decision and to the manifest error of assessment vitiating the contested decision, which were settled by the Court of First Instance. The appeal seeks, to a very large extent, to re-examine questions of fact which are beyond the jurisdiction of the Court of Justice. Impala also submits in this respect that the question whether a decision is sufficiently reasoned is a question of fact. Lastly, it adds that its individual replies to the grounds of appeal raised by the appellants should be understood as being in the alternative.

29 In this regard, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal lies on points of law only. The Court of First Instance accordingly has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C–185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I–8417, paragraphs 23 and 24; Case C–551/03 P *General Motors* v *Commission* [2006] ECR I–3173, paragraphs 51 and 52; and Case C–328/05 P *SGL Carbon* v *Commission* [2007] ECR I–3921, paragraph 41).

30 On the other hand, 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 Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 24, and Joined Cases C–189/02 P, C–202/02 P, C–205/02 P to C–208/02 P and C–213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I–5425, paragraph 453).

31 As regards the present case, as is apparent from, among other things, paragraph 22 of this judgment and contrary to what Impala contends, the appellants do not, by their appeal, seek generally to call into question the findings of fact made by the Court of First Instance, as such. By contrast, they raise for the most part questions of law which can form a valid basis for an appeal. Impala's general plea of inadmissibility should therefore be rejected. That being said, to the extent that Impala puts forward more detailed objections of inadmissibility in relation to a number of

specific parts of the appeal, those objections fall to be addressed in the context of the grounds of appeal concerned.

The plea of inadmissibility based on the appellants having omitted to challenge a critical passage of the judgment under appeal

32 Impala submits that, in any event, the Court of First Instance held in paragraph 528 of the judgment under appeal that the Commission did not carry out a prospective analysis of whether the concentration would create a collective dominant position, and held that for this reason alone that Impala's second plea in law at first instance was well founded. That, in itself, is sufficient to annul the contested decision. Accordingly, even if the appellants succeed on one or more of their grounds of appeal, the appeal must in any event be dismissed, since the appellants do not contest the finding that no prospective analysis was carried out.

33 In that regard, it is sufficient to hold that the appeal expressly refers, in a list of the passages in the judgment under appeal that are specifically subject to criticism, to paragraph 528 of that judgment, as well as to paragraphs 533, 539 and 541, which also address the question of the creation of a collective dominant position.

34 That being the case, it cannot validly be argued that the appeal is limited to the reasoning of the Court of First Instance regarding the question of the strengthening of a pre-existing collective dominant position with the result that it should be rejected as inadmissible in its entirety.

Substance

35 The seven grounds of appeal relied on by the appellants overlap in a number of respects. Essentially, the first to fourth grounds, together with the seventh ground, concern the manner in which the Court of First Instance carried out its review, particularly with respect to questions of proof. The fifth ground concerns the concept of a collective dominant position. The sixth ground relates to the findings of the Court of First Instance with respect to the failure of the contested decision to state adequate reasons.

36 It is appropriate to begin the examination of the substance of this appeal by considering the grounds of appeal concerning the manner in which the Court of First Instance approached issues of evidence and proof, and, in the first place, by considering the second part of the third ground.

The second part of the third ground of appeal, alleging an error of law in that the Court of First Instance applied an excessive burden and standard of proof as regards decisions approving a concentration

– The judgment under appeal

37 It is apparent from, among others, paragraphs 289, 366 and 459 of the judgment under appeal that the Court of First Instance considered whether the considerations on which the contested decision was based were capable of justifying the Commission's finding in that decision that the markets in question were not sufficiently transparent to allow a collective dominant position.

– Arguments of the parties

38 By their third ground of appeal, the appellants maintain that the Court of First Instance committed an error of law by applying an incorrect and excessive standard of proof as regards merger clearance decisions. In the second part of that ground, the appellants submit that the Court of First Instance misconstrued the burden and standard of proof which applies to those decisions.

39 According to the appellants, since it is for the Commission to substantiate a decision prohibiting a concentration, where it has not been able to collect evidence which meets the high standard set by the Community judicature to justify such a prohibition, particularly where the Commission is pursuing a theory of collective dominance, it must approve the proposed concentration. It is clear, in particular, from Article 10(6) of the Regulation that if the Commission is unable to substantiate its theory of competitive harm on the basis of convincing evidence, the scheme of the Regulation dictates that it must approve the concentration.

40 The appellants also maintain in that regard that the Court of First Instance committed an error of

law in failing to recognise that the Commission is obliged to satisfy a higher standard of proof when a concentration is prohibited than when such a concentration is approved, since a prohibition represents a serious limitation of the commercial freedom of the notifying parties and since concentrations should benefit from a presumption that they are compatible with the common market. It is clear from the case-law that the Commission must prove that a decision prohibiting a concentration is well founded in accordance with a standard which is stricter than one based on the mere balancing of probabilities and, consequently, that the Commission is not subject to the same burden and standard of proof in the case of an approval decision as it is in the case of a prohibition decision. Under a stricter standard than the mere balancing of probabilities, the Commission is, in reality, required only to prove that a decision prohibiting a concentration is well founded. According to the appellants, the failure to accept such an 'asymmetric' standard of proof permeates the assessment by the Court of First Instance of the contested decision and of the evidence on which the Commission relied.

41 The appellants go on to submit that, as a result, the Court of First Instance committed an error of law in requiring the Commission to prove the absence of transparency in the recorded music market, when it should have examined whether, at the date of the contested decision, there was sufficient evidence to prove to the requisite legal standard that that transparency existed. That error vitiates the whole of the judgment under appeal and, in particular, in various respects described in detail in the appeal, paragraphs 381 to 387, 389, 420, 428, 429 and 433.

42 According to Impala, to follow the appellants' line of argument in support of the second part of the third ground of appeal and to accept that there is a presumption in favour of the approval of concentrations could have grave repercussions for the merger control regime, such as the risk of abuse of the system. That line of argument ignores the delicate balance created by the Community legislation on merger control between private and public interests and the symmetrical double obligation imposed on the Commission to prohibit mergers which are incompatible with the common market and to approve those that are compatible with it. The standard of proof required in that regard is that of the balance of probabilities and it is for the Commission to demonstrate where the balance falls. Impala also submits that the Court of First Instance concluded that the Commission had found a large body of convincing evidence showing that there was transparency on the markets concerned, but that it had ultimately decided that there was not sufficient transparency on the basis of 'less transparent' campaign discounts. The Court of First Instance also found that the evidence that was supposed to establish that insufficiency of transparency did not support it.

43 Impala also considers that in putting forward the arguments referred to in paragraph 41 of this judgment the appellants appear to be inviting the Court to reopen the findings of fact made by the Court of First Instance.

– Findings of the Court

44 As a preliminary remark, it is clear from the Court's case-law that an alleged failure to have regard to the rules of evidence is a question of law, which is admissible in an appeal (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 65, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 40). Thus, in so far as Impala, under its general plea of inadmissibility, specifically argues that the third ground of appeal is inadmissible in its entirety, that argument cannot be accepted.

45 As regards the substance, as Impala points out, at the heart of the second part of the third ground of appeal is the premiss that the standard of proof will differ according to whether a decision approving a concentration or a decision prohibiting a concentration is involved. In this connection, it is common ground between the parties that in the judgment under appeal the Court of First Instance applied the same standard of proof to the contested decision – an approval decision – as that which it would have applied to a prohibition decision.

46 In that regard, it should be noted at the outset that there is nothing in Article 2(2) or (3) of the Regulation which states that it imposes different standards of proof in relation to decisions approving a concentration, on the one hand, and decisions prohibiting a concentration, on the other.

47 Thus, as the Court has, in substance, already held, the prospective analysis called for in relation to the control of concentrations, which consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it

would give rise to a significant impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them is the most likely (see, to that effect, Case C‑12/03 P *Commission* v *Tetra Laval* [2005] ECR I‑987, paragraph 43).

48 Contrary to what the appellants submit, it cannot therefore be inferred from the Regulation that there is a general presumption that a notified concentration is compatible with, or incompatible with, the common market.

49 That interpretation of the Regulation is not invalidated by Article 10(6), which provides that a notified concentration is to be deemed compatible with the common market where the Commission has not taken a decision on the compatibility of that concentration within the prescribed period. That provision is a specific expression of the need for speed, which characterises the general scheme of the Regulation and which requires the Commission to comply with strict time-limits for the adoption of the final decision (see, in that regard, Case C‑202/06 P *Cementbouw Handel & Industrie* v *Commission* [2007] ECR I‑0000, paragraph 39). It is, however, an exception to the general scheme of the Regulation, which is laid down in particular in Articles 6(1) and 8(1), according to which the Commission is to rule expressly on the concentrations which are notified to it.

50 Furthermore, it is true that, as is apparent from the Court's case-law, the decisions of the Commission as to the compatibility of concentrations with the common market must be supported by a sufficiently cogent and consistent body of evidence (see, to that effect, Joined Cases C‑68/94 and C‑30/95 *France and Others* v *Commission* [1998] ECR I‑1375, '*Kali & Salz*', paragraph 228) and that in the context of the analysis of a 'conglomerate-type' concentration the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important (see *Commission* v *Tetra Laval*, paragraph 44).

51 However, it cannot be deduced from that that the Commission must, particularly where it pursues a theory of collective dominance, comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving them. That case-law merely reflects the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the case of the control of concentrations, to support the conclusions underpinning the Commission's decisions (see, to that effect, *Commission* v *Tetra Laval*, paragraphs 41 and 44). Furthermore, the fact that an issue of collective dominance does, or does not, arise, cannot of itself have an impact on the standard of proof which applies. In that regard, the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration is a factor which must be taken into account when assessing the plausibility of the various consequences such a concentration may have, in order to identify those which are most likely to arise, but such complexity does not, of itself, have an impact on the standard of proof which is required.

52 It follows that, where it has been notified of a proposed concentration pursuant to the Regulation, the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration, in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue.

53 The appellants are accordingly incorrect in maintaining that, since it was a decision approving a concentration that was at issue, the Court of First Instance should have considered only whether the Commission could, by applying a particularly high standard of proof, have prohibited that concentration. Consequently, without it being necessary to adopt a position on the admissibility of the specific criticisms relating to the paragraphs of the judgment under appeal listed in paragraph 41 of this judgment, it must be held that since the premiss underlying those criticisms is groundless, they cannot, in any event, be accepted.

54 In the light of the above, the second part of the third ground of appeal must be rejected.

The first ground of appeal, alleging an error of law in that the Court of First Instance relied on the statement of objections as a benchmark for its review of the substance of the contested decision

– The judgment under appeal

55 In a number of passages in the judgment under appeal, among others, in paragraphs 379, 424 and 446, the Court of First Instance referred to the statement of objections in order to support its

reasoning, both as regards the plea alleging inadequate reasoning in the contested decision and as regards the argument alleging manifest errors of assessment which vitiated that decision.

56 In its examination of the plea alleging insufficient reasoning in the contested decision, the Court of First Instance observed in particular as follows:

'282 The Court must examine, first of all, the impact of the circumstance, emphasised by [Impala], that the Commission had concluded emphatically in the statement of objections that the concentration was incompatible with the common market on the ground, in particular, that a collective dominant position existed before the proposed concentration and that the market for recorded music was transparent and particularly conducive to coordination.

283 This fundamental U-turn in the Commission's position may indeed appear surprising, particularly in view of the late stage at which it was made. In effect, as may be seen from the case-file and from the oral argument before the Court, throughout the administrative procedure the Commission considered, on the basis of all the information which it had received, during an investigation lasting five months, both from the various operators on the market and from the parties to the concentration, that the market was sufficiently transparent to allow tacit collusion on prices, and that it was only in the wake of the arguments submitted by the parties to the concentration, assisted by their economic adviser, at the hearing on [14] and [15] June 2004 that, without carrying out any fresh market investigations, it adopted the opposite position and, on 1 July 2004, sent the draft decision to the Advisory Committee.

284 However, as the Commission correctly submits, it follows from the case-law ([Joined Cases 142/84 and 156/84] [*British American Tobacco*] *and Reynolds* [*Industries*] v *Commission*, [[1987] ECR 4487]) that, when the Commission rejects an application under Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 17), it is sufficient for it to set out the reasons why it did not consider it possible to show the existence of an infringement of the competition rules, but it is not obliged to explain any differences by comparison with the statement of objections, since that is a preparatory document containing assessments which are purely provisional in nature and are intended to define the scope of the administrative procedure vis-à-vis the undertakings forming the subject of that procedure, or to discuss all the points of fact and of law dealt with during the administrative procedure. In [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], the Court of Justice referred to the provisional nature of a statement of objections and to the Commission's obligation to take into account the elements resulting from the administrative procedure, in order, in particular, to drop any objections which may have proved unfounded.

285 Admittedly, that case-law was developed in respect of proceedings for the application of Articles 81 EC and 82 EC and not in the specific field of the control of concentrations, where the need to observe the mandatory time-limits governing the adoption of decisions by the Commission does not allow it to extend its investigation, thus reducing the likelihood that the Commission will fundamentally alter its position as the administrative procedure advances. In its final observations, moreover, the Commission emphasised that the measures of investigation carried out after the hearing consisted essentially in consulting the operators on the market concerning the proposed commitments and did not deal with the objections raised against the notified concentration. However, the fact remains that the statement of objections is merely a preparatory document and that the final decision must be based solely on all the circumstances and evidence relevant for the purpose of the assessment of the effects which the proposed concentration will have on competition in the reference markets. It follows that the mere fact that the Commission did not explain in the body of the decision the change in its position by comparison with that set out in the statement of objections cannot as such constitute a lack of, or an insufficient, statement of reasons.'

– Arguments of the parties

57 The appellants claim that the Court of First Instance committed an error of law in using the statement of objections as a benchmark for evaluating the substance of the contested decision, in contravention of the rights of the defence.

58 In those circumstances, the appellants take the view that the comparison made by the Court of First Instance between the contested decision and the provisional findings of the Commission contained in the statement of objections cannot support the conclusions reached in the judgment

under appeal as regards the reasoning of the contested decision and the Commission's findings in it. They cite in that regard paragraphs 300, 302 and 308 of the judgment under appeal as regards the conclusions of the Court of First Instance in relation to the reasoning of the contested decision. In addition, as regards the examination by the Court of First Instance of the arguments based on manifest errors of assessment, the appellants criticise in their appeal paragraphs 338, 339, 341, 362, 378, 379, 398, 402, 409, 419, 424, 446, 447, 451, 456, 467, 491, 532 and 538 of the judgment.

59 In support of the appellants in relation to this ground of appeal, the Commission argues that in much of the judgment under appeal the Court of First Instance – contrary to the case-law cited by that court itself in paragraph 284 of the judgment, to which it paid only lip service – did not examine the contested decision on its own merits as regards the question whether it was adequately reasoned and, as regards the plea of substantive error, the question whether that decision contains errors of fact or manifest errors of assessment, but instead focused in its judgment on the question whether the statement of objections was shown to be unfounded. Thus, according to the Commission, since certain facts were not mentioned in the statement of objections, the Court of First Instance inferred from that that they could not be important for the assessment of the consequences of the concentration in general. Moreover, whereas the Commission set out certain findings in the contested decision that were expressed in a less unqualified manner in the statement of objections, the Court of First Instance took as a basis for its review the assessment made in the statement of objections.

60 Impala argues that the Court of First Instance merely mentioned extracts from the statement of objections in order to emphasise inherent inconsistencies in the contested decision itself and the lack of underlying support for the findings set out in it. The Court of First Instance expressly recognised that the statement of objections is a preparatory document, that its findings are purely provisional and that the Commission does not have to explain differences between that statement and the contested decision.

– Findings of the Court

61 It is apparent from the Court's case-law that the right to a fair hearing, which is a fundamental principle of Community law and forms, in particular, part of the rights of the defence, requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the EC Treaty (see inter alia, to that effect, Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, paragraph 15; Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10; *Kali & Salz*, paragraph 174; and *Aalborg Portland and Others* v *Commission*, paragraph 66).

62 For procedures for the control of concentrations governed by the Regulation, that principle is laid down in the second sentence of Article 18(3) and, in more detail, in Article 13(2) of the Implementing Regulation. The latter in substance requires, among other things, that written notice be given to the notifying parties of the Commission's objections, with an indication to those parties of the period within which they may inform the Commission of their views in writing.

63 It follows, by analogy with the case-law on Articles 81 EC and 82 EC, that the statement of objections is a procedural and preparatory document which, in order to ensure that the rights of the defence may be exercised effectively, delimits the scope of the administrative procedure initiated by the Commission, thereby preventing the latter from relying on other objections in its decision terminating the procedure in question (see, in particular, the order in Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1986] ECR 1899, paragraphs 13 and 14). It is therefore inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its further assessment on the basis of the observations submitted to it by the parties and subsequent findings of fact (see, to that effect, *SGL Carbon* v *Commission*, paragraph 62). The Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned (see the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 13).

64 It follows that the Commission is not obliged to maintain the factual or legal assessments set forth in that document. On the contrary, it must give as reasons for its ultimate decision its final assessments based on the situation existing at the time the formal proceedings are closed (see, by way of analogy, the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 15).

65 Furthermore, the Commission is not obliged to explain any differences with respect to its provisional assessments set out in the statement of objections (see, to that effect, the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 15, and the judgment in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 70).

66 The fact that the Commission is, by contrast to the position under Articles 81 EC and 82 EC, subject to strict time-limits, has no effect on the provisional nature of the statement of objections. The effective exercise of the rights of the defence requires that the arguments of the parties to a proposed concentration be taken into account in proceedings for the control of concentrations in the same way as the arguments of the parties affected by proceedings initiated under Articles 81 EC or 82 EC.

67 It is true that the Court of First Instance expressly recognised, in particular in paragraphs 284 and 285 of the judgment under appeal, the preparatory nature of the statement of objections, including where proceedings for the control of concentrations are involved. It also acknowledged that the Commission is not, in accordance with the case-law relating to Articles 81 EC and 82 EC, obliged to explain any differences by comparison with the statement of objections.

68 However, having regard to the line of argument of the appellants and of the Commission set out in paragraphs 58 and 59 of this judgment, it is necessary to examine the criticisms made by them in relation to a series of specific references to the statement of objections made by the Court of First Instance in its examination of the validity of the contested decision.

69 In that regard, it is clear from the case-law that while, in the context of the control of concentrations, a field in which the Commission has a margin of assessment with regard to economic matters, review by the Court of First Instance is limited to establishing whether the evidence relied on is factually accurate and to establishing the absence of a manifest error of assessment, it none the less remains the case that the correctness, completeness and reliability of the facts on which a decision is based may be the subject of judicial review (see, to that effect, *Commission* v *Tetra Laval*, paragraph 39, and Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-0000, paragraphs 56 and 57). Indeed, that is one of the ways in which the Community judicature can verify whether the factual and legal elements upon which the exercise of the power of assessment depends were present (see, to that effect, Case C–269/90 *Technische Universität München* [1991] ECR I–5469, paragraph 14). It follows that notwithstanding the preparatory and provisional nature of the statement of objections and despite the fact that the Commission is not obliged to explain any differences by comparison with the statement of objections, the Court of First Instance is not necessarily precluded from using the statement of objections in order to interpret a decision of the Commission, particularly as regards the examination of its factual basis.

70 Thus, for example, the references to the statement of objections made by the Court of First Instance in paragraphs 300, 302 and 308 of the judgment under appeal when reaching its findings in relation to the reasoning of the contested decision were, as the Advocate General pointed out in substance in points 165 and 166 of her Opinion, made for purely illustrative purposes, or simply for the sake of completeness. The same applies to certain of the paragraphs of the judgment cited by the appellants which concern the evaluation by the Court of First Instance of the arguments alleging manifest errors of assessment, namely paragraphs 338, 339, 341, 362, 402, 456, 467, 532 and 538 of the judgment under appeal, which serve merely to illustrate and to supplement what the Court of First Instance had, in any event, already directly deduced from the contested decision.

71 However, some of the references in the judgment under appeal to the statement of objections show that, notwithstanding the position it itself adopted as to the provisional nature of that statement, the Court of First Instance treated what, in paragraph 410 of the judgment, it termed 'findings of fact made previously' in that statement as being more reliable and more conclusive than the findings set out in the contested decision itself.

72 The Court of First Instance, in effect, relied in that regard on a distinction between those 'findings of fact made previously', on the one hand, and 'assessments', on the other, which could, in its view, more legitimately be modified. In particular, in paragraph 379 of the judgment under appeal, the

Court of First Instance classified the statement in the statement of objections that ‘there is sufficient evidence that the majors are aware of each other’s commercial terms’ as not being ‘an assessment by the Commission that might be modified, but rather a finding of fact resulting from its investigation’. That statement by the Court of First Instance should be understood in the light of other statements made previously in the judgment under appeal. Thus, in paragraph 335 of the judgment, the Court of First Instance stated, among other things, that ‘the findings set out in the [contested decision] must be compatible with the findings of fact made in the statement of objections, in so far as it is not established that the latter findings were incorrect’. In addition, in paragraph 378 of the judgment, the Court of First Instance stated that ‘the conclusions drawn from [the evidence as mentioned in the contested decision] are also markedly different from the findings made in the statement of objections’.

73 Thus, the Court of First Instance did not merely use the statement of objections as a basis for verifying the correctness, completeness and reliability of the factual material which underpinned the contested decision. It treated a particular category of conclusions set out in that statement as established, whereas those conclusions could, however, only be considered as being provisional.

74 That conception of the statement of objections can also be seen in other paragraphs of the judgment under appeal. Thus, in paragraphs 409 and 410 of the judgment, the Court of First Instance criticised the fact that the Commission did not refute the ‘findings of fact made previously’ in the statement of objections. In addition, in paragraph 424 of the judgment, the appellants and the Commission were criticised for not having asserted, ‘still less demonstrated’, that a ‘finding’ in the statement of objections was incorrect. In paragraph 446 of the judgment under appeal, it was similarly indicated that ‘the observation that there was no evidence that discounts significantly affected prices constitutes a finding of fact rather than an assessment’. Moreover, in paragraphs 398, 419, 447 and 451 of the judgment, the Commission was, in essence, criticised for having relied to a considerable extent, for the purposes of the contested decision, on the impact of ‘campaign discounts’, whereas, as the Court of First Instance indicated in paragraph 447 of the judgment, the Commission ‘did not even consider it necessary to mention [those] discounts in the statement of objections’.

75 As the Commission points out, it can happen that, in their reply to the statement of objections, the notifying parties will supplement or clarify their ‘case’ regarding the functioning of the market or markets in question in the light of that statement, so that new elements may be added or facts previously examined by the Commission may be put in an entirely different light. In those circumstances, even if the lack of justification for certain of the individual findings of fact provisionally made by the Commission in the statement of objections is not established, the Commission’s evaluation of those findings in that new context may be radically different. In the judgment under appeal, it appears that the Court of First Instance, by focusing on the discrepancies between the contested decision, which was the subject of the action brought before it, and the ‘findings of fact previously made’ in the statement of objections, excluded that possibility. As the Commission argues, the approach adopted by the Court of First Instance in some paragraphs of the judgment under appeal appears to assume that the Commission’s provisional conclusions in the statement of objections are invariably based on unequivocal evidence. Apart, possibly, from non-controversial elements which, for example, by reason of their empirical and verifiable nature are obvious to such a degree that they cannot be contested, it should not be assumed that assessments made in a statement of objections cannot be modified in the light of the replies to such a statement. Furthermore, even if it were accepted that the Court of First Instance was entitled to make a distinction between the findings of fact and the assessments made in the statement of objections, it must be held that in paragraphs 379 and 446 of the judgment under appeal, it categorised as findings of fact certain complex assessments which could not in any event be considered as findings of fact that could not be modified.

76 In those circumstances, it must be held that the Court of First Instance committed an error of law in so far as, in its examination of the line of argument alleging the existence of manifest errors of assessment, it treated certain elements in the statement of objections as being established, without demonstrating the reasons for which, notwithstanding the final position adopted by the Commission in the contested decision, those elements should be considered as being established beyond dispute.

77 None the less, that error is not of itself capable of undermining the finding of the Court of First Instance in paragraph 377 of the judgment under appeal that ‘the evidence, as mentioned in the [contested decision], does not support the conclusions drawn from it’. Consequently, it is not of itself capable of leading to the setting aside of the judgment under appeal. Further grounds of appeal thus fall to be examined.

The second ground of appeal, together with the first part of the third ground, alleging errors of law in that the Court of First Instance required the Commission to undertake new market investigations following the response to the statement of objections and applied an unduly high standard of proof to the evidence submitted in response to the statement of objections

– The judgment under appeal

78 In its examination of the plea alleging manifest errors of assessment in relation to the issue of market transparency, the Court of First Instance stated in paragraph 414 of the judgment under appeal, in particular, that 'the parties to the concentration cannot wait until the last minute before submitting evidence to the Commission with a view to refuting objections raised at the proper time by the Commission, since the Commission would then no longer be in a position to carry out the necessary investigations. In such a hypothetical situation, that evidence must at the very least be particularly reliable, objective, relevant and cogent if it is to be capable of validly refuting the objections raised by the Commission'.

79 The Court of First Instance also held, in paragraph 415 of the judgment under appeal, that the Commission cannot 'go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration, in particular where, as in the present case, those aspects constitute the crucial element on which the [contested decision] is based and where the data and assessments submitted by the parties to the concentration are diametrically opposite to the information gathered by the Commission during its investigation and also to the conclusions which it drew from that information'.

80 In addition, in a number of places in the judgment under appeal, among others in paragraphs 398, 428 and 451, the Court of First Instance stated that the Commission did not, following the response of the parties to the concentration to the statement of objections, carry out any new market investigations in order to test the validity of its altered assessment of the proposed concentration.

– Arguments of the parties

81 By the second ground of appeal, the appellants claim that the Court of First Instance committed an error of law in holding, in essence, that the Commission is required to undertake new market investigations following the response to the statement of objections. Its finding that the Commission committed errors of assessment and of reasoning because it did not undertake any new investigations is accordingly without foundation.

82 By the first part of the third ground, which should be considered together with the second ground, the appellants maintain that the Court of First Instance in effect suggested in paragraph 414 of the judgment under appeal that the exculpatory evidence submitted by the notifying parties in response to the statement of objections is subject to a higher standard of proof than that applied to the evidence cited by the Commission in the statement of objections.

83 In support of the appellants, the Commission argues, first, that in view of the tight deadlines that it faces under the Regulation it must be able to rely on the evidence submitted by the appellants in the reply to the statement of objections, since that reply forms part of the formal proceedings. Like the appellants, it observes that the Regulation provides for the imposition of fines or periodic penalty payments where incorrect or misleading information is submitted and gives the Commission the power to revoke a decision based on incorrect information for which one of the undertakings is responsible or which has been obtained by deceit.

84 Secondly, the Commission considers that paragraph 414 of the judgment under appeal, which sets out the approach followed by the Court of First Instance in paragraphs 415 to 457 of the judgment to a large body of evidence, reveals a number of related errors of law concerning, among other things, the probative value of the evidence submitted in response to the statement of objections.

85 Impala submits that the Court of First Instance took into account the strict timetables laid down by the Regulation. It merely found as a fact that the Commission had failed to carry out any market investigations whatsoever, without stating whether, after the hearing, market investigations should have been carried out. According to Impala, the Commission should have investigated the problem of transparency and discounts before issuing the statement of objections.

86 As regards the first part of the third ground of appeal, Impala submits that it is clear from

paragraph 414 of the judgment under appeal that the Court of First Instance referred to a hypothetical situation in which the parties to a concentration provide evidence at the very last minute, giving the Commission no opportunity to carry out the necessary investigations. It is also clear, according to Impala, from that paragraph of the judgment under appeal that it must be inferred that the Court of First Instance considered, not that the Commission should have investigated those matters after the hearing, but that it should have done so earlier in the formal proceedings.

– Findings of the Court

87 It is necessary at the outset to reject Impala's argument set out in paragraph 86 of this judgment that paragraph 414 of the judgment under appeal refers to a hypothetical situation. Such an interpretation of that paragraph is refuted by its very wording, which makes it clear that the observations of the Court of First Instance that are criticised in the first part of the third ground of appeal referred to the procedure leading to the adoption of the contested decision.

88 Next, as is clear from paragraphs 61 and 62 of this judgment, compliance with the rights of the defence prior to the adoption of any decision which may impact adversely on the undertakings concerned is imperative in procedures for the control of concentrations.

89 Accordingly, the notifying parties cannot, as a rule, be criticised for putting forward certain – potentially decisive – arguments, facts or evidence only in their arguments in reply to the statement of objections. It is only with that statement that the parties to the concentration can obtain detailed indications as to the reservations of the Commission in relation to their proposed concentration and as to the arguments and evidence on which it relies in that regard. As is apparent from paragraph 62 of this judgment, it flows from the notifying undertakings' rights of defence laid down in the second sentence of Article 18(3) of the Regulation and in Article 13(2) of the Implementing Regulation that those undertakings have the right to submit in their written and oral hearing following receipt of the statement of objections all material which they consider capable of refuting the Commission's objections and of leading it to approve their proposed concentration. Contrary to what the Court of First Instance suggests, in particular in paragraph 414 of the judgment under appeal, a line of argument put forward in reply to the statement of objections forms part of the investigation to be undertaken in the formal proceedings. Such a line of argument is not submitted out of time, but at the time laid down for that purpose in the procedure for the control of concentrations.

90 Furthermore, as is apparent from paragraph 49 of this judgment, the need for speed which characterises the general scheme of the Regulation requires the Commission to comply with strict time-limits for the adoption of the final decision.

91 In those circumstances, having regard in particular to the time constraints which arise by virtue of the procedural time-limits laid down by the Regulation, the Commission cannot, in principle, be required, in every individual case, to send, following communication of the objections and after hearing the undertakings concerned, requests for extensive information to numerous economic operators shortly before transmitting its draft decision to the Advisory Committee on concentrations, pursuant to Article 19 of the Regulation.

92 In addition, as the Commission observes, the reply to the statement of objections may concentrate on the elements which the notifying parties consider to be crucial to the outcome of the formal proceedings. Such elements may not have been regarded as crucial in the statement of objections. A failure to take those elements into account may be a component of the parties' criticisms of the Commission's preliminary assessment. Having regard to the requirements of the rights of the defence, the arguments of the notifying parties submitted in reply to the statement of objections cannot be subject to more demanding standards as to their probative value and their cogency than those imposed in relation to the arguments of competitors, customers and other third parties questioned by the Commission in the course of the administrative procedure or in the light of information provided by the notifying undertakings at a previous stage of the Commission's investigation.

93 Furthermore, when the Commission examines in its decision the arguments in defence submitted by the notifying undertakings and takes the opportunity to reconsider its provisional findings in the statement of objections, with a view to possibly departing from them, it does not 'delegate' the investigation to those undertakings. It should be pointed out in that regard that Articles 14 and 15 of the Regulation provide for the imposition of fines or periodic penalty payments where incorrect or misleading information is submitted and that Article 8(5)(a) of the Regulation gives the Commission

the power to revoke a decision which is based on incorrect information for which one of the undertakings concerned is responsible or which has been obtained by deceit.

94 It is true that the Commission is required to examine carefully the arguments of the parties to the concentration as regards their exactitude, completeness and cogency and to disregard them where justified doubts arise. It is also true that, under Article 3(1) of the Implementing Regulation, the notification of the proposed concentration must contain information that is correct and complete and that, in accordance with Article 11 of the Regulation, the notifying parties are bound to provide a response to any requests for information by the Commission which is complete, correct and submitted within the periods laid down, failing which, where the information in question was requested by decision, the Commission may, by virtue of Articles 14 and 15 of the Regulation, impose fines and periodic penalty payments. None the less, it remains the case that the Commission must, at the stage of the reply to the statement of objections, if it is not to undermine the rights of the defence of the notifying parties, apply the same criteria as those applied for the purposes of the examination of the arguments of third parties or those adopted at an earlier stage of its investigation, while being entitled to draw the appropriate consequences in the event that it should transpire at a very advanced stage of the procedure that the notification concerned does not comply with the requirements of Article 3(1) of the Implementing Regulation.

95 It follows that the Court of First Instance committed an error of law, first, in requiring, in essence, that the Commission apply particularly demanding requirements as regards the probative character of the evidence and arguments put forward by the notifying parties in reply to the statement of objections and, secondly, in finding that the lack of additional market investigations after communication of the statement of objections and the adoption by the Commission of the appellants' arguments in defence amounted to an unlawful delegation of the investigation to the parties to the concentration.

96 Nevertheless, that error of law does not vitiate the whole of the judgment under appeal, in particular that part of it which relates to the inadequacies of reasoning in the contested decision and the finding of the Court of First Instance in paragraph 377 of the judgment under appeal that 'the evidence, as mentioned in the [contested decision], does not support the conclusions drawn from it'. Further grounds of appeal thus fall to be examined.

The seventh ground of appeal, alleging an error of law in that the Court of First Instance relied on evidence that was not disclosed to the parties to the concentration

– The judgment under appeal

97 In paragraph 352 of the judgment under appeal, when examining price transparency and, in particular, the possibility that the retail market was monitored by the majors through weekly reports drawn up by their sales representatives, the Court of First Instance referred to a finding of the Commission in the contested decision that the appellants had set up a system of weekly reports which also included information on competitors. In paragraphs 356 to 360 of the judgment under appeal, the Court of First Instance referred additionally in that regard to a number of documents submitted by Impala, which were classified as confidential. Accordingly, paragraphs 356 to 360 of the version of the judgment under appeal published in the European Court Reports are simply marked '[*confidential*]'. Reference is also made to the weekly monitoring reports in paragraphs 389 and 451 of the judgment under appeal, with paragraph 389 containing a section marked '[*confidential*]' in the version published in the European Court Reports.

– Arguments of the parties

98 The appellants maintain that the Court of First Instance committed an error of law in relying, in paragraphs 356 to 360 of the judgment under appeal, on evidence that was not before the Commission when the contested decision was adopted and which had never been disclosed to them. According to the appellants, it is hard to imagine why the Court of First Instance would have discussed those documents over five paragraphs of its judgment and referred to them on two other occasions, in paragraphs 389 and 451 of the judgment under appeal, if it did not consider them relevant to the outcome of its review.

99 Impala submits that the information in question was mentioned during the hearing of 14 and 15 June 2004 in the presence of the parties and was provided to the Commission on a confidential basis after the hearing. According to Impala, the appellants were accordingly aware, as a result of the hearing, that that information concerned their own price monitoring practices in France and they

gave ample comments on that aspect of the pricing system during both the administrative procedure and the proceedings before the Court of First Instance. In any event, according to Impala, even if the appellants' complaint underlying this ground of appeal were correct, it cannot be taken into account since that evidence did not influence the outcome of the judgment under appeal.

– Findings of the Court

100 It is necessary, first of all, to reject Impala's argument set out in paragraph 99 of this judgment that the appellants were adequately informed of the content of the documents forming the subject-matter of paragraphs 356 to 360 of the judgment under appeal at the hearing before the Commission. Impala's written response to the appeal states that 'the information was mentioned during the … hearing … and was then provided to the Commission on a confidential basis post the hearing'. In those circumstances, it cannot be claimed that the content of those documents was disclosed in good time and in a manner which was sufficiently precise and clear to allow the appellants, if necessary, to reply effectively to the inferences which Impala drew from those documents before the Commission.

101 By virtue of Article 18(3) of the Regulation, the Commission may base its decisions taken under the Regulation only on objections on which the parties have been able to submit their observations. It follows that, since the appellants were unable to acquaint themselves in sufficient time with the tenor of the confidential documents in question, the Commission could not rely on those documents for the purposes of the contested decision.

102 The Court of First Instance therefore committed an error of law in relying, as a basis for the annulment of the contested decision, on documents submitted by Impala on a confidential basis, since the Commission itself could not have used them for the purposes of adopting that decision by reason of their confidential nature.

103 Without it being necessary to adjudicate on the question whether the taking into account of those documents could have had an impact on the outcome of the examination by the Court of First Instance of the arguments relating to manifest errors of assessment on the Commission's part, it need only be stated that the error of law identified in the seventh ground of appeal is not, in any event, capable of invalidating the finding of the Court of First Instance in paragraph 325 of the judgment under appeal that, in substance, the contested decision should be annulled on the ground of its inadequate reasoning. Further grounds of appeal thus fall to be examined.

The fifth ground of appeal, alleging an error of law in that the Court of First Instance misconstrued the relevant legal criteria applying to the creation or strengthening of a collective dominant position

– The judgment under appeal

104 In paragraphs 250 to 254 of the judgment under appeal, the Court of First Instance made the following observations as regards the concept of a collective dominant position:

'250 … The determination of the existence of a collective dominant position must be supported by a series of elements of established facts, past or present, which show that there is a significant impediment of competition on the market owing to the power acquired by certain undertakings to adopt together the same course of conduct on that market, to a significant extent, independently of their competitors, their customers and consumers.

251 It follows that, in the context of the assessment of the existence of a collective dominant position, although the three conditions defined by the Court of First Instance in [Case T-342/99] *Airtours* v *Commission* [[2002] ECR II-2585], which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also necessary, they may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.

252 Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.

253 It follows that, in the present case, the alignment of prices, both gross and net, over the last six years, even though the products are not the same (each disc having a different content), and also the fact that they were maintained at such a stable level, and at a level seen as high in spite of a significant fall in demand, together with other factors (power of the undertakings in an oligopoly situation, stability of market shares, etc.), as established by the Commission in the [contested decision], might, in the absence of an alternative explanation, suggest, or constitute an indication, that the alignment of prices is not the result of the normal play of effective competition and that the market is sufficiently transparent in that it allowed tacit price coordination.

254 However, as [Impala] has based its line of argument on an incorrect application of the various conditions that must be satisfied in order for there to be a collective dominant position, as defined in *Airtours* v *Commission* … and, in particular, the condition relating to market transparency, rather than on the theory that a finding of a common policy over a long period, together with the presence of a series of other factors characteristic of a collective dominant position, might, in certain circumstances and in the absence of an alternative explanation, suffice to demonstrate the existence of a dominant position, as opposed to the creation of such a position, without its being necessary positively to establish market transparency, the Court will confine itself, in its examination of the pleas in law put forward, to ascertaining that the [contested decision] properly applied the conditions defined in *Airtours* v *Commission*. Without its even being necessary to consider whether the opposite approach would lead the Court to step outside the framework of the dispute as defined by the parties, or whether it would merely constitute an application of the law in the context of a plea raised by [Impala], the Court must follow the approach thus outlined, in view of the *inter partes* principle, since that issue has not been discussed before the Court.'

105 Paragraph 309 of the judgment under appeal reads as follows:

'Furthermore, it follows from the last sentence of recital 77 to the [contested decision] that discounts are not capable of really affecting the transparency of the market as regards prices resulting from, in particular, public list prices, since it is stated that "[i]f a significant deviation from pricing policies was being implemented by the majors through the grant of discounts, this deviation would have been reflected in their average net prices".'

106 As regards the question of the impact of variations in discounts on the transparency of the market, the Court of First Instance stated in particular in paragraph 420 of the judgment under appeal, that 'as [Impala] observed, the differences in the ranges of discounts over time could be the result of differences in performance and do not preclude the discounts being based on a known set of rules'.

107 In paragraph 427 of the judgment under appeal, the Court of First Instance stated that certain evidence on which the Commission relied 'do[es] not preclude the possibility that [variations of discount by customer] may, at least for an industry professional, be explained quite readily on the basis of a number of general or specific rules governing the grant of discounts'.

108 Paragraph 428 of the judgment under appeal reads as follows:

'Although, as the Commission emphasised, [Impala] admittedly did not explain precisely what those various rules governing the grant of campaign discounts are, or, according to the Commission, referred to too high a number of such rules, which would render their application complex and therefore not particularly transparent, the fact remains that, as already stated, the Commission did not carry out an investigation in the market in that regard or, at least, did not adduce any evidence of the opacity of campaign discounts, apart from the tables drawn up by the parties to the concentration, which, in addition to their imperfections, were in any event intended solely to establish the existence of certain variations in campaign discounts but do not demonstrate that the explanation for those variations might not be more or less readily apparent to an industry professional. …'

109 In paragraph 429 of the judgment under appeal, the Court of First Instance stated that, 'although the combination of variables necessarily has the effect of increasing the hypothetical situations, the Commission has not demonstrated that the exercise would be rendered excessively difficult for a market professional'.

– Arguments of the parties

110 The appellants maintain that, in holding that the Commission had committed manifest errors of assessment and had inadequately reasoned the contested decision as regards market transparency, the Court of First Instance misconstrued the position under Community law as regards the concept of a collective dominant position. According to the appellants, the test of market transparency as an indication of a collective dominant position, as laid down by the Court of First Instance in its judgment in *Airtours* v *Commission*, and which the Court of First Instance purported to follow in the judgment under appeal, required the Commission to establish, first, that the majors had a plausible mechanism for monitoring each other's net wholesale prices and, secondly, given that the contested decision was essentially based on the existence of tacit collusion, that the majors had actually applied such a monitoring mechanism.

111 According to the appellants, the Court of First Instance in practice applied a watered-down test for establishing market transparency, as is apparent in particular from paragraph 251 of the judgment under appeal, in that it inferred that transparency from a number of factors which, as a matter of law, are not sufficient to establish the required degree of transparency. In particular, by ignoring the relevance of discounts in assessing transparency at the level of net wholesale prices, the Court of First Instance committed an error of law in failing to identify a method by which significant changes to the net wholesale prices of the other majors could be observed in a sufficiently precise and timely manner to identify deviation from any tacitly agreed price levels with precision and in good time.

112 According to the appellants, a hypothesis of pre-existing tacit collusion would imply that the appellants and the other majors had actually monitored their net wholesale prices and had sufficiently precise and timely information regarding the changes in each other's net wholesale prices. Neither the Court of First Instance, nor Impala, nor the Commission could identify a mechanism by which the majors could actually monitor net wholesale prices or prove that such a mechanism had been used.

113 Instead, according to the appellants, the Court of First Instance applied an incorrect test in assessing the degree of transparency required for a finding of collective dominance on the recorded music market in question. It considered elements that are irrelevant to the criterion relating to market transparency, while disregarding elements that are clearly pertinent to that issue. In that last respect, the appellants submit that the Court of First Instance committed errors of law by, in particular:

– inferring, in paragraph 309 of the judgment under appeal, transparency of discounts from their impact on average net prices;

– dismissing, in paragraph 429 of the judgment under appeal, the relevance of complex pricing structures when assessing transparency; and

– dismissing, in paragraphs 298, 306, 310 and 395 of the judgment under appeal, the relevance of price variations for assessing transparency.

114 Impala suggests first of all that the fifth ground of appeal represents an attempt by the appellants to reopen the factual assessments made by the Court of First Instance, rather than alleging errors of law.

115 In the alternative, Impala submits that the Court of First Instance applied the correct test for establishing market transparency in the judgment under appeal, namely the test laid down in paragraph 62 of that court's judgment in *Airtours* v *Commission*. In that regard, Impala contends in particular that the only factor that the Commission had found to be 'less' transparent was that of campaign discounts. However, the Court of First Instance found that the underlying evidence on which the Commission based its finding did not support that finding, despite the Court of First Instance having undertaken an exhaustive examination of that evidence. The true position is that the fifth ground of appeal does not concern the legal test for market transparency, but rather the assessment by the Court of First Instance of the factual elements that may establish that transparency. According to Impala, the judgment under appeal does not misapply the test laid down in paragraph 62 of the judgment of the Court of First Instance in *Airtours* v *Commission*, since that court neither applied a watered-down test nor did it fail to consider transparency at the required level.

116 Impala also challenges the arguments summarised in paragraph 113 of this judgment.

– Findings of the Court

117 It is apparent from the Court's case-law that the question whether the Court of First Instance applied the correct legal standard when examining the evidence is a question of law, which is amenable, as such, to judicial review on appeal (see *Sumitomo Metal Industries and Nippon Steel* v *Commission*, paragraph 40). In the present case, the arguments of the appellants set out in paragraphs 110 to 112 of this judgment are accordingly admissible on appeal.

118 As regards the three specific criticisms summarised in paragraph 113 of this judgment, only the second and the third are admissible. The first of those criticisms does not relate to the relevance of a particular element relied on in order to establish that a collective dominant position existed, but seeks, in reality, a reappraisal of the facts which, under the settled case-law referred to in paragraph 29 of this judgment, falls, in principle, outside the jurisdiction of the Court of Justice on appeal (see also to that effect, by way of analogy, Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-0000, paragraphs 34 and 35). By contrast, the second and third specific criticisms invoke errors of law.

119 As regards the merits of this ground of appeal, it should be noted at the outset that the Court has already held, in substance, that the concept of a collective dominant position is included in that of 'dominant position' within the meaning of Article 2 of the Regulation (see, to that effect, *Kali & Salz*, paragraphs 166 and 178). In that regard, the existence of an agreement or of other links in law between the undertakings concerned is not essential to a finding of a collective dominant position. Such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question (see Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I–1365, paragraph 45).

120 In the case of an alleged creation or strengthening of a collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it will lead to a situation in which effective competition in the relevant market is significantly impeded by the undertakings which are parties to the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market (see *Kali & Salz*, paragraph 221) in order to profit from a situation of collective economic strength, without actual or potential competitors, let alone customers or consumers, being able to react effectively.

121 Such correlative factors include, in particular, the relationship of interdependence existing between the parties to a tight oligopoly within which, on a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct on the market in such a way as to maximise their joint profits by increasing prices, reducing output, the choice or quality of goods and services, diminishing innovation or otherwise influencing parameters of competition. In such a context, each operator is aware that highly competitive action on its part would provoke a reaction on the part of the others, so that it would derive no benefit from its initiative.

122 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

123 Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must

therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

124 The conditions laid down by the Court of First Instance in paragraph 62 of its judgment in *Airtours* v *Commission*, which that court concluded, in paragraph 254 of the judgment under appeal, should be applied in the dispute before it, are not incompatible with the criteria set out in the preceding paragraph of this judgment.

125 In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.

126 In that regard, the assessment of, for example, the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to. In that last respect, it is necessary, in order to analyse the sustainability of a purported tacit coordination, to take into account the monitoring mechanisms that may be available to the participants in the alleged tacit coordination in order to ascertain whether, as a result of those mechanisms, they are in a position to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in that coordination is evolving.

127 As regards the present case, the appellants submit that, even though the Court of First Instance stated in paragraph 254 of the judgment under appeal that it was following the approach adopted in its judgment in *Airtours* v *Commission*, in practice, it committed an error of law in inferring the existence of a sufficient degree of transparency from a number of factors which were not, however, relevant to a finding of an existing collective dominant position. In that context, the appellants object in particular to the fact that the Court of First Instance indicated in paragraph 251 of the judgment under appeal that the conditions laid down in paragraph 62 of the judgment in *Airtours* v *Commission* could ‘in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position’.

128 In this regard, as the Commission observed at the hearing, objection cannot be taken to paragraph 251 of itself, since it constitutes a general statement which reflects the Court of First Instance’s liberty of assessment of different items of evidence. It is settled case-law that it is, in principle, for the Court of First Instance alone to assess the value to be attached to the items of evidence adduced before it (see, inter alia, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I–1981, paragraph 66, and Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I–4549, paragraph 50).

129 Similarly, the investigation of a pre-existing collective dominant position based on a series of elements normally considered to be indicative of the presence or the likelihood of tacit coordination between competitors cannot therefore be considered to be objectionable of itself. However, as is apparent from paragraph 125 of this judgment, it is essential that such an investigation be carried out with care and, above all, that it should adopt an approach based on the analysis of such plausible coordination strategies as may exist in the circumstances.

130 In the present case, the Court of First Instance, before which Impala raised arguments relating, in particular, to the parts of the contested decision relating to market transparency, did not carry out its analysis of those parts by having regard to a postulated monitoring mechanism forming part of a plausible theory of tacit coordination.

131 It is true that the Court of First Instance referred in paragraph 420 of the judgment under appeal to the possibility of a ‘known set of rules’ governing the grant of discounts by the majors. However – as the appellants rightly submit in the context of the second specific criticism mentioned in paragraph 113 of this judgment, which relates to the question whether certain discount variations

established by the Commission in the contested decision were liable to call into question the possibility of adequate monitoring of mutual compliance with the terms of any tacit coordination there may have been – the Court of First Instance was content to rely, in paragraphs 427 to 429 of the judgment under appeal, on unsupported assertions relating to a hypothetical industry professional. In paragraph 428 of the judgment, the Court of First Instance itself acknowledged that Impala, the applicant before that court, 'admittedly did not explain precisely what those various rules governing the grant of campaign discounts are'.

132 It must be pointed out in that regard that Impala represents undertakings which, even if they are not members of the oligopoly formed by the majors, are active on the same markets. In those circumstances, it is clear that the Court of First Instance disregarded the fact that the burden of proof was on Impala in relation to the purported qualities of such a hypothetical 'industry professional'.

133 In the light of the above and without there being any need to adopt a position on the third specific criticism mentioned in paragraph 113 of this judgment, it must be held that, in misconstruing the principles which should have guided its analysis of the arguments raised before it concerning market transparency in the context of an allegation of a collective dominant position, the Court of First Instance committed an error of law.

134 That error vitiates the part of the judgment under appeal which concerns the examination by the Court of First Instance of the arguments relating to the manifest errors of assessment committed by the Commission, including the finding of that court in paragraph 377 of the judgment under appeal. However, it is not, of itself, capable of invalidating that court's finding in paragraph 325 of the judgment under appeal that, in substance, the contested decision had to be annulled because it was inadequately reasoned. Further grounds of appeal thus fall to be examined.

The fourth ground of appeal, alleging an error of law in that the Court of First Instance exceeded the scope of its role in carrying out judicial review

– The judgment under appeal

135 In a number of paragraphs in the judgment under appeal, for example, in paragraphs 347 and 361, the Court of First Instance used expressions such as 'a high level of transparency of prices' and 'a high degree of transparency on the market'. Moreover, in paragraph 299 of the judgment under appeal, the Court of First Instance described the finding in the contested decision that list prices were 'rather aligned' as being 'a prudent conclusion to say the least, as the alignment was in fact very marked'. In paragraph 307 of the judgment, the Court of First Instance held that 'the variation in the general levels of invoice discounts applied by the parties to the concentration, as referred to at recital 78 to the [contested decision], is very low'. In paragraph 317 of the judgment under appeal, the Court of First Instance inferred from the contested decision that 'campaign discounts have only a limited impact on prices'.

136 In paragraph 425 of the judgment under appeal, the Court of First Instance stated, as regards the contested decision, that 'the calculation of the differential between minimum and maximum discounts by customer … made for each of the parties to the concentration was carried out incorrectly'. In paragraph 427 of the judgment, the Court of First Instance stated that the data supplied by the parties to the concentration were 'of doubtful relevance'.

137 In paragraph 434 of the judgment under appeal, the Court of First Instance held, in particular, as follows:

'… the study drawn up by the economic advisers to the parties to the concentration does not present data that are sufficiently reliable, relevant and comparable … While it is indeed probable that the different types of retailer (supermarkets, independents, specialist chains, etc.) apply different mark-up policies, and that there are differences within each category of operators, and even differences for each individual operator, according to the types of album or their degree of success, it is very unlikely, on the other hand, and the study contains no data in that regard, that a retailer will apply a different sales policy for the same type of album. …'

– Arguments of the parties

138 The appellants, supported in that regard by the Commission, submit that the Court of First Instance exceeded the scope of its role in carrying out judicial review, in breach of Article 230 EC and settled

case-law, in substituting its own assessment for that of the Commission, without proving the existence of manifest errors of assessment vitiating the contested decision and without asking for a report from an economic expert to be obtained.

139 Moreover, in its examination of the contested decision, the Court of First Instance itself committed manifest errors of assessment and fundamentally misconstrued the evidence before it as regards essential parts of the case, including in particular the relevance, the complexity and the opacity of discounts.

140 Furthermore, the appellants consider that in paragraphs 425, 427 and 434 of the judgment under appeal the Court of First Instance also distorted some of the evidence.

141 Impala considers that this ground of appeal represents, at least to a significant extent, an attempt to reopen the assessment of the facts by the Court of First Instance, without any proof on the part of the appellants that that court misconstrued the evidence before it.

142 In the alternative, Impala submits that the Court of First Instance had the relevant case-law concerning the scope of its role in carrying out review in mind when it considered the contested decision, in view of its reference in paragraph 328 of the judgment under appeal to paragraph 39 of the judgment in *Commission* v *Tetra Laval*, and that it did not therefore exceed the scope of its role in carrying out judicial review.

– Findings of the Court

143 It is necessary at the outset to reject Impala's argument alleging the inadmissibility of the fourth ground of appeal. Contrary to what Impala contends, by this ground, the appellants do not merely challenge the assessment of the facts at first instance, but invoke questions of law which are admissible on appeal.

144 As regards the substance, it should first of all be noted that the Commission has a margin of assessment with regard to economic matters for the purposes of the application of the substantive rules of the Regulation, in particular Article 2. It follows that the review by the Community judicature of a Commission decision relating to concentrations is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment (see *Kali & Salz*, paragraphs 223 and 224, and *Commission* v *Tetra Laval*, paragraph 38).

145 That being so, while the Court of First Instance must not substitute its own economic assessment for that of the Commission for the purposes of applying the substantive rules of the Regulation, that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, *Commission* v *Tetra Laval*, paragraph 39, and *Spain* v *Lenzing*, paragraphs 56 and 57).

146 Accordingly, as regards the present case, in so far as the Court of First Instance carried out an in-depth examination of the evidence underlying the contested decision when considering the arguments raised before it, it acted in conformity with the requirements of the case-law set out in paragraphs 144 and 145 of this judgment.

147 Nevertheless, that finding is not, of itself, sufficient to reject the fourth ground of appeal. As well as the question whether the Court of First Instance exceeded the scope of its role in carrying out judicial review as regards the intensity of its review of the factual basis of the contested decision, the appellants also maintain, as is mentioned in paragraph 139 of this judgment, that, in examining the factors underpinning the contested decision, the Court of First Instance itself committed manifest errors of assessment and fundamentally misconstrued the evidence before it.

148 The latter claims overlap partially with other grounds put forward in this appeal, namely, in the first place, the first, second and seventh grounds, together with the first part of the third ground, relating to the manner in which the Court of First Instance dealt with some of the evidence before it and, in the second place, the fifth ground, alleging that the Court of First Instance misconstrued the legal criteria applying to a collective dominant position.

149 It is sufficient to hold in that respect, as is apparent from paragraphs 95, 102 and 133 of this judgment, that, in its examination of the line of argument based on the existence of manifest errors of assessment, the Court of First Instance committed errors of law in relation to both the manner in which some of the evidence was dealt with and the legal criteria applying to a collective dominant position arising from tacit coordination.

150 Consequently, without it being necessary to adjudicate either on the appellants' claims alleging distortion of the evidence or on the question whether the Court of First Instance in fact substituted its own economic assessment in the judgment under appeal for that of the Commission, it must be held that at least that part of the judgment under appeal dealing with the examination of the arguments alleging the existence of manifest errors of assessment is vitiated by errors of law. As regards that part of the judgment under appeal which concerns the inadequate reasoning of the contested decision, it remains necessary to address the sixth ground of appeal.

The sixth ground of appeal, alleging an error of law in that the Court of First Instance applied an incorrect standard of reasoning as regards decisions approving a concentration

– The judgment under appeal

151 In paragraphs 255 to 276 of the judgment under appeal, the Court of First Instance summarised the relevant elements of the contested decision for the purpose of examining the first plea raised before it. Paragraph 275 of the judgment reads as follows:

'It follows from the foregoing that [it] was on the basis of product homogeneity, market transparency and also the use of retaliation that the Commission concluded that there was no collective dominant position.'

152 In the judgment under appeal, the Court of First Instance reviewed various sections of the contested decision in order to determine whether it contained reasoning which was adequate to make a finding of a lack of transparency of the market in question, and its reply in each case decided the issue in the negative.

153 The Court of First Instance first of all examined the section of the contested decision which dealt specifically with market transparency. In that regard, it stated in particular in paragraphs 289, 290 and 294 of the judgment under appeal as follows:

'289 As regards the section on transparency, it must be observed, by way of preliminary remark, that it contains only three recitals, although according to the [contested decision], and still more so according to the position defended by the Commission in its written submissions to the Court, in the present case transparency is the essential, and indeed the only, ground for the assertion that there is no collective dominant position on the markets for recorded music. It should also be noted that it is not concluded in that section that the market is not transparent, or even that it is not sufficiently transparent to allow tacit collusion. At the very most, it is stated, first, at recital 111 *in fine*, that the need to carry out monitoring at album level, in particular for campaign discounts, "could reduce transparency in the market and may make tacit collusion more difficult" and, second, at recital 113 *in fine*, that "[h]owever, the Commission has not found sufficient evidence that, by monitoring retail prices or by contacts with retailers, the majors have overcome in the past the deficits as regards the transparency of discounts, in particular campaign discounts as described for the five larger Member States". Clearly, such vague assertions, which fail to provide the slightest detail of, in particular, the nature of campaign discounts, the circumstances in which such discounts might be applied, their degree of opacity, their size or their impact on price transparency, cannot support to the requisite legal standard the finding that the market is not sufficiently transparent to allow a collective dominant position.

290 Next, it appears that, apart from the two extracts mentioned above, all the factors set out at recitals 111 to 113 to the [contested decision], far from demonstrating the opacity of the market, show, on the contrary, that the market was transparent.

...

294 It follows from the foregoing that, in the section of the [contested decision] dealing with the examination of transparency, the Commission not only did not conclude that the market was opaque or not sufficiently transparent to allow a collective dominant position, but, moreover,

mentioned only factors capable of giving rise to great transparency in the market and of facilitating the monitoring of compliance with collusion, with the sole exception of the rather limited and unsubstantiated assertion that campaign discounts could reduce transparency and make tacit collusion more difficult. It must therefore be stated that that section could clearly not, in itself, be considered to support to the requisite legal standard the assertion that the market was not sufficiently transparent.'

154 The Court of First Instance next examined the reasoning set out in the contested decision relating to the possibility of a 'common understanding on prices' between the majors and analysed that reasoning in paragraphs 295 to 324 of the judgment under appeal, by seeking evidence that would explain the alleged insufficiency of transparency on the markets in question. In that regard, the Court of First Instance made, among others, the following findings:

'315 It is thus apparent that the only element of opacity found in the contested decision consists in the assertion, at recital 80 (and at the corresponding recitals for the other large countries), that "[h]owever, it appears that campaign discounts are less transparent than file discounts and that their monitoring requires also a careful observation of promotional developments on the retail market".

...

318 It should also be observed that the [contested decision] does not state that the market is opaque, or even that it is not sufficiently transparent to allow coordination of prices, but at the most that campaign discounts are less transparent, although the [contested decision] does not provide the slightest information as regards their nature, the circumstances in which they are granted or their actual importance for net prices, or their impact on the transparency of prices.

319 It should further be borne in mind that, as stated above, the Commission described in the [contested decision] numerous elements and factors which favour the transparency of the market and facilitate the monitoring of compliance with a collusive arrangement.

320 It follows that the few assertions relating to campaign discounts contained in the section of the [contested decision] dealing with the examination of the coordination of prices in the large countries, in so far as they are imprecise, unsupported, and indeed contradicted by other observations in the [contested decision], cannot demonstrate the opacity of the market or even of campaign discounts. Those assertions are confined, moreover, to indicating that campaign discounts are less transparent than file discounts, but do not explain how they would be relevant for the transparency of the market and do not make it possible to understand how they in themselves might compensate for all the other factors of transparency of the market identified in the [contested decision] and thus eliminate the transparency necessary for the existence of a collective dominant position.

...

324 It follows that the section dealing with the smaller countries, too, contains no reasoning for the finding that the market is not transparent on account of the campaign discounts. In any event, the situation existing in the smaller countries cannot constitute a valid ground for the finding relating to the degree of transparency in the markets in the large countries.

325 It follows from all of the foregoing that the complaint alleging insufficient reasoning for the finding relating to the transparency of the market is well founded, which in itself is reason to annul the [contested decision].'

155 Paragraph 411 of the judgment under appeal reads as follows:

'In its defence, the Commission did, admittedly, claim that it examined the other majors' discounts, but that as those figures could not be disclosed to the parties to the concentration, they could not be included in the [contested decision]. However, that argument cannot be followed.'

156 Paragraph 530 of the judgment under appeal states as follows:

'It follows from recital 157 to the [contested decision], and in particular from the final sentence thereof, that the Commission's conclusion that the concentration does not represent a sufficiently significant change to entail the probable creation of a collective dominant position is expressly based on the conditions relating to the transparency of the market and to the retaliatory measures.'

– Arguments of the parties

157 The appellants submit, as their principal argument, that the Community system of control of concentrations, and more specifically Article 10(6) of the Regulation, precludes the Court of First Instance from annulling a decision approving such a concentration on the ground of inadequate reasoning.

158 In the alternative, the appellants submit that the Court of First Instance applied an excessively high standard of reasoning that is inconsistent with settled case-law and fails to take account of the particular context and nature of proceedings for the control of concentrations. In the first place, the Court of First Instance was wrong to require the Commission to explain its departure from the statement of objections.

159 In the second place, the Court of First Instance erred in its review of the reasoning of the contested decision in failing to take account of the particular context of a decision approving a concentration. In that regard, the appellants put forward a number of arguments. First, they consider that it is necessary to impose less stringent requirements as regards the reasoning of a decision approving a concentration than as regards a decision prohibiting a concentration. Secondly, the Court of First Instance wrongly failed to review the reasoning of the contested decision from the perspective of knowledgeable industry professionals. Thirdly, the short timescale separating the statement of objections from a decision approving a concentration calls for a measure of restraint in the review of the reasoning of such a decision. Fourthly, the fact that the appellants are entitled to implement the notified concentration pleads in favour of not annulling decisions approving a concentration lightly on the ground that they are inadequately reasoned. Fifthly, the Court of First Instance committed an error of law in paragraph 411 of the judgment under appeal in requiring the Commission to publish details on pricing and discounting, taking into account their confidential and sensitive nature.

160 In any event, contrary to the conclusions of the Court of First Instance, the appellants contend that settled case-law indicates that the contested decision is adequately reasoned since it permitted Impala to ascertain the reasons underlying the decision and the Court of First Instance to exercise its power of review. In that regard, the appellants argue, among other things, that the finding of the Court of First Instance that the contested decision was inadequately reasoned sits ill with its conclusion that the decision was vitiated by manifest errors of assessment.

161 Lastly, the appellants submit that the review by the Court of First Instance of the reasoning of the contested decision is vitiated by the application of an incorrect standard of proof, the failure to observe the proper scope of judicial review and the application of an incorrect test as regards transparency.

162 Without prejudice to its general plea of inadmissibility, Impala considers, first, that the appellants cannot make a general rule out of the exception clause that is Article 10(6) of the Regulation. Secondly, according to Impala, the appellants are incorrect in maintaining, in substance, that Article 253 EC may or may not be applied according to whether a decision relating to a proposed concentration is negative or positive. Thirdly, Impala submits that the degree of reasoning required depends on the context and legal framework within which a particular measure is adopted. It is entirely consistent with this principle that the type of reasoning required should be adapted to the type of case involved. The present case is one in which the formal proceedings were opened and which involved both substantial third-party opposition and a statement of objections.

163 As regards the appellants' line of argument put forward in the alternative concerning the standard of reasoning applied by the Court of First Instance, Impala contends that the Court merely mentioned extracts from the statement of reasons in order to emphasise the inadequacy of the reasoning of the contested decision and the inconsistencies in it and that that court's finding that the reasoning in the contested decision was inadequate was based on the reasoning set out in it and not on its inadequacy as compared with the reasoning of the statement of objections. Impala also submits that the Court of First Instance did not disregard the context of proceedings for the control of concentrations.

164 Moreover, it does not follow from the fact that the Court of First Instance was able to make an in-depth review of the contested decision that the reasoning of that decision was adequate. According to Impala, it is quite clear that the Court of First Instance was unable to understand in particular why the Commission, when the evidence consistently pointed to there being sufficient transparency

to support a finding of collective dominance, nevertheless concluded that there was insufficient evidence of transparency because campaign discounts were less transparent than other kinds of discounts. In Impala's view, the real reasons for the contested decision remain unknown.

165 As regards the appellants' line of argument summarised in paragraph 161 of this judgment, Impala contends that the observations of the Court of First Instance on certain aspects of the reasoning of the contested decision are based on a thorough examination of the Commission's analysis but, above all, on the internal inconsistencies within the contested decision itself.

– Findings of the Court

166 It is clear from settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I–1719, paragraph 63; Case C-42/01 *Portugal* v *Commission* [2004] ECR I–6079, paragraph 66; and Case C-390/06 *Nuova Agricast* [2008] ECR I-0000, paragraph 79).

167 The institution which adopted the measure is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections (Joined Cases C-465/02 and C–466/02 *Germany and Denmark* v *Commission* [2005] ECR I–9115, *'Feta'*, paragraph 106). Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see Case 16/65 *Schwarze* [1965] ECR 877, 888, and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I–395, paragraph 16). Thus, the Commission does not infringe its duty to state reasons if, when exercising its power to examine concentrations, it does not include precise reasoning in its decision as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of the concentration (see, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 64). Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations.

168 It follows that where the Commission declares a concentration to be compatible with the common market on the basis of Article 8(2) of the Regulation the requirement to state reasons is satisfied when that decision clearly sets out the reasons for which the Commission considers that the concentration in question, where appropriate following modification by the undertakings concerned, does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

169 In that regard, while it is true that the Commission is not obliged, in the statement of reasons for decisions adopted under the Regulation, to take a position on all the information and arguments relied on before it, including those which are plainly of secondary importance to the appraisal it is required to undertake, it none the less remains the case that it is required to set out the facts and the legal considerations having decisive importance in the context of the decision. The reasoning must in addition be logical and must not disclose any internal contradictions (see to that effect, by way of analogy, Case 13/60 *Geitling and Others* v *High Authority* [1962] ECR 83, 117; Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 78; Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805, paragraph 26; and Case 28/87 *Arendt* v *Parliament* [1988] ECR 2633, paragraphs 7 and 8).

170 It is in the light of these principles that the objections raised by the appellants under the sixth ground of appeal should be examined.

171 As their principal argument, the appellants submit that a Commission decision approving a concentration cannot be annulled on the ground of inadequate reasoning. They rely in particular in this regard on Article 10(6) of the Regulation.

172 It follows from paragraph 49 of this judgment that the purpose of that provision is to ensure legal certainty where, exceptionally, the Commission has not adopted a decision within the prescribed period. Thus, the undertakings concerned are free to implement their concentration as soon as approval is deemed to have been given.

173 As Impala observes, the line of argument of the appellants based on Article 10(6) of the Regulation has the result that decisions approving concentrations do not have to be reasoned at all, as they cannot be challenged on the ground of lack of a statement of reasons.

174 It should be noted that an inadequate statement of reasons in breach of Article 253 EC constitutes an infringement of essential procedural requirements for the purposes of Article 230 EC and is, moreover, a plea which may, and even must, be raised by the Community judicature of its own motion (see, to that effect, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I–983, paragraph 24). Furthermore, according to settled case-law, where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law (Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075, paragraph 22 and the case-law cited). It follows that Article 10(6) of the Regulation must be interpreted and applied in the light of Articles 230 EC and 253 EC.

175 Thus, as is apparent from paragraph 49 of this judgment, Article 10(6) constitutes an exception to the general scheme of the Regulation, which is laid down in particular in Articles 6(1) and 8(1) thereof, according to which the Commission is to rule expressly on the concentrations which are notified to it, whether its decision be a negative or a positive one. It follows that, not only can Article 10(6) of the Regulation not form the basis of a general presumption that concentrations are compatible with the common market, it also cannot serve as a basis for an exception to the rule that a decision approving such a concentration may be challenged on the ground of infringement of the duty to state reasons. The legitimate need for legal certainty in exceptional situations, which that provision reflects, cannot go so far as to exclude decisions relating to concentrations in whole or in part from review by the Community judicature.

176 The appellants’ line of argument based on Article 10(6) of the Regulation must therefore be rejected.

177 In the alternative, the appellants submit, among other things, that since the contested decision allowed Impala to ascertain the reasons for the approval at issue and the Court of First Instance to exercise its power of judicial review, that court did not observe the settled case-law of the Community judicature on the requirement to state reasons.

178 In that regard, as is apparent from paragraph 166 of this judgment, it is settled case-law, first, that the purpose of the statement of reasons required by Article 253 EC is to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review and, secondly, that the requirements to be satisfied by the statement of reasons must be appraised by reference to the nature of the measure at issue and the context in which it was adopted (see also Case 32/86 *SISMA* v *Commission* [1987] ECR 1645, paragraph 8; Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraph 14; Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I–1809, paragraphs 39 to 41; Case C-114/00 *Spain* v *Commission* [2002] ECR I–7657, paragraphs 62 and 63; Case C-195/99 P *Krupp Hoesch* v *Commission* [2003] ECR I-10937, paragraph 110; and *Aalborg Portland and Others* v *Commission*, paragraph 372).

179 In the present case, it is true that a certain imbalance in the contested decision between the presentation of the elements tending to plead in favour of there being sufficient transparency and the presentation of the impact of the campaign discounts, which plead, according to the Commission, against such transparency, may appear unfortunate. Nevertheless, in the light, first, of the context in which the contested decision was adopted, marked in particular by the short space of time between the written reply to the statement of objections and the hearing before the Commission, on the one hand, and the end of the formal proceedings, on the other, and, secondly, the requirements laid down by the case-law referred to in paragraphs 166 to 169 of this judgment,

in particular paragraphs 166 and 167, the Court of First Instance could not, without committing an error of law, find that the Commission had failed to comply with the duty to provide an adequate statement of reasons for the contested decision (see, by way of analogy, Joined Cases 275/80 and 24/81 *Krupp Stahl* v *Commission* [1981] ECR 2489, paragraph 13, and Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 21).

180 In the first place, the contested decision showed the reasoning followed by the Commission in a way which subsequently allowed a party such as Impala to challenge its validity before the competent Court. It would be unreasonable in that regard to require, as did the Court of First Instance in paragraph 289 of the judgment under appeal, a detailed description of each of the factors underpinning the contested decision, such as the nature of campaign discounts, the circumstances in which they might be applied, their degree of opacity, their size or their specific impact on price transparency (see to that effect, by way of analogy, Case C–286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 59 to 61, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-0000, paragraph 108). That is all the more the case because Impala was, as is apparent in particular from paragraphs 7 and 10 of the judgment under appeal, closely associated with the formal proceedings (see, by way of analogy, Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 29, and Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 50) and that it was, in addition, perfectly able to challenge the validity of the Commission's substantive appraisal in the contested decision before the Court of First Instance.

181 In the second place, as is apparent from, among others, paragraphs 275, 289 and 530 of the judgment under appeal, the Court of First Instance was aware of the reasons for which the Commission decided to approve the concentration at issue. It also devoted numerous paragraphs in its judgment to an analysis of whether those reasons were well founded. It must be pointed out in that regard that the duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue (see *Commission* v *Sytraval and Brink's France*, paragraph 67, and Case C–310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48). The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect. It cannot therefore be claimed that it was impossible for the Court of First Instance to exercise its power of judicial review (see, by way of analogy, *Chronopost and La Poste* v *UFEX and Others*, paragraph 112).

182 The appellants' sixth ground of appeal should therefore be upheld, without it being necessary to adjudicate on the objections referred to in paragraphs 158, 159 and 161 of this judgment.

183 Having regard to the above considerations, the present appeal must be declared to be well founded.

The alleged cross-appeal

184 The Commission's response contains a separate section containing 'additional observations' on the 'essential grounds' of the contested decision. In that section, the Commission contends that the Court of First Instance was wrong to characterise the Commission's findings in relation to the retaliatory measures as essential grounds of the decision. In the Commission's view, were it to be held in this appeal that the findings made in the contested decision in relation to lack of market transparency were not incorrect in law, the decision should be declared to be lawful irrespective of whether it contains errors of law concerning the retaliatory measures.

185 Impala interpreted the arguments contained in the Commission's response as a cross-appeal and replied to them in a separate document of 23 March 2007, relying on Article 117(2) of the Rules of Procedure of the Court. Subsequently, the parties were allowed to lodge further documents on this matter, the last of which was lodged at the Court Registry on 16 July 2007, while at the same time the question was left open whether Impala was entitled to invoke Article 117(2).

186 Under Article 117(2) of the Rules of Procedure, for a submission to be regarded as a cross-appeal, the party which relies on it must seek to set aside, in whole or in part, the judgment under appeal on a plea in law which was not raised in the appeal. Whether that is the case here is to be

determined by reference to the wording, aim and context of the passage in question in the Commission's response.

187 It must be emphasised in that regard that nowhere in its response does the Commission use the expression 'cross-appeal'. Moreover, the Commission itself clearly stated during these proceedings, for instance at the hearing, that it had no intention of bringing a cross-appeal by its 'additional observations'.

188 In those circumstances, it must be held that those observations do not constitute a cross-appeal. Contrary to what Impala submits, there is accordingly no need to adopt a position with regard to them.

Referral of the case back to the Court of First Instance

189 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

190 Since the Court of First Instance examined only two of the five pleas relied on by Impala in support of its action, the Court of Justice considers that the present case is not in a state where judgment may be given. The case must therefore be referred back to the Court of First Instance.

191 Since the case is to be referred back to the Court of First Instance, the costs relating to the present appeal proceedings must be reserved.

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

1. **Sets aside the judgment of the Court of First Instance of 13 July 2006 in Case T-464/04 *Impala* v *Commission*;**

2. **Refers the case back to the Court of First Instance of the European Communities;**

3. **Reserves the costs.**

[Signatures]

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* Language of the case: English.

Case T-170/06

Alrosa Company Ltd

v

Commission of the European Communities

(Competition – Abuse of a dominant position – World market for the production and supply of rough diamonds – Decision making binding the commitments proposed by the undertaking in a dominant position – Article 9 of Regulation (EC) No 1/2003 – Principle of proportionality – Contractual freedom – Right to be heard)

Summary of the Judgment

1. *Actions for annulment – Natural or legal persons – Measures of direct and individual concern to them*

   (Art. 230, fourth para., EC; Council Regulation No 1/2003, Art. 9)

2. *Competition – Dominant position – Abuse – Examination by the Commission – Commitments by the undertakings concerned to meet the Commission's competition concerns*

   (Arts 81 EC, 82 EC and 85 EC; Council Regulation No 1/2003, Arts 7(1) and 9)

3. *Competition – Administrative procedure – Bringing infringements to an end – Commission's powers*

   (Council Regulation No 1/2003, Arts 7(1) and 9(1))

4. *Competition – Administrative procedure – Bringing infringements to an end – Commission's powers*

   (Council Regulation No 1/2003, Arts 7(1) and 9(1))

5. *Competition – Dominant position – Abuse – Commission's powers*

   (Art. 82 EC)

6. *Competition – Administrative procedure – Observance of the rights of the defence*

   (Arts 81 EC and 82 EC; Council Regulation No 1/2003, Art. 9)

1. An undertaking is directly and individually concerned for the purpose of the fourth paragraph of Article 230 EC by a Commission decision which makes binding the individual commitments proposed by an undertaking in a dominant position and relating to the restriction and cessation of the dominant undertaking's contractual relations with the former undertaking, in so far as the decision in question produces direct and immediate effects as regards the former undertaking's legal situation, refers to it in its provisions, and was adopted at the conclusion of proceedings in which the undertaking participated to a decisive extent, is liable to have an appreciable effect on the undertaking's competitive position on the market, and is aimed at bringing to an end the trading relationship which had existed for a considerable time between the two undertakings.

   (see paras 38-40)

2. The effect of a Commission decision making binding the commitments proposed by undertakings under Article 9 of Regulation No 1/2003 is to bring to an end the proceedings to establish and

penalise an infringement of the competition rules. Thus, such a decision cannot be considered as being a mere acceptance on the Commission's part of a proposal that has been freely put forward by a negotiating partner, but constitutes a binding measure which puts an end to an infringement or a potential infringement, as regards which the Commission exercises all the prerogatives conferred on it by Articles 81 EC and 82 EC, with the only distinctive feature being that the submission of offers of commitments by the undertakings concerned means that the Commission is not required to pursue the regulatory procedure laid down under Article 85 EC and, in particular, to prove the infringement.

By making a particular type of conduct of an operator in relation to third parties binding, a decision adopted under Article 9 of Regulation No 1/2003 may indirectly have legal effects *erga omnes*, which the undertaking concerned would not have been in a position to create on its own; the Commission is thus their sole author from the time at which it makes binding the commitments offered by the undertaking concerned and accordingly assumes sole responsibility for them. It is not obliged in any way to take into account and, *a fortiori*, to take into account on a take-it-or-leave-it basis, the offers of commitment which the undertakings concerned submit to it. Moreover, Article 9 (1) of Regulation No 1/2003 does not preclude a decision from being adopted for an indefinite duration.

Furthermore, the principle of proportionality, although it is not referred to in Article 9 of Regulation No 1/2003, is a general principle of Community law, with which the Commission is obliged to comply when it adopts decisions making binding the commitments proposed by undertakings on the basis of that provision.

(see paras 87-88, 91-92)

3. Notwithstanding the Commission's margin of discretion as to the choice of adopting a procedure under Article 7(1) of Regulation No 1/2003 or Article 9(1) of that regulation, and the voluntary nature of the commitments offered under that provision by the undertakings, the Commission is required to comply with the principle of proportionality when it decides to make such commitments.

Since the review of the proportionality is an objective review, the appropriateness of and the need for the Commission decision must be assessed in relation to the aim pursued by the institution, which consists, according to Article 7(1) of Regulation No 1/2003, of putting an end to the infringement which has been established and, according to Article 9(1) thereof, addressing the concerns expressed by the Commission in its preliminary assessment. If, contrary to the decisions adopted under Article 7(1), the Commission is not required under Article 9(1) formally to establish the existence of an infringement, it must none the less establish the reality of the competition concerns which justified its envisaging the adoption of a decision under Articles 81 EC and 82 EC and which allow it to require the undertaking concerned to comply with certain commitments. This presupposes an analysis of the market and an identification of the infringement envisaged which, while less definitive than those under Article 7(1) of Regulation No 1/2003, must be sufficient to allow a review of the appropriateness of the commitment. Consequently, the Commission cannot, without going beyond the powers conferred on it both by the competition rules of the Treaty and by Regulation No 1/2003, adopt, whether on the basis of Article 7(1) or Article 9(1) of that regulation, a decision prohibiting absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement.

Furthermore, the level of review carried out by the Court of the analyses carried out by the Commission on the basis of the competition rules of the Treaty must take into account the margin of discretion which underlies each decision under consideration and is justified by the complexity of the economic rules to be applied. In that regard, the fact that the analysis undertaken by the Commission, both under Article 7(1) and under Article 9(1) of Regulation No 1/2003, may require complex economic assessments cannot mean that, in the absence of such assessments, the review undertaken by the Court of the decisions of the Commission is, on any basis, to be limited to manifest errors of assessment.

(see paras 95-97, 99-100, 103-105, 107-110)

4. In assessing proportionality, the need for a Commission decision which makes binding the individual commitments proposed by an undertaking in a dominant position and which relate to the restriction and cessation of its contractual relations, must be assessed in relation to its aims, such as the cessation of practices which prevented the contracting partner from establishing itself as an effective competitor on the market in question and from providing third parties with an alternative source of supply.

In particular, compliance with the principle of proportionality requires that, when measures that are less onerous than those it proposes to make binding exist, and are known by it, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach. To that effect, although the Commission cannot substitute itself for the parties so as to amend the commitments they offer under Article 9 of Regulation No 1/2003 in order that those commitments may address the concerns set out in its preliminary assessment, it is able to make those commitments binding only in part or to a particular extent. However the Commission cannot propose to the parties that they should offer it commitments which go further than a decision which it could have adopted under Article 7(1) of Regulation No 1/2003.

Only exceptional circumstances, such as where the undertakings concerned have a collective dominant position, can justify a decision adopted under Article 9(1) of Regulation No 1/2003 prohibiting undertakings completely and indefinitely from contracting amongst each other. Therefore, in the absence of such circumstances, a Commission decision requiring, for an indefinite period, all direct or indirect trading relations between two undertakings to be brought to an end, infringes the principle of proportionality.

(see paras 112, 119-121, 131, 139-141)

5. Since the object of Article 82 EC is not to prohibit the holding of dominant positions but solely to put an end to their abuse, the Commission cannot require an undertaking in a dominant position to refrain from making purchases which allow it to maintain or to strengthen its position on the market, if that undertaking does not, in so doing, resort to methods which are incompatible with the competition rules. While special responsibilities are incumbent on an undertaking which occupies such a position, they cannot amount to a requirement that the very existence of the dominant position be called into question.

(see para. 146)

6. As regards a Commission decision requiring that long-standing trading relations between two undertakings that are party to an agreement capable of constituting an abuse of a dominant position, the close connection between the two sets of proceedings initiated by the Commission on the basis of Articles 81 EC and 82 EC, following notification of that agreement, and the fact that that decision expressly refers to the contracting partner but is not addressed to it, must lead to the applicant being accorded, as regards the proceedings taken as a whole, the rights given to an ‘undertaking concerned’ within the meaning of Regulation No 1/2003, although, strictly speaking, it does not fall to be so classified in proceedings relating to Article 82 EC. Consequently, that undertaking is entitled to be heard on individual commitments which the Commission intends to make binding by adopting a decision – in the context of proceedings initiated under Article 82 EC, and proposed by the undertaking with which it has maintained long-standing trading relations which the decision requires to be terminated – and must have the possibility to exercise that right fully. It is necessary, if the right to be heard is to be complied with, first, that the undertakings which proposed those commitments under Article 9 of Regulation No 1/2003 be informed of the essential factual elements on the basis of which the Commission required new commitments, including conclusions which the Commission drew from the third-party observations on the proposed commitments, and, secondly, that those undertakings can express their views on the matter.

(see paras 187, 196, 203)

Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 11 July 2007
Alrosa Company Ltd v Commission of the European Communities. Competition - Abuse of a dominant position - World market for the production and supply of rough diamonds - Decision making binding the commitments proposed by the undertaking in a dominant position - Article 9 of Regulation (EC) No 1/2003 - Principle of proportionality - Contractual freedom - Right to be heard.
Case T-170/06.

In Case T170/06,

Alrosa Company Ltd , established in Mirny (Russia), represented by R. Subiotto, S. Mobley and K. Jones, lawyers,

applicant,

v

Commission of the European Communities , represented by F. Castillo de la Torre, A. Whelan and R. Sauer, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Decision 2006/520/EC of 22 February 2006 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/B-2/38.381 - De Beers) (OJ 2006 L 205, p. 24) making binding the commitments given by De Beers to bring to an end its purchases of rough diamonds from Alrosa with effect from 2009, after a period of progressive reduction of the amounts purchased by it from 2006 to 2008, and bringing the proceedings to an end in accordance with Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)

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

composed of H. Legal, President, I. Wiszniewska-Biaecka, V. Vadapalas, E. Moavero Milanesi and N. Wahl, Judges,

Registrar: K. Poche, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2007,

gives the following

Judgment

On those grounds,

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

hereby:

1. Annuls Commission Decision 2006/520/EC of 22 February 2006 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/B-2/38.381 - De Beers);

2. Orders the Commission to pay its own costs and those incurred by Alrosa Company Ltd.

Legal and factual background to the dispute

1. Legal background

Regulation No 1/2003

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) has been applicable since 1 May 2004.

2. Article 7(1) of Regulation No 1/2003 provides:

Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.'

3. Article 9 of Regulation No 1/2003 states:

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.'

4. Article 27 of Regulation No 1/2003 provides:

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment....

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets....

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted....

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time-limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

Regulation No 773/2004

5. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings

by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18) was adopted under Article 33 of Regulation No 1/2003 and entered into force on 1 May 2004.

6. Article 10 of Regulation No 773/2004 provides inter alia:

1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.

...'

7. Article 15(1) of Regulation No 773/2004 states:

If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.'

2. Facts

8. The applicant, Alrosa Company Ltd (Alrosa'), is an undertaking established in Mirny (Russia). It is active, inter alia, in the world market for the production and supply of rough diamonds, where it occupies the number two position. It is essentially active in Russia, where it is engaged in exploration, mining, valuation and trading activities, and also in the jewellery business.

9. De Beers SA is a company established in Luxembourg (Luxembourg). The De Beers group, of which it is the principal holding company, is also engaged in the world market for the production and supply of rough diamonds, where it occupies the number one position. It is essentially active in South Africa, Botswana, Namibia and Tanzania, and also in the United Kingdom. It is engaged in those areas in exploration, mining, valuation, trading and manufacturing, and also in the jewellery business, thus covering the entire diamond supply chain.

10. On 5 March 2002, Alrosa and De Beers notified to the Commission an agreement entered into on 17 December 2001 between Alrosa and two subsidiaries of the De Beers group, City and West East Ltd and De Beers Centenary AG (the notified agreement'), with a view to obtaining negative clearance or an exemption under 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).

11. The subject-matter of that agreement, which was concluded in the context of long-standing trading relations between Alrosa and De Beers, was essentially the supply of rough diamonds.

12. Clause 12 of the notified agreement provided that it was entered into for a period of five years from the date of confirmation by the Commission to the contracting parties that it [did] not infringe Article 81(1), or merit[ed] an exemption under Article 81(3) EC; and [did] not otherwise infringe Article 82 EC'.

13. During that period, Alrosa undertook to sell natural rough diamonds produced in Russia to De Beers to the value of USD 800 million a year, while De Beers undertook to buy those diamonds from Alrosa, as specified in clause 2.1.1 of the notified agreement. However, in respect of the fourth and fifth years during which the notified agreement was in force, Alrosa was entitled, under clause 2.1.2, to reduce that amount to USD 700 million. The amount of USD 800 million, established in accordance with the prices in force on the date on which the notified agreement was entered into, accounted for around one half of Alrosa's annual production and for the entire production exported outside the Community of Independent States (CIS).

14. On 14 January 2003, the Commission sent a statement of objections to the applicant and De Beers in Case COMP/E-3/38.381, in which it expressed the opinion that the notified agreement was capable of constituting an anticompetitive agreement prohibited by Article 81(1) EC and could not be exempted under Article 81(3) EC. On the same date, it sent a separate statement of objections to De Beers in Case COMP/E2/38.381, in which it expressed the opinion that the agreement was capable of constituting an abuse of a dominant position prohibited by Article 82 EC.

15. On 31 March 2003, the applicant and De Beers submitted joint written submissions to the Commission in response to the statement of objections issued in Case COMP/E-3/38.381.

16. On 1 July 2003, the Commission sent a supplementary statement of objections to the applicant and De Beers, expressing the opinion that the notified agreement was also capable of constituting an anti-competitive agreement prohibited by Article 53(1) of the Agreement on the European Economic Area (EEA) and could not be exempted under Article 53(3) of the EEA Agreement. On the same date, it sent a separate supplementary statement of objections to De Beers, expressing the opinion that the notified agreement was also capable of constituting an abuse of a dominant position prohibited under Article 54 of the EEA Agreement.

17. On 7 July 2003, the Commission heard oral submissions from the applicant and De Beers.

18. On 12 September 2003, the applicant proposed commitments which involved the progressive reduction of the quantity of rough diamonds sold to De Beers with effect from the sixth year in which the notified agreement was in force and, with effect from 2013, an undertaking no longer to sell rough diamonds to De Beers. The applicant subsequently withdrew those commitments.

19. On 14 December 2004, the applicant and De Beers jointly submitted commitments (the joint commitments') designed to meet the concerns which the Commission had communicated to them. These joint commitments provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, the value of which was to go down from USD 700 million in 2005 to USD 275 million in 2010, and subsequently to be capped at that level.

20. On 3 June 2005, the Commission published a notice... in Case COMP/E-2/38.381 - De Beers-Alrosa' in the Official Journal of the European Union (OJ 2005 C 136, p. 32) (the summary notice'). In that notice, the Commission stated that it had received commitments from Alrosa and De Beers in the course of a Commission investigation pursuant to Articles 81 EC and 82 EC, and Articles 53 and 54 of the EEA Agreement (point 1), gave a summary of the case (points 3 to 10) and described the commitments which had been offered (points 11 to 15). It also invited interested third parties to submit their comments within one month (points 2 and 17) and stated that it intended to adopt a decision making the joint commitments binding, subject to the outcome of that market test (points 2 and 16).

21. Following that publication, 21 interested third parties submitted comments to the Commission, which informed Alrosa and De Beers of those comments on 27 October 2005. At that meeting, the Commission also invited the parties to submit to it, before the end of November 2005, fresh joint commitments intended to lead to a complete cessation of their trading relationship with effect from 2009.

22. On 25 January 2006, De Beers offered individual commitments (the individual commitments proposed by De Beers') designed to meet the concerns expressed by the Commission in the light of the outcome of the market test. The individual commitments proposed by De Beers provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, the value of which was to go down from USD 600 million in 2006 to USD 400 million in 2008, and their subsequent discontinuance.

23. On 26 January 2006, the Commission sent the applicant a copy of the individual commitments

proposed by De Beers and invited it to submit its observations in that regard. It also provided it with a copy of the nonconfidential versions of the comments from third parties.

24. Subsequently, there was an exchange of views between the applicant and the Commission on certain aspects of the proceedings provided for in Article 9 of Regulation No 1/2003 and of their implications for the present case. The principal issues were the question of access to the file and the question of the rights of the defence and, in particular, of the right to be heard. In addition, in its letter of 6 February 2006, the applicant provided observations on the individual commitments proposed by De Beers and the third-party comments.

25. On 22 February 2006, the Commission adopted Decision 2006/520/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/B-2/38.381 - De Beers) (OJ 2006 L 205, p. 24) (the Decision').

26. Article 1 of the Decision provides that the commitments as listed in the Annex shall be binding on De Beers' and Article 2 provides that the proceedings in the present case shall be brought to an end'.

Procedure and forms of order sought

27. By application lodged at the Registry of the Court of First Instance on 29 June 2006, Alrosa brought the present action.

28. By a separate document lodged at the Registry on the same date, the applicant requested the Court of First Instance to deal with the case by means of the expedited procedure pursuant to Article 76a(1) of its Rules of Procedure.

29. On 16 August 2006, the Commission lodged its defence.

30. By decision of 14 September 2006, the Court of First Instance (Fourth Chamber) granted the applicant's application for the case to be dealt with by means of the expedited procedure, after hearing the views of the Commission and having regard to the particular urgency and the circumstances of the case.

31. By letter of 28 September 2006, the Court of First Instance (Fourth Chamber) requested the Commission, pursuant to Articles 49 and 64 of the Rules of Procedure, to produce the statements of objections sent on 14 January and 1 July 2003 to De Beers under Article 82 EC and Article 54 of the EEA Agreement. The Commission complied with that measure of organisation of procedure within the prescribed period.

32. By decision of 9 October 2006, the Court of First Insta nce, after hearing the parties, referred the case to the Fourth Chamber (Extended Composition), in accordance with Article 14(1) and Article 51(1) of the Rules of Procedure.

33. The parties presented oral argument and replied to questions put by the Court at the hearing on 19 April 2007.

34. Alrosa claims that the Court should:

- annul the Decision;

- order the Commission to pay the costs.

35. The Commission contends that the Court should:

- dismiss the action as unfounded;

- order Alrosa to pay the costs.

Law

1. Admissibility

36. While observing that Article 82 EC and Article 54 of the EEA Agreement can relate only to undertakings in a dominant position, which does not apply in Alrosa's case, and that Alrosa cannot therefore be considered as being a party concerned by the proceedings leading to the adoption of the Decision or as being an addressee thereof, the Commission does not challenge the admissibility of the action in so far as it is based on the fact that the applicant is individually and directly concerned by the Decision.

37. However, since the question whether the action is admissible involves considerations of public policy, the Court should examine it of its own motion under Article 113 of the Rules of Procedure (Case C-313/90 CIRFS and Others v Commission [1993] ECR I1125, paragraph 23).

38. Since the applicant is not the addressee of the Decision, it is necessary to determine whether the Decision is of direct and individual concern to it, within the meaning of the fourth paragraph of Article 230 EC.

39. In the present case, in accordance with Article 9(1) of Regulation No 1/2003, the Decision makes binding the individual commitments proposed by De Beers to limit its purchases from Alrosa to a particular amount of rough diamonds between 2006 and 2008 and not to purchase, directly or indirectly, any rough diamonds from Alrosa after 2009. In so far as it restricts the ability of De Beers to obtain supplies of rough diamonds from Alrosa, the Decision produces direct and immediate effects as regards Alrosa's legal situation. The applicant is accordingly directly concerned by the Decision.

40. The applicant is also individually concerned by the Decision inasmuch as the Decision: was adopted at the conclusion of proceedings in which Alrosa participated to a decisive extent; refers to Alrosa expressly; is aimed at bringing to an end the trading relationship which had existed for a considerable time between Alrosa and De Beers; and is liable to have an appreciable effect on Alrosa's competitive position on the market for the supply and production of rough diamonds (see, to that effect, Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraphs 54 to 56).

41. Accordingly, the applicant is entitled to challenge the validity of the Decision on the basis of the fourth paragraph of Article 230 EC.

2. Substance

42. The arguments put forward by the applicant in support of its application can be divided into three pleas in law, alleging, first, infringement of the right to be heard, secondly, that the Decision infringes Article 9 of Regulation No 1/2003, which does not allow commitments to which an undertaking concerned has not voluntarily subscribed to be made binding on the undertaking, a fortiori for an indefinite period, and thirdly, the excessive nature of the commitments that were imposed, in breach of Article 9 of Regulation No 1/2003, Article 82 EC, contractual freedom and the principle of proportionality.

43. In the circumstances of the case, the second and the third pleas should first be considered together.

The pleas alleging infringement of Article 9 of Regulation No 1/2003, Article 82 EC, the principle of freedom of contract and the principle of proportionality

Arguments of the parties

44. The applicant maintains, in the first place, that the Decision infringes Article 9 of Regulation

No 1/2003, inasmuch as it makes binding commitments proposed by only one of the two undertakings concerned in the present case, namely the individual commitments proposed by De Beers, and does so for an indefinite period.

45. The first sentence of Article 9 of Regulation No 1/2003 affords to the Commission and to the undertaking or undertakings concerned by proceedings under the competition rules the opportunity of arriving at a mutually beneficial settlement of their dispute. According to the logic of that approach, when several undertakings are concerned and jointly offer commitments to the Commission, it is only those commitments that the latter may accept and make binding, and not commitments offered individually by one of them. In the present case, the applicant should have been considered as an undertaking concerned. Accordingly, the Commission was not entitled to make the individual commitments by De Beers binding.

46. Furthermore, the second sentence of Article 9 of Regulation No 1/2003 should be construed as requiring the Commission, when it opts to make commitments binding, to adopt decisions in that regard only for a specified period. The Decision, however, was adopted for an indefinite period.

47. The applicant also maintains that the Decision renders impossible, in absolute terms and for a potentially indefinite period, any supply of rough diamonds by Alrosa to De Beers. In doing so, the Decision infringes Article 9 of Regulation No 1/2003, Article 82 EC and contractual freedom.

48. In that connection, the applicant claims, first of all, that the Decision is essentially vitiated by an error of law, inasmuch as it is tantamount to prohibiting lawful conduct for an indefinite period.

49. The principle of a free market economy in which there is freedom of competition, enshrined in Article 4(1) EC, and contractual freedom, enshrined in the laws of the Member States and already recognised by Community law, are of fundamental importance in the Community legal order (Case T-41/96 Bayer v Commission [2000] ECR II-3383, paragraph 180; see also, to that effect, Opinion of Advocate General Rozès in Case 210/81 Schmidt v Commission [1983] ECR 3045, at p. 3072; and Opinion of Advocate General Jacobs in Case C7/97 Bronner [1998] ECR I-7791, I-7794, paragraph 56).

50. Consequently, the application of the Community competition rules must take account of these principles. In particular, Article 82 EC, which is aimed at specific abusive conduct, cannot be interpreted as making it illegal merely to enter into a contract for the sale or purchase of goods on the sole ground that one of the parties is in a dominant position.

51. In the present case, the Decision deprives Alrosa and De Beers of all freedom to enter into contracts, including those entered into on an ad hoc basis, on the sole ground that De Beers is in a dominant position on the markets downstream from the market for the supply of rough diamonds. The Decision amounts to a legal boycott of Alrosa by De Beers with effect from 2009. That unprecedented situation is all the more noteworthy, since the notified agreement originally covered only 50% of Alrosa's annual output of rough diamonds and 10% of annual worldwide sales, and then, in the version issued to reflect the joint commitments, 18% of Alrosa's annual production and 3.6% of annual worldwide sales.

52. The applicant goes on to maintain that the Decision is essentially vitiated by a manifest error of assessment, inasmuch as the concerns expressed in relation to the notified agreement did not justify in any way the removal of Alrosa's contractual freedom.

53. The principal concern expressed by the Commission in its preliminary assessment of the notified agreement under Article 82 EC and Article 54 of the EEA Agreement was that the exclusive supply

commitment laid down in the agreement would result in strengthening De Beers' market power by excluding Alrosa from the market for the supply of rough diamonds and, consequently, depriving other purchasers of access to the significant source of supply which it represented.

54. In such a case it would have been necessary, in accordance with the case-law (Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 89, and Case T-65/98 Van den Bergh Foods v Commission [2003] ECR II-4653, paragraphs 80, 81 and 160), to conduct a detailed assessment of the foreclosure effects which De Beers' conduct would result in. The need for that assessment was all the more pressing since the Commission and the Community Courts have not thus far had occasion to adjudicate on the lawfulness under Article 82 EC of an exclusive supply commitment involving a dominant purchaser.

55. In the present case, it would have, first, been appropriate to amend the notified agreement to the extent necessary in order to reduce the foreclosure effects found to exist, and, secondly, been unwarranted to rule out any possibility of Alrosa entering into an agreement with De Beers.

56. Finally, the applicant maintains that the Decision will itself have anticompetitive effects. First, the Decision deprives it of access to the largest buyer on the market, thereby running the risk of reducing its output in the absence of any assurance of finding alternative purchasers at equivalent prices. Secondly, it deprives De Beers of access to Alrosa's output, thereby enabling the other purchasers to exercise greater market power in their negotiations with Alrosa and to impose artificial prices.

57. The Decision also infringes Article 9 of Regulation No 1/2003, Article 82 EC and the principle of proportionality.

58. In that connection, the applicant points out, first of all, that under the principle of proportionality enshrined in the third paragraph of Article 5 EC, action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty. Consequently, as the Court has held, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the rules in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 Fedesa and Others [1990] ECR I-4023, paragraph 13, and Joined Cases C-241/91 P and C242/91 P RTE and ITP v Commission [1995] ECR I-743, paragraph 93).

59. Next, the applicant claims that this principle applies to decisions adopted by the Commission under Article 9 of Regulation No 1/2003. The powers conferred on the Commission by Regulation No 1/2003 are to be viewed together with its concomitant duty to ensure that the principles laid down in Articles 81 EC and 82 EC are applied. The use made by it of that power cannot therefore exceed what is necessary to ensure that competition is not distorted in the internal market.

60. In that connection, it is immaterial that the commitments made binding by the Commission are initially offered by the undertakings concerned and in what way their offer may go beyond what is necessary in order to comply with Articles 81 EC and 82 EC. It is only in order to meet the concerns which have been notified to them by the Commission that the undertakings concerned offer commitments. Consequently, it remains imperative that the commitments finally deemed necessary by the Commission should meet the concerns expressed in its preliminary assessment, without exceeding what is appropriate and necessary and should be the least onerous possible to ensure compliance with the Community competition rules. At the very least, observance of these requirements is imperative where, as in the present case, the fact of making commitments binding is likely to have an adverse effect on a party involved in the case.

61. The applicant maintains, finally, that the Decision infringes the principle of proportionality.

62. First, the Decision is not necessary in order to attain the objective of prohibiting abuses of dominant positions pursued by Article 82 EC. The joint commitments proposed to the Commission would have reduced the share of Alrosa's annual output reserved for De Beers from 50% in 2005 to 18% in 2010 and beyond, on the basis of prices prevailing on the date of conclusion of the notified agreement, and in reality to a still lower share thereafter, taking into account, first, the anticipated increase in Alrosa's output and, secondly, the expected increase in rough diamond prices. A 50% share has generally been deemed sufficient by the Commission in previous decisions involving a supplier in a dominant position, and in the present case a share well below that figure would have been sufficient.

63. Secondly, the Decision produces effects which are disproportionate in the light of the objective pursued by Article 82 EC of maintaining undistorted competition. It completely rules out the possibility previously open to Alrosa of entering into a contractual relationship with De Beers. Having regard to the concerns expressed by the Commission as to the risk of foreclosure of the market, it would have been sufficient, having regard to the extent of that risk in practice, to amend the notified agreement in the manner provided for by the joint commitments and, consequently, to limit the share of Alrosa's annual output and the share of worldwide output reserved to De Beers to 18% and 3.6%, respectively, of the market. However, the Commission failed entirely to state in the Decision why that less stringent option which had been proposed to it by the undertakings concerned could not be accepted.

64. Thirdly, the disproportionate nature of the Decision in turn gives rise to discrimination to Alrosa's detriment, since other sellers remain free to sell their rough diamonds to De Beers, in quantities which, as a percentage of annual worldwide production, are equal to or greater than the 3.6% under the notified agreement as amended by the joint commitments.

65. The Commission contends that the pleas put forward by the applicant are unfounded.

66. First of all, the concept of undertakings concerned' mentioned in the first sentence of Article 9 of Regulation No 1/2003 refers, in the same way as the concept of parties concerned' mentioned in other provisions of that regulation, to the person or, where relevant, the persons against whom the proceedings have been initiated, that is to say, persons who may be held liable for an agreement or concerted practice within the meaning of Article 81 EC and Article 53 of the EEA Agreement or for an abuse of a dominant position within the meaning of Article 82 EC and Article 54 of the EEA Agreement. In the present case, De Beers alone was an undertaking concerned by the proceedings initiated under the provisions relating to abuses of a dominant position. Consequently, only De Beers was entitled to offer in that connection commitments capable of being made binding by the Commission.

67. In addition, the second sentence of Article 9 of Regulation No 1/2003 can be construed only as conferring on the Commission the power, and not as imposing a duty, to adopt decisions for a specified period.

68. The Commission also contends, in the first place, that the Decision does not infringe contractual freedom. First of all, it is wrong to allege that the Decision can be equated to a prohibition of lawful conduct.

69. Contractual freedom is limited by the prohibition of anti-competitive practices referred to in Articles 81 EC and 82 EC. In the present case, the agreement, viewed in the context of the longstanding trading relationship between Alrosa and De Beers, appeared, following a preliminary assessment, to run counter to those provisions, in the same way as other types of trading relationship between the parties entered into during the Commission's investigation, such as ad hoc sales in the form of willing-buyer/willing-seller' arrangements. What is more, the Commission did not arrive

at that preliminary assessment on the sole basis of the dominant position held by De Beers on the downstream markets, as the applicant maintains, but in the light of its dominant position on the market for the production and supply of rough diamonds, as stated in recitals 23 and 24 in the preamble to the Decision.

70. Nor, moreover, does the Decision have the result of eliminating Alrosa's freedom of contract. On the contrary, it merely makes binding the individual commitments proposed by De Beers, within the scope of its own freedom of contract, to terminate its agreement with Alrosa. It might well be the case that it was in Alrosa's interest to substitute an agreement with its main competitor for the risks that competition gives rise to. However, neither the interest that the partner of a dominant undertaking might have in tying itself to that undertaking by an agreement nor the other circumstances peculiar to that partner, should, according to the case-law, be taken into account for the purposes of the application of Article 82 EC (Hoffmann-La Roche v Commission , paragraphs 89 and 91; Case 322/81 Michelin v Commission [1983] ECR 3461, paragraph 71; Case C-393/92 Almelo and Others [1994] ECR I1477, paragraph 44; and Case T-65/89 BPB Industries and British Gypsum v Commission [1993] ECR II-389, paragraph 68).

71. The Commission next contends that it is incorrect to claim that its concerns did not justify the adoption of the individual commitments proposed by De Beers.

72. Whilst agreeing that it is normally necessary to conduct a specific examination of the effects that foreclosure may have on competition, the Commission argues that in the present case it would have been a very complex exercise to carry out an analysis with a view to determining whether De Beers could purchase a specific quantity of rough diamonds from Alrosa without causing the effects identified in the Commission's preliminary assessment and, if so, what that quantity might have been. In any event, that analysis was of no value inasmuch as, having regard to the objective pursued by Article 9 of Regulation No 1/2003, the Commission was legitimately entitled to accept at face value the individual commitments proposed by De Beers. Furthermore, members of its staff had already informed the parties, during the administrative procedure, that it might be minded to require a complete cessation of trading relations between Alrosa and De Beers.

73. Moreover, contrary to the applicant's assertions, the Commission's concerns were not limited to issues of the exclusion of competitors or foreclosure of the market. On the contrary, they extended to all the dealings between Alrosa and De Beers which sought jointly to regulate, by methods different from those consistent with normal competition, the volume, price and range of rough diamonds on the world market, in such a way as to eliminate an independent supplier from the market, to consolidate the role of marketmaker played by De Beers and to undermine the maintenance and development of competition, as indicated in recitals 28, 30 and 32 in the preamble to the Decision.

74. Finally, the Commission submits that the applicant is not entitled to maintain that the implementation of the Decision will have anti-competitive effects. It contends that the arguments put forward in that regard are irrelevant inasmuch as they wrongly present Alrosa as being a supplier of De Beers whereas it is in fact a competitor of De Beers, and are neither persuasive from an economic point of view nor supported on any other basis.

75. In the second place, the Commission maintains that the Decision does not infringe the principle of proportionality.

76. In that regard, it first of all acknowledges that the principle of proportionality is applicable to decisions by which it applies Article 9 of Regulation No 1/2003.

77. However, the specific nature of that provision must be taken into account. Unlike Article 7 of Regulation No 1/2003, which allows the Commission to establish the existence of an infringement, to order the parties concerned to bring it to an end and to impose on them any structural or behavioural

remedy, including the cessation of trading relations which are contrary to the Community competition rules, Article 9 of that regulation provides that the Commission, without making a finding of infringement, may establish that there is no need for further action since the undertakings concerned have voluntarily offered commitments which meet its competition concerns.

78. In the light of these factors, a decision pursuant to Article 9 of Regulation No 1/2003 does not need to be based on a statement of reasons such as that required for a decision pursuant to Article 7 of Regulation No 1/2003, in particular where it proves difficult to determine the nature or extent of the commitment necessary to meet the concerns expressed by the Commission, for example because the conduct of concern to the Commission is novel or specific, as in the present case. Moreover, the achievement of the objective of Article 9 of Regulation No 1/2003 would be undermined if the outcome of the review of a decision pursuant to that provision were to depend on the appraisal of another, hypothetical, decision adopted under Article 7 of that regulation. That would imply that the Commission would none the less have to carry out an assessment, as for a decision taken pursuant to Article 7 of Regulation No 1/2003, and would thus forego a part of the efficiency gains which the legislature sought to obtain through Article 9 of that regulation.

79. Furthermore, before accepting commitments offered to it, the Commission has to ascertain whether they deal sufficiently with the competition concerns that have been identified. Article 9 is an enforcement tool in that context.

80. The Commission accepts that the application of the principle of proportionality obliges it to reject commitments that are manifestly excessive, but adds that in so far as commitments are offered voluntarily by the undertakings concerned, such a case is likely to remain exceptional. In any event, it could not be obliged to conduct a parallel assessment for the purposes of a hypothetical decision adopted under Article 7 of Regulation No 1/2003, since such a parallel assessment would undermine the very purpose of Article 9 of that regulation in terms of effectiveness of procedures.

81. The Commission concludes from the above that, in the light of the objective and structure of Article 9 of Regulation No 1/2003, and if the usefulness of this provision is to be preserved, judicial review of decisions applying that provision should be limited to verifying whether or not there has been a manifest breach of the principle of proportionality and, more generally, whether or not there has been a manifest error in the complex economic assessment carried out to determine whether the commitments offered by the undertakings concerned meet the concerns expressed in the preliminary assessment.

82. The Commission submits, next, that in the present case the Decision is not disproportionate and, in particular, does not unduly affect Alrosa's legitimate business interests.

83. First, the applicant is not entitled to maintain that the Decision went beyond what was necessary in making binding the individual commitments proposed by De Beers. It is misleading to claim that the notified agreement reserved only one half of Alrosa's annual output to De Beers, since the other half was in any event reserved for the Russian market and the notified agreement, as originally framed, thus covered the entire annual output intended for the world market, and then, had the joint commitments been made binding, 36% of that output. Moreover, these percentages should not be viewed in isolation but seen against the background of trading relations that had been in place for almost half a century with a view to jointly regulating output and prices. It was in the light of those factors that, first, the Commission expressed concerns as to control of the market by De Beers and the inability of Alrosa to compete with it fully; that, secondly, the interested third parties then confirmed that it was necessary to bring the trading relationship between those companies to an end; and, thirdly, that De Beers unilaterally offered such commitments and by doing so allayed any possible concerns. The Commission also contends that the prohibition on auctions open to all is justified in the light of the past practices of Alrosa and De Beers in the case of ad hoc sales

of a willingbuyer/willingseller' kind. On any basis, the applicant has not shown in any way how less onerous commitments, such as the joint commitments previously offered to the Commission, could have been sufficient.

84. Secondly, the applicant is not entitled to maintain that the Decision has caused it hardship which is disproportionate to the objective pursued. The Commission took due account of its interests by allowing it to submit observations on the individual commitments offered by De Beers and by providing for a transitional phase intended to enable Alrosa to put in place an alternative distribution system. Moreover, in September 2003, Alrosa itself submitted undertakings to the Commission which involved the complete and indefinite cessation of its trading relations with De Beers. Lastly, it is not the case that Alrosa will be unable to enter into contractual relations with De Beers for an indefinite period after that transitional phase, since the proceedings may always be reopened under Article 9(2) of Regulation No 1/2003.

85. Thirdly, the applicant has no basis for alleging that the Decision discriminates against it inasmuch as its situation vis-à-vis De Beers differs from that of other suppliers owing, first, to Alrosa's position as a principal competitor of that dominant undertaking and, secondly, to its longstanding trading relationship with that undertaking.

Findings of the Court

- The powers conferred on the Commission by Article 9 of Regulation No 1/2003

86. It is clear from the actual wording of Article 9 of Regulation No 1/2003 that the Commission may, by decision, make commitments offered by the undertakings concerned binding where those commitments satisfy the concerns expressed in its preliminary assessment. Since offers made by undertakings are themselves without binding legal effect, it is the decision of the Commission taken under Article 9 of Regulation No 1/2003, and that decision alone, which has legal consequences for the undertakings.

87. Because the effect of that decision is to bring to an end the proceedings to establish and penalise an infringement of the competition rules, it cannot be considered as being a mere acceptance on the Commission's part of a proposal that has been freely put forward by a negotiating partner, but constitutes a binding measure which puts an end to an infringement or a potential infringement, as regards which the Commission exercises all the prerogatives conferred on it by Articles 81 EC and 82 EC, with the only distinctive feature being that the submission of offers of commitments by the undertakings concerned means that the Commission is not required to pursue the regulatory procedure laid down under Article 85 EC and, in particular, to prove the infringement.

88. By making a particular type of conduct of an operator in relation to third parties binding, a decision adopted under Article 9 of Regulation No 1/2003 may indirectly have legal effects erga omnes , which the undertaking concerned would not have been in a position to create on its own; the Commission is thus their sole author from the time at which it makes binding the commitments offered by the undertaking concerned and accordingly assumes sole responsibility for them. It is not obliged in any way to take into account and, a fortiori , to take into account on a take-it-or-leave-it basis, the offers of commitment which the undertakings concerned submit to it.

89. Although Regulation No 1/2003 does not define the concept of undertaking concerned', it is clear from its wording that that expression relates to undertakings which are responsible for the conduct in question and which are liable to be penalised because of it.

90. Proceedings under Article 82 EC therefore involve, as a rule, the undertaking which is in a dominant position and the conduct of which is liable to constitute an abuse. If the correct interpretation were to be that all undertakings liable to be affected by behavioural commitments intended to put an end to an established or contemplated abuse must be associated with the offer of commitments

in their capacity as undertakings concerned, that would result in the use of Article 9 of Regulation No 1/2003 being impossible in practice in most of the situations to which Article 82 EC applies.

91. As regards the period in which the decision making commitments binding may remain in force, it should be noted that while Article 9(1) of Regulation No 1/2003 provides that such a decision may be adopted for a specified period, it does not, however, require this. The definitive wording of Article 9 of Regulation No 1/2003 falls to be distinguished in that regard, as the Commission rightly points out, from the wording which had been used at the stage of the Commission proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (COM(2000) 582 final), which provided that such a decision was to be adopted for a specified period'. There is, accordingly, no reason of principle which prohibits the Commission from making commitments for an indefinite period binding.

92. Furthermore, although Article 9 of Regulation No 1/2003 does not, unlike Article 7(1), refer to the principle of proportionality, the Commission is obliged to comply with that principle when it adopts decisions on the basis of Article 9. The principle of proportionality is recognised by settled case-law as constituting a general principle of Community law (Fedesa and Others , paragraph 13).

93. Recital 34 in the preamble to Regulation No 1/2003 states, moreover, that in accordance with the principles of subsidiarity and proportionality as set out in Article 5 [EC], this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively'.

94. The Commission accepts in its observations that the principle of proportionality applies to decisions adopted under Article 9 of Regulation No 1/2003. It none the less considers that that principle should be applied differently under Article 7(1) and under Article 9(1) of that regulation.

95. In that regard, the Court finds, in the first place, that the objective of Article 7(1) of Regulation No 1/2003 is the same as that of Article 9(1) of that regulation and is indissociable from the main objective of Regulation No 1/2003, which is to ensure the effective application of the competition rules laid down under the Treaty.

96. In order to attain that objective, the Commission possesses a margin of discretion in the choice offered to it by Regulation No 1/2003: it may make the commitments proposed by the undertakings concerned binding through the adoption of a decision under Article 9 of that regulation, or it may follow the procedure laid down under Article 7(1), which requires that an infringement be established.

97. Nevertheless, the existence of that margin of discretion as to the choice of procedure to be followed does not relieve the Commission of the obligation to comply with the principle of proportionality when it decides to make commitments offered under Article 9(1) of Regulation No 1/2003 binding.

98. In the second place, according to settled case-law in the matter, the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (Case T-260/94 Air Inter v Commission [1997] ECR II-997, paragraph 144, and Van den Bergh Foods v Commission , paragraph 201); when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case 265/87 Schräder [1989] ECR 2237, paragraph 21, and Case C174/05 Zuid-Hollandse Milieufederatie and Natuur en Milieu [2006] ECR I2443, paragraph 28).

99. The review of the proportionality of a measure is thus an objective review, since the appropriateness of and the need for the contested decision must be assessed in relation to the aim pursued by the institution. For decisions adopted under Article 7 of Regulation No 1/2003, the aim is to put

an end to the infringement which has been established; for those adopted under Article 9 of that regulation, the aim is to address the concerns expressed by the Commission in its preliminary assessment, which justify it envisaging the adoption of a decision requiring an infringement to be brought to an end.

100. In cases to which Article 7(1) of Regulation No 1/2003 applies, the Commission has to establish the existence of an infringement, which implies a clear definition of the relevant market and, where relevant, of the abuse for which the undertaking in question is alleged to be responsible. It is true that, under Article 9(1) of that regulation, the Commission is not required formally to establish the existence of an infringement, as, moreover, recital 13 in the preamble to Regulation No 1/2003 indicates, but it must none the less establish the reality of the competition concerns which justified its envisaging the adoption of a decision under Articles 81 EC and 82 EC and which allow it to require the undertaking concerned to comply with certain commitments. This presupposes an analysis of the market and an identification of the infringement envisaged which are less definitive than those which are required for the application of Article 7(1) of Regulation No 1/2003, although they should be sufficient to allow a review of the appropriateness of the commitment.

101. Indeed, it would be contrary to the scheme of Regulation No 1/2003 for it to be possible to take a decision which would, under Article 7(1) of the regulation, fall to be regarded as disproportionate to the infringement that had been established, by having recourse to the procedure laid down under Article 9(1) and adopting a decision in the form of a commitment that is made binding, on the ground that the infringement does not have to be formally proved in such a case.

102. It has already been held, on the basis of Article 3 of Regulation No 17, that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (RTE and ITP v Commission , paragraph 93). The same interpretation must be given to the first sentence of Article 7(1) of Regulation No 1/2003, the wording of which is very similar to that of Article 3(1) of Regulation No 17.

103. It follows that the Commission cannot, without going beyond the powers conferred on it both by the competition rules of the EC Treaty and by Regulation No 1/2003, adopt on the basis of Article 7(1) of that regulation a decision prohibiting absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement (see, to that effect, Case T-24/90 Automec v Commission [1992] ECR II2223, paragraphs 51 and 52).

104. No objective consideration based on the difference between Article 7 and Article 9 of Regulation No 1/2003 allows any other conclusion to be reached as regards the limits which should be imposed on the capacity of the Commission to lay down binding measures under Article 9(1) of that regulation.

105. In the third place, the voluntary nature of the commitments also does not relieve the Commission of the need to comply with the principle of proportionality, because it is the Commission's decision which makes those commitments binding. The fact that an undertaking considers, for reasons of its own, that it is appropriate at a particular time to offer certain commitments does not of itself mean that those commitments are necessary.

106. Moreover, the Court of Justice has held, as regards the former Regulation No 17, that in some circumstances the obligations imposed by a commitment on the parties must be regarded in the same way as orders requiring an infringement to be brought to an end (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C117/85 and C-125/85 to C129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I1307, paragraph 181). The Court of Justice held that, in giving that commitment, the undertakings concerned merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally (Ahlström Osakeyhtiö and Others , paragraph 181).

107. The fact that the commitments are proposed by an undertaking does not therefore limit the review which the Court is to conduct of the well-foundedness of the Commission's decision to make those commitments binding.

108. Lastly, the level of review carried out by the Court of the analyses carried out by the Commission on the basis of the competition rules of the Treaty must take into account the margin of discretion which underlies each decision under consideration and is justified by the complexity of the economic rules to be applied. Having regard to the effect of decisions taken under Articles 81 EC and 82 EC on the fundamental economic freedoms guaranteed by the Treaty, cases involving a limited review must be restricted to those in which the contested decision is based on a complex economic assessment, save in fields, such as concentrations, where the existence of a discretionary power is essential to the exercise of the powers of the regulatory institution (Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraphs 38 to 40).

109. It is true that, in the context of the review of concentrations, settled caselaw provides that the Commission enjoys a broad discretion in assessing the necessity of obtaining commitments in order to dispel the serious doubts raised by a notified concentration (Case T-158/00 ARD v Commission [2003] ECR II-3825, paragraphs 328 and 329). The review limited to manifest error which the Court undertakes in that field is justified by the prospective nature of the economic analysis carried out by the Commission in order to be able to find that the concentration in question will not create or strengthen a dominant position (Case T102/96 Gencor v Commission [1999] ECR II753, paragraph 163).

110. By contrast, the analysis which the Commission is required to carry out in proceedings initiated under Regulation No 1/2003 concerns, whether a decision adopted under Article 7(1) or Article 9(1) of Regulation No 1/2003 is involved, existing practices. Plainly, that fact does not mean that complex economic assessments may not be necessary, but it cannot mean that, in the absence of such assessments, the review undertaken by the Court of the decisions of the Commission is, on any basis, to be limited to manifest errors of assessment.

111. It follows that the Court must verify in the present case whether the measures made binding by the Decision were appropriate and necessary to bring to an end the abuse that had been identified in the Commission's preliminary assessment.

- Whether the Decision complied with the principle of proportionality

112. According to settled case-law, the principle of proportionality requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the aim pursued, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Fedesa and Others , paragraph 13, and Case C-180/00 Netherlands v Commission [2005] ECR I6603, paragraph 103).

113. The aim pursued by the Commission in adopting the Decision must be sought in the preliminary assessment contained in the statement of objections addressed to De Beers under Article 82 EC. That assessment provided that the notified agreement prevented Alrosa from operating as an independent supplier on the rough diamond market and thereby eliminated a source of supply for potential customers. The Commission therefore takes the view that the notified agreement leads to exclusivity of distribution for the benefit of De Beers and is capable of constituting an abuse of a dominant position.

114. It follows that the abuse identified in the Commission's preliminary assessment is constituted by the notified agreement, the entering into of which by De Beers is presented as an abuse of its dominant position. In those circumstances, it could be said that the mere fact of not permitting the parties to implement that agreement would, in the context of the proceedings initiated under

Article 81 EC, have been sufficient to put an end to any possible abuse.

115. However, and even though the complaints set out in the statement of objections under Article 82 EC relate only to the notified agreement, it may be noted that the concerns expressed by the Commission in the Decision also relate to the situation disclosed by the notified agreement, that is to say, more precisely to the existence of long-standing relations between the parties, the continuation of which the notified agreement ensures.

116. Thus, point 28 of the Decision states:... the investigated practices raising concerns due to dominance and the marketmaker role of De Beers are those arising from the purchase relationship between De Beers and its most important competitor Alrosa in the light of its historic context. The Commission's investigation revealed that De Beers and Alrosa had established their long-lasting trading relationship in order jointly to regulate volume, assortment and prices for rough diamonds sold on the world market. The basis for today's purchases still appears to be the same and to constitute one of the main elements for De Beers' market-maker role'.

117. It can therefore be concluded that the notified agreement was envisaged in the preliminary assessment as being the source of the Commission's competition concerns not only as such, which would render any recourse to Article 82 EC inappropriate, but because it strengthened and perpetuated pre-existing trading relations, considered to be abusive in themselves.

118. Point 46 of the Decision states that the main reason for the Commission's concerns regarding the practice identified in the proceedings under Article 82 EC was De Beers' enhancing or maintaining its dominant position by reducing access to a viable source of alternative supply of rough diamonds for potential customers and by hindering the second biggest competitor [Alrosa] from competing fully with De Beers'.

119. Therefore, the aim pursued by the Commission in making the individual commitments proposed by De Beers binding was to bring to an end practices which prevented Alrosa from establishing itself as an effective competitor on the market in question and to provide third parties with an alternative source of supply.

120. Accordingly, the need for the Decision must be assessed in the light of those two objectives.

121. Point 47 of the Decision states that the individual commitments proposed by De Beers were sufficient to address the concerns expressed in the Commission's preliminary assessment, a matter which the applicant does not contest. However, it remains necessary to consider whether the individual commitments proposed by De Beers and made binding by the Decision also satisfy the criterion of necessity, even though the conclusion of the Decision does not address that aspect of the proportionality of the measure.

122. In that regard, as was stated above, judicial review of Commission measures involving complex economic assessments must be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C219/00 P Aalborg Portland and Others v Commission [2004] ECR I123, paragraph 279).

123. In order for the Court to be able to undertake only a limited review of the proportionality of the Decision in the present case, it would require to be in a position to determine that the Commission had carried out its assessment on the basis of a complex economic analysis which allowed it to conclude that the commitments that were made binding were necessary in order to address the concerns set out in its preliminary assessment.

124. Both in its defence and at the hearing, the Commission indicated that there might have been

a grey zone between the joint commitments and the individual commitments proposed by De Beers, but that the identification of alternative solutions to the commitments that were made binding would have required a complex economic assessment which Article 9 of Regulation No 1/2003 is intended to avoid. The Commission also stated that, having regard to the difficulty in establishing alternative solutions, it had reached the conclusion that a complete prohibition represented the only appropriate solution in order to address its initial concerns.

125. It follows that in the present case the Commission did not carry out a complex economic assessment justifying a limitation of the review to be undertaken by the Court of the Decision and that its contention that a limited review should be undertaken is based on the particular characteristics of Article 9 of Regulation No 1/2003 alone. As is mentioned in paragraph 100 of this judgment, although Article 9 does not require the Commission to adduce evidence of the infringement targeted by the proceedings, that does not relieve it of the necessity of establishing an analytical framework which is sufficient to allow an effective judicial review of the proportionality of the measure adopted.

126. The Court holds that, on any basis, the Decision is vitiated by an error of assessment which, moreover, is manifest. It is clear from the circumstances of the case that other, less onerous, solutions than the permanent prohibition of transactions between De Beers and Alrosa were possible in order to achieve the aim pursued by the Decision, that their determination presented no particular difficulties of a technical nature and that the Commission could not relieve itself of the duty to consider such solutions.

127. In that regard, the Court notes in the first place that, according to settled case-law, an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC (Hoffmann-La Roche v Commission , paragraph 89). Applied to a purchaser in a dominant position, that case-law means that for De Beers to reserve to itself the whole of Alrosa's production exported outside the CIS could, even if the latter consented, constitute an abuse in the context of their relations.

128. Prima facie, the most appropriate way of bringing an abuse of this kind to an end would therefore have been to prohibit the parties from entering into any agreement allowing De Beers to reserve to itself the whole, or even a material part, of Alrosa's production exported outside the CIS, in order for Alrosa to re-establish its independence on the market and for third-party access to an alternative source of supply to be guaranteed, without it being necessary to prohibit all purchases by De Beers of diamonds produced by Alrosa.

129. In the second place, joint commitments had been proposed in December 2004 by De Beers and Alrosa, and the Commission has failed to explain in what way they did not address the concerns expressed in its preliminary assessment.

130. It is true that the Commission is never obliged under Article 9(1) of Regulation No 1/2003 to decide to make commitments binding instead of proceeding under Article 7 of that regulation. It is therefore not required to give the reasons for which commitments are not in its view suitable to be made binding, so as to bring the proceedings to an end.

131. However, compliance with the principle of proportionality requires that, when measures that are less onerous than those it proposes to make binding exist, and are known by it, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach.

132. The joint commitments proposed in December 2004 by De Beers and Alrosa, which the Commission

admittedly was under no procedural obligation to take into account, either in its decision or in its statement of reasons, none the less represented a less onerous measure than the measure which it decided to make binding and it follows that examination of those commitments is relevant in that regard to the review of proportionality.

133. In so far as, first, they progressively opened up access by third parties to Alrosa's production and, secondly, gave Alrosa the time necessary to develop its own distribution system for rough diamonds, and therefore to become an effective competitor to De Beers, the joint commitments were, prima facie, capable of addressing the concerns expressed by the Commission.

134. The Court finds that, for the period from 2005 to 2009, the joint commitments provided for a substantial reduction in the quantity of diamonds reserved by Alrosa for De Beers, with that quantity going down from USD 700 million in 2005 to USD 275 million with effect from 2009. Alrosa would therefore have sold, with effect from 2009, only 35% of the quantity of diamonds to De Beers that it had sold to that company in 2004. It would accordingly have been difficult for De Beers to influence the prices set by Alrosa, inasmuch as more than two thirds of the diamonds exported by Alrosa outside the CIS would have been sold at a price determined in negotiation with third parties. Even if it were to be accepted that De Beers and Alrosa wished to coordinate their pricing policies, it would thus be difficult to conceive how such coordination could have been put into practice, in so far as, faced with a refusal by third parties to buy at the price agreed between the two undertakings, Alrosa would not have been able to turn to De Beers in order to sell the unsold stock. The joint commitments would thus have given third parties effective access to an alternative and independent source of supply.

135. A progressive reduction over five years in the quantity sold to De Beers, coupled with a limit on sales to a maximum value of USD 275 million with effect from 2009, would also have allowed Alrosa to set up its distribution system outside the CIS, without which it could not establish itself as an effective competitor to De Beers. The Court notes, however, that at point 47 of the Decision the Commission stated that the transitional period from 2006 to 2008, that is to say, three years, was necessary for Alrosa to build a competitive distribution system for the quantities of diamonds previously sold by De Beers'. However, the Commission does not explain in what way such a period could have been sufficient for that purpose, when Alrosa had informed the Commission in September 2003 that it needed a period of eight years to put in place an effective distribution system and that it would only be with effect from 2012 that it took the view that it could stop all sales of rough diamonds to De Beers, as is clear from the documents annexed to the application.

136. It will also be noted that on 3 June 2005, the date on which the notice relating to the joint commitments was published in the Official Journal of the European Union , the Commission intended, subject to the results of the market test, to make those commitments binding. The Commission was therefore of the view that those commitments addressed, prima facie, the concerns it had expressed in its preliminary assessment.

137. In the third place, even if it were to be accepted that the joint commitments were unable to address the Commission's initial concerns, changes to them would also have been capable of resolving the competition problems arising from the notified agreement, without it being necessary to require the parties to put an end completely to all trading relations with effect from 2009.

138. In particular, it would have been possible to respond to the amendment proposed by the applicant in its letter to the Commission of 6 February 2006, which would have allowed it to sell, by way of sales to De Beers at auction, diamonds having a maximum annual value of USD 275 million. Such an amendment would, first, have given third parties full access to Alrosa's output and, secondly, have allowed Alrosa to continue to sell a limited quantity to the largest buyer on the market on an ad hoc basis.

139. It is true that the Commission cannot substitute itself for the parties so as to amend the commitments they offer under Article 9 of Regulation No 1/2003 in order that those commitments may address the concerns set out in its preliminary assessment. However, there is nothing to prevent it from making proposed commitments binding only in part or to a particular extent. Moreover, it appears that in the present case, at the meeting of 27 October 2005, the Commission had proposed to the parties that the joint commitments be amended. On that occasion, it announced its intention to take a decision, based on Article 7 of Regulation No 1/2003, which would prohibit them from having any trading relations with effect from 2009 if they did not offer commitments to that effect before the end of November 2005.

140. None the less, the Commission cannot lawfully propose to the parties that they should offer it commitments which go further than a decision which it could have adopted under Article 7(1) of Regulation No 1/2003. In the present case, a decision adopted under that provision which required De Beers to bring to an end with effect from 2009, for an indefinite period, all direct or indirect trading relations with Alrosa would manifestly go beyond what the Commission could have required if it were to comply with the principle of proportionality, having regard to the objective pursued.

141. Only exceptional circumstances, which have not been identified in the Decision and which are not apparent from the file, can justify a decision adopted under Article 9(1) prohibiting undertakings completely and indefinitely from contracting amongst each other. It is true that, where the undertakings concerned have a collective dominant position, it is possible that nothing less than a complete prohibition of any dealings between them may be the only way of preventing abuses. But, while the Commission gave it to be understood in the statement of objections notified to the parties under Article 81 EC that an oligopoly might have existed between Alrosa and De Beers, the analysis set out in the Decision is based solely on the dominant position of De Beers and not on a possible collective dominant position of the two undertakings. Both in its defence and at the hearing, the Commission confirmed that the Decision should indeed be understood in that way.

142. Furthermore, the comparison made by the Commission between the commitments offered by the applicant in September 2003, the joint commitments and the commitments that were made binding cannot suffice to show that the latter were necessary, since the necessity for the prohibition imposed in the present case, in the form of commitments that were made binding, must be assessed objectively, having regard to the aim pursued by the Commission.

143. As regards the commitments proposed by the applicant in September 2003, on which the Commission relies in order to justify the proportionality of the measure, it is true that these envisage a complete and indefinite cessation of trading relations with De Beers. However, the Court finds, first, that those commitments provided for such a cessation of trading relations with effect from 2013 and not from 2009, which gave Alrosa further four years in which to develop a distribution system outside the CIS allowing it to sell the volume of rough diamonds previously sold to De Beers. The putting in place of such a system was clearly necessary in order to allow third parties to have access to Alrosa's output and to allow Alrosa to compete fully with De Beers. Secondly, Alrosa withdrew those commitments on the ground that they were not economically viable. Lastly, the fact that an undertaking has offered commitments at a particular time, for reasons of its own, does not mean that those commitments can be assumed to be proportionate and does not relieve the Commission of the obligation to verify their adequacy and their necessity as regards the aim which it is sought to achieve. Consequently, the fact that Alrosa proposed a number of commitments in September 2003 has no effect on the lawfulness of the Decision.

144. As regards the joint commitments proposed by the parties in December 2004, the Commission describes these as inadequate, on the ground that if De Beers was allowed to continue to buy rough diamonds from Alrosa up to a value of USD 275 million a year, that could prevent Alrosa from

competing with it, since the remaining two thirds of its production intended for export would make it more difficult for Alrosa to offer regular supplies of a wide range of diamonds. In addition, the Commission considers that De Beers could continue to use Alrosa's diamonds in order to perform its market-maker role.

145. However, the Court finds that the only point put forward by the Commission in support of the assertion that Alrosa's capacity to supply a wide variety of diamonds would be reduced if a maximum annual quantity equivalent to USD 275 million continued to be sold to De Beers is a reference to point 70 of the statement of objections under Article 81 EC. That point states: De Beers... has a considerable advantage over its competitors, not only because of its size but also because it is able to guarantee the best consistency [in the] supply [of rough diamonds] to its customers. That is because it has access to the output of a larger number of different mines producing a larger variety of rough diamonds and it is the only producer keeping large stocks'. That point does not explain why Alrosa could not guarantee a regular supply of significant quantities of rough diamonds if it continued to supply a limited quantity to De Beers.

146. Furthermore, even if it were to be accepted that the sale to De Beers of a limited quantity of diamonds could have allowed the latter to maintain or to reinforce its market-maker role, and hence its dominant position, an infringement of the competition rules would not necessarily be established. Since the object of Article 82 EC is not to prohibit the holding of dominant positions but solely to put an end to their abuse, the Commission cannot require an undertaking in a dominant position to refrain from making purchases which allow it to maintain or to strengthen its position on the market, if that undertaking does not, in so doing, resort to methods which are incompatible with the competition rules. While special responsibilities are incumbent on an undertaking which occupies such a position (Michelin v Commission , paragraph 57), they cannot amount to a requirement that the very existence of the dominant position be called into question.

147. In the present case, the Commission has required the parties to put an end to all trading relations, with the clear intention of weakening De Beers' role as marketmaker.

148. The Decision also de facto obliges Alrosa, which is not subject to the procedure initiated under Article 82 EC, to make significant changes to its structure and activity in order to compete with De Beers outside the CIS, and to do so within a period of three years.

149. The Commission is thus forcing an operator which is not directly concerned by the proceedings initiated under Article 82 EC to work towards a change in the structure of the market for the production and supply of rough diamonds. Such a measure exceeds the powers of the Commission under Article 82 EC.

150. The Commission lastly contends that the prohibition on transactions by way of open auction is justified in the light of the past practices of Alrosa and De Beers in relation to ad hoc sales (of a willingbuyer/willing-seller' kind). It argues that it would be legitimate to be concerned that those sales could allow the parties to continue to implement the notified agreement, since the quantities sold in such a case could be the same as the quantities laid down under that agreement.

151. In that regard, even if it were to be accepted that De Beers and Alrosa might have wished, by another route, to maintain the value of the transactions laid down under the notified agreement, the Commission was not without the means to take such measures against them as were necessary to ensure compliance with the competition rules. In particular, Article 9(2) of Regulation No 1/2003 provides that the Commission may reopen the proceedings where the undertakings concerned act contrary to their commitments. Likewise, Article 23(2) of that regulation allows it to penalise undertakings which fail to comply with a commitment made binding under Article 9.

152. Furthermore, even if it were the case that ad hoc sales between De Beers and Alrosa allowed

De Beers to maintain or strengthen its role as market-maker, such a result would not, of itself, contravene the competition rules, in so far as such sales were made to the party making the highest offer.

153. The Court accordingly does not accept the argument that to allow Alrosa to sell a particular quantity of diamonds to De Beers at auction would necessarily have imperilled the achievement of the objectives targeted by the Commission. Such sales would have allowed, first, third parties to gain access to Alrosa's production under the same conditions as De Beers, and, secondly, Alrosa to sell to the largest buyer on the market. Since the Commission has not established that criteria other than the value of the offer to purchase were taken into account by Alrosa in the case of sales actually made at auction, the argument based on the preferential treatment which De Beers would have enjoyed at such sales cannot be accepted. Moreover, in its letter of 6 February 2006, which was admittedly sent to the Commission after the expiry of the period allowed for new commitments to be submitted, Alrosa proposed to limit the value of diamonds sold to De Beers at auction to USD 275 million. At the very least, such a limit would have reduced the risks of distortion of competition put forward by the Commission.

154. It follows that there were, in the present case, less onerous alternative solutions for the undertakings than the total prohibition of transactions and that the Commission could not refuse to take them into consideration on the basis of the alleged difficulty in determining them.

155. As regards, lastly, the Commission's argument that the Decision is not permanent in nature because it would be possible to reopen the proceedings in accordance with Article 9(2) of Regulation No 1/2003, the Court points out that that possibility arises in three cases: where there has been a material change in any of the facts on which the decision was based; where the undertakings concerned act contrary to their commitments; and where the decision was based on incomplete, incorrect or misleading information. Since the situations justifying a reopening are thus exhaustively listed, Alrosa could not request that the proceedings be reopened on grounds such as those set out in its application, in particular on the basis that the principle of proportionality had been infringed. Furthermore, the Commission would have a discretion to refuse to reopen. The Commission's argument based on Article 9(2) of Regulation No 1/2003 cannot therefore be accepted.

156. That being so, the applicant is right to argue, first, that the prohibition on all trading relations between De Beers and itself for an indefinite period manifestly goes beyond what was necessary in order to achieve the targeted objective and, secondly, that other solutions existed that were proportionate to that objective. In making use of the procedure allowing commitments offered by an undertaking concerned to be made binding, the Commission was not relieved of its duty to apply the principle of proportionality, which requires in this case that there be an appraisal in concreto of the viability of those intermediate solutions.

157. It follows from all of the above that the plea alleging infringement of Article 9(1) of Regulation No 1/2003 and of the principle of proportionality is well founded and that the Decision should be annulled on that ground alone.

158. However, having regard to the powers of the Commission in relation to the enforcement of judgments annulling decisions adopted on the basis of Articles 81 EC and 82 EC, it is appropriate, for the sake of completeness, to give a ruling in the present case on the applicant's first plea, alleging infringement of the right to be heard.

The plea alleging infringement of the right to be heard

Arguments of the parties

159. The applicant claims that the Decision was adopted in breach of its right to be heard in that

the Commission, first, did not inform it of the reasons for which it took the view, in the light of the observations submitted by the interested third parties, that the joint commitments did not address the Commission's concerns and, secondly, that the Commission did not afford it an opportunity to state its position in that regard.

160. In support of that plea, Alrosa argues first of all that the right to be heard, as guaranteed in the context of proceedings applying the competition rules, imposes two obligations on the Commission. That right, which is available to every person before any individual measure which would affect him or her adversely is taken, as is mentioned in the first indent of Article 41(2) of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), implies that the parties concerned should be put in a position before the measure is adopted to submit their observations on the objections which the Commission considers must be upheld against them and that in that regard they must be informed of the facts on which those objections are based (Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299) and of the conclusions drawn from those matters by the Commission (Case T-9/89 Hüls v Commission [1992] ECR II-499, paragraph 38).

161. The applicant next argues that the concerns expressed by the Commission in the Decision differ from those previously set out by it in its preliminary assessment, in the form in which it was brought to Alrosa's notice.

162. Initially, the Commission expressed concerns in relation to two points. As is apparent from the statement of objections concerning Article 81 EC and Article 53 of the EEA Agreement and the summary notice, it stated, first, that the agreement appeared to restrict competition on the ground that it reserved half of Alrosa's production to De Beers and thereby reduced Alrosa's capacity to conduct itself as an independent operator on the market. The Commission indicated, secondly, that the agreement appeared to constitute an abuse of a dominant position on the ground that it deprived De Beers' customers of access to an alternative source of supply and strengthened De Beers' market power at the expense of its main competitor. It was in the light of that preliminary assessment that the applicant and De Beers offered joint commitments which the Commission initially intended to make binding.

163. Subsequently, the Commission changed its view. Once it had been given notice of the comments submitted by the interested third parties in response to the summary notice, which mentioned six other concerns as regards the competition rules, the Commission stated, in recitals 41 and 42 in the preamble to the Decision, that, whilst they did not identify any new relevant concerns, those observations, and the Commission's own analysis, finally led it to form the view that the joint commitments did not meet its concerns.

164. Lastly, the applicant considers that, in those circumstances, it was for the Commission to afford it the possibility of making its views known not only as regards the observations submitted by the interested third parties but also as regards the analysis on the basis of which the Commission subsequently took the view that the joint commitments were no longer sufficient and that it was necessary to make the individual commitments proposed by De Beers binding. That, however, did not happen.

165. The Commission's objections in that regard are, it argues, unfounded. First, the Commission cannot reasonably maintain, as it did in recital 41 in the preamble to the Decision, that the individual commitments merely enhanced the joint commitments. The absolute and potentially indefinite prohibition on having any trading relationship whatever with De Beers is, from an economic point of view, quite different in nature from the possibility of pursuing such a relationship, albeit under restrictive conditions. Secondly, the Commission cannot legitimately argue that the applicant is not a party concerned by the proceedings initiated under Article 82 EC and Article 54 of the EEA Agreement.

Since the Commission has itself acknowledged that the circumstances of the case warranted hearing the applicant in relation to the observations submitted by the interested third parties, it was not justified in refusing to hear it in regard to its revised assessment.

166. The Commission takes the view that this plea is unfounded.

167. First of all, it states that it is necessary to distinguish the applicant's position in the context of the proceedings initiated under Article 81 EC and Article 53 of the EEA Agreement, on the one hand, and its position under the proceedings initiated under Article 82 EC and Article 54 of the EEA Agreement, on the other. The first of those sets of proceedings was initiated against De Beers and Alrosa, which were addressees of a statement of objections, offered joint commitments to the Commission and were heard by it, in particular with regard to the observations submitted by the interested third parties regarding those commitments. However, those proceedings became devoid of all purpose by reason of the individual commitments proposed by De Beers and were therefore closed without any decision being adopted. The second set of proceedings was, for its part, initiated against De Beers but not against the applicant and led to the adoption of the Decision.

168. The Commission goes on to contend that the legal situation of the party concerned by proceedings applying the competition rules, that is to say, the legal situation of the person against whom those proceedings are initiated and upon whom a penalty may be imposed, must be distinguished from that of parties interested by those proceedings, that is to say, persons who may have an interest in its outcome but against whom those proceedings have not been initiated and upon whom a penalty will not be imposed. The scope of the right to be heard, as enshrined in general principles of law and the provisions of secondary law, is not the same for those two categories of persons.

169. Finally, the Commission advances an argument as to the specific nature of the legal situation of parties who are involved in some capacity in proceedings under the competition rules where it is envisaged that recourse will be had to Article 9 of Regulation No 1/2003. That provision, which was enacted in order to enable the Commission to bring the proceedings to an end rapidly and efficiently when it is offered commitments meeting its concerns, does not require the Commission to hear the parties in the same way as when that is not the case. In particular, the Commission's first task is not to address a statement of objections to the parties concerned but to inform the undertakings concerned of its concerns by means of a preliminary assessment. When those undertakings offer to it commitments which appear to meet its concerns and it envisages making them binding, the Commission must then enable interested third parties to submit their comments in that connection by publishing a summary notice in the Official Journal of the European Union.

170. Such publication does not prejudge the Commission's assessment and does not require it to apply Article 9 of Regulation No 1/2003. Thus, the Commission may continue its examination of the commitments offered by the undertakings concerned and may decide, in the light of that examination, and on the basis of any observations submitted by interested third parties and the circumstances of the case, to make those commitments binding, or to take the view that they fail to meet its concerns and examine a new set of commitments offered by the undertakings concerned, or indeed have recourse to the procedure laid down under Article 7 of Regulation No 1/2003. The Commission is accordingly under no obligation whatever to adopt a decision which applies Article 9 of Regulation No 1/2003.

171. In the present case, since the applicant is not a party concerned by the proceedings which led the Commission to adopt the Decision, there was no basis on which it might be entitled to the benefit of the rights conferred on the parties concerned by Article 27 of Regulation No 1/2003 and by Articles 10 to 12 of Regulation No 773/2004.

172. None the less, the applicant was in fact accorded the right to be heard to which it could legally claim to be entitled in the context of those proceedings. The scope of that right was determined

by the applicant's particular position in the present case. In essence, that position had its origin in the parallel pursuit of two sets of proceedings concerning agreements and abuses of a dominant position, under the provisions of Regulation No 17 and then of Regulation No 1/2003. It may also be accounted for by the successive presentation of joint commitments by the applicant and De Beers and then, following the market test, of the individual commitments proposed by De Beers.

173. Accordingly, the applicant was informed, first, of the concerns expressed by the Commission in its preliminary assessment of the notified agreement under Article 82 EC and Article 54 of the EEA Agreement, by means of the summary notice; secondly, of the observations submitted in that connection by the interested third parties; and, thirdly, of the individual commitments offered by De Beers. Furthermore, Alrosa had the possibility of making known its views on the comments of the interested third parties and on the individual commitments offered by De Beers, and in fact expressed its views in that connection.

174. Moreover, it is wrong to claim that the Commission raised fresh concerns following publication of the summary notice and receipt of the observations of the interested third parties. The Commission merely analysed whether the joint commitments of Alrosa and De Beers met or did not meet its concerns in regard to the agreement. The observations submitted by the interested third parties in that connection did not raise fresh issues and confirmed the inadequacy of the joint commitments.

Findings of the Court

175. Regulation No 1/2003 distinguishes between a number of categories of participants in the proceedings before the Commission: undertakings concerned' (Article 7), complainants' (Articles 7 and 27), undertakings or parties concerned' (Articles 9, 17, 18, 21(1), 27(2)), undertakings which are the subject of the proceedings' (Article 27(1)) and interested third parties' (Article 27(4)).

176. It is clear immediately that the applicant is not a complainant'. In addition, for the reasons set out above, De Beers alone is the undertaking concerned' and the subject of the proceedings' conducted by the Commission under Article 82 EC.

177. However, the applicant is also not a mere interested third party' to the proceedings for the purposes of Article 27(4) of Regulation No 1/2003. Alrosa is the contracting partner of De Beers in the context of a long-lasting bilateral trading relationship, which the Decision brings to an end. The applicant was also involved in both sets of proceedings initiated by the Commission following the notification of its agreement with De Beers.

178. The manner in which the Commission initiated the two sets of proceedings relating to the agreement between De Beers and Alrosa supports that conclusion.

179. Thus, following intimation of the notified agreement on 14 January 2003, the Commission initiated two sets of proceedings, one based on Article 81 EC, and the other on Article 82 EC. The two sets of proceedings were registered under the same number (38.381), as the Commission stated at the hearing.

180. The Commission sent the statement of objections concerning the proceedings based on Article 81 EC to the applicant and the statements of objections concerning both sets of proceedings to De Beers. Each of the statements related to the agreement which De Beers and Alrosa intended to enter into, against the background of the relations which existed between the parties at the time.

181. Following on the statements of objections, the applicant and the Commission entered into discussions, to which De Beers subsequently became a party, with a view to reaching a negotiated settlement of the case. On 31 March 2003, the applicant and De Beers sent joint written observations to the Commission in reply to the statement of objections issued under Article 81 EC. Those observations

also addressed the compatibility of the agreement with Article 82 EC, although the applicant did not receive a copy of the statement of objections sent to De Beers under that article.

182. Moreover, on 7 July 2003, the applicant and De Beers made oral submissions to the Commission. On 14 December 2004, the applicant and De Beers jointly submitted commitments designed to address the concerns which the Commission had notified to them.

183. The statement in case COMP/E-2/38.381 - De Beers - Alrosa of 3 June 2005, in which the Commission referred to the joint commitments offered by the applicant and De Beers and invited the interested third parties to submit to it their observations, also makes no distinction between the two sets of proceedings.

184. To that, there falls to be added the fact that on 27 October 2005 the applicant and De Beers attended a joint meeting with the Commission, at which the Commission informed them of the observations of the 21 interested third parties submitted following the notice of 3 June 2005.

185. Lastly, in a letter of 22 February 2006, the Commission informed the applicant that the proceedings involving it had been brought to an end as a result of the individual commitments proposed by De Beers in the proceedings brought under Article 82 EC.

186. This summary of the facts shows that the proceedings taken by the Commission under Articles 81 EC and 82 EC were at all times treated de facto as being a single set of proceedings, not only by the Commission but also by the applicant and by De Beers.

187. In the circumstances of the present case, the close connection between the two sets of proceedings initiated by the Commission and the fact that the Decision expressly refers to Alrosa should have led to the applicant being accorded, as regards the proceedings taken as a whole, the rights given to an undertaking concerned' within the meaning of Regulation No 1/2003, although, strictly speaking, it did not fall to be so classified in the proceedings relating to Article 82 EC.

188. Recital 37 in the preamble to Regulation No 1/2003 states that it respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union' and that it should be interpreted and applied with respect to those rights and principles'. Article 41(2) of the Charter of Fundamental Rights of the European Union provides that every person has the right to be heard before any individual measure which would affect him or her adversely is taken'.

189. Likewise, Article 27(2) of Regulation No 1/2003 provides that the rights of defence of the parties concerned shall be fully respected in the proceedings' and that the parties concerned are to be entitled to have access to the Commission's file'.

190. Lastly, recital 10 in the preamble to Regulation No 773/2004, which relates to the conduct of proceedings by the Commission pursuant to Articles 81 EC and 82 EC, states: in order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision'.

191. It should also be noted that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).

192. The Court finds that on 3 June 2005, the date on which the notice in which the Commission referred to the joint commitments offered by De Beers and the applicant was published, the Commission intended to make those commitments binding, subject to the result of the consultation with third parties. It accordingly took the view that those commitments addressed, prima facie, the concerns

it had expressed in its preliminary assessment.

193. However, following receipt of the comments from third parties, the Commission took the view that the joint commitments did not address its initial concerns and that the only solution that could be envisaged was the cessation of all relations between Alrosa and De Beers with effect from 2009. The Commission none the less stated in point 41 of the Decision that a large majority of the observations confirmed [its] competition concerns, as expressed in its preliminary assessment, but indicated that the Commission's competition concerns would be insufficiently addressed with the proposed commitments' and that no relevant new concerns' were identified in those third-party observations. That means that the Commission did not accept any new objections raised by the third parties.

194. However, the Court is not convinced by the Commission's assertion that the comments from the third parties did no more than confirm its initial concerns. If the comments from the third parties added nothing to the Commission's preliminary assessment, the Commission could, in the circumstances, have made the joint commitments binding. If, on the contrary, the third parties took the view that the joint commitments were inadequate and if their comments led the Commission to conclude that only a definitive cessation of relations between the parties with effect from 2009 was capable of addressing its initial concerns, the Commission was under a duty to hear the parties on those observations, and on the other factual elements justifying its new conclusion. It is clear that the Commission can depart from the assessment made of the joint commitments only if the factual background has changed or if that assessment was undertaken on the basis of incorrect information.

195. It is true that the Commission was entitled to take the view, after receipt of the observations from the third parties, that the commitments proposed by the parties did not address the concerns set out in its preliminary assessment, since the purpose of the consultation with third parties provided for under Article 27(4) of Regulation No 1/2003 is precisely to allow the Commission to take a decision which will address the competition issues identified in its preliminary assessment.

196. However, it is necessary in a case of this kind, if the right to be heard is to be complied with, first, that the undertakings which proposed those commitments be informed of the essential factual elements on the basis of which the Commission required new commitments and, secondly, that those undertakings can express their views on the matter. In the present case, the applicant was provided only with a summary of the conclusions which the Commission drew from the third-party observations. At the meeting of 27 October 2005, the Commission merely informed it of the fact that the third-party comments had principally referred to the risk of partitioning of the market and the risk of a cartel between De Beers and Alrosa, and that the Commissioner for Competition had requested the team responsible for the case not to accept the joint commitments in the circumstances. At the same time, Alrosa received a summary of the third-party observations and was informed of the nature of the commitments which the Commission expected the parties to give following the negative result of the consultation with third parties: cessation of all relations with effect from 2009 and a new offer of commitments, on that basis, before the end of November 2005.

197. The undertakings concerned also have the right, under Article 27(2) of Regulation No 1/2003, of access to the Commission's file. According to settled case-law, that right is one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (Joined Cases T-191/98 and T-212/98 to T-214/98 Atlantic Container Line and Others v Commission [2003] ECR II-3275, paragraph 334, and Case T-38/02 Groupe Danone v Commission [2005] ECR II-4407). In accordance with Article 15(1) of Regulation No 773/2004, the exercise of that right presupposes that the undertaking concerned has made a request to that effect to the Commission.

198. In that regard, the Court notes in the first place that the parties are in agreement that

the applicant requested a non-confidential version of the third-party observations. However, according to the applicant, that request was made orally at the meeting of 27 October 2005 and repeated in the letter of 6 December 2005, whereas, according to the Commission, it was not until 6 December 2005 that the applicant requested a non-confidential version of the third-party observations, that is to say, after the expiry of the period allowed for the submission of new commitments.

199. The file shows that at the meeting of 27 October 2005, in reply to a question from the applicant's lawyers regarding access to the non-confidential version of the thirdparty observations, the Commission indicated that, in accordance with the procedure laid down in Article 9(1) of Regulation No 1/2003, it was under no duty to provide Alrosa with that version. The fact that the possibility of access to those documents was discussed between the parties at that meeting is, moreover, not disputed by the Commission.

200. It must also be pointed out that the individual commitments made binding by the Decision were submitted by De Beers on 25 January 2006, that is to say, after the final date of 30 November 2005 given by the Commission at the meeting of 27 October 2005 for the submission of new commitments. That being the case, it cannot be maintained that new proposals for joint commitments could no longer be submitted by Alrosa and De Beers after 30 November 2005 or that, after that date, a request for access to the third-party observations would have been of no practical benefit to the applicant.

201. Following on the formal request made by the applicant in writing on 6 December 2005, the Commission did not supply a non-confidential version of those thirdparty observations until 26 January 2006, that is to say, more than six weeks after the date of the applicant's formal request in that regard and more than three months after the meeting of 27 October 2005, at which the question of access to the non-confidential version of the third-party observations had been discussed by the parties. The Court also notes that those documents were supplied to the applicant at the same time as the copy of the individual commitments proposed by De Beers, thus making it impossible for the applicant to provide an effective reply and to propose new joint commitments with De Beers.

202. The third-party observations were of particular importance in the proceedings, in so far as the Commission took them into account in concluding that the market testing was negative and that only the cessation of all trading relations with effect from 2009 constituted an acceptable solution. According to point 42 of the Decision, those observations, together with the Commission's own analysis, led the Commission to suggest amendments to the proposed commitments'.

203. It follows that the applicant had, in circumstances such as those of the present case, a right to be heard on the individual commitments proposed by De Beers which the Commission envisaged making binding in the proceedings initiated under Article 82 EC and that it was not given the opportunity to exercise that right fully, even though the extent to which such an irregularity might have affected the Commission's decision cannot be precisely determined in the present case.

204. Accordingly, the applicant's first plea in law, which has been considered for the sake of completeness, is also well founded.

205. It follows that the Decision must be annulled.

Costs

206. Under Article 87(2) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must, in accordance with the forms of order sought by the applicant, be ordered to pay, in addition to its own costs, the costs incurred by the applicant.

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NOTES Israel, Marc ; Roberts, Felix: Making commitments, Competition Law Insight 2007 Vol.6 Issue 9 p.6-7 ; Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (juin-août 2007) (1ère partie), Petites affiches. La Loi / Le Quotidien juridique 2007 no 221 p.9-13 ; Le More, Pauline: Kartellbekämpfung, Verpflichtungszusagen und Grundrechte: eine schwierige "Ménage à trois", Europäische Zeitschrift für Wirtschaftsrecht 2007 p.722-726 ; Prieto, Catherine: Droit spécial du contrat. Engagements dans l'affaire des diamants remis en cause par le TPICE, au nom de la liberté contractuelle et du principe de proportionnalité, Revue des contrats 2007 p.1176-1178 ; Kotsovili, M.: Efimerida Dioikitikou Dikaiou 2007 p.479-481

PROCEDU Action for annulment

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Joined Cases T-125/03 and T-253/03

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd

v

Commission of the European Communities

(Competition – Administrative procedure – Commission's powers of investigation – Documents seized in the course of an investigation – Legal professional privilege protecting communications between lawyers and their clients – Admissibility)

Summary of the Judgment

1. *Actions for annulment – Actionable measures – Measures producing binding legal effects – Acts bringing about a change in the applicant's legal position*

   (Art. 230, fourth para., EC)

2. *Competition – Administrative procedure – Commission's powers of investigation – Refusal by the undertaking to produce a communication with a lawyer on grounds of confidentiality – Powers of the Commission*

   (Council Regulation No 17, Art. 14)

3. *Competition – Administrative procedure – Commission's powers of investigation – Power to require production of a communication between a lawyer and client – Limits – Legal professional privilege protecting such communications – Objectives*

   (Council Regulation No 17, Art. 14)

4. *Competition – Administrative procedure – Commission's powers of investigation – Power to require production of a communication between a lawyer and client – Limits – Legal professional privilege protecting such communications – Scope*

   (Council Regulation No 17, Art. 14)

5. *Competition – Administrative procedure – Commission's powers of investigation – Power to require production of a communication between a lawyer and client – Limits – Legal professional privilege protecting such communications – Scope*

   (Council Regulation No 17, Art. 14)

6. *Competition – Administrative procedure – Commission's powers of investigation – Power to require production of a communication between a lawyer and client – Limits – Legal professional privilege protecting such communications – Community concept of confidentiality*

   (Council Regulation No 17, Art. 14)

1. Where an undertaking relies on legal professional privilege for the purpose of opposing the seizure of a document in the course of an investigation pursuant to Article 14 of Regulation No 17, the decision whereby the Commission rejects that request produces legal effects for that undertaking, by bringing about a distinct change in its legal position. That decision, the possible illegality of which has no effect on the lawfulness of the decision ordering the inspection of which it forms a part, in effect withholds from the undertaking the protection provided by Community law and is definitive in

nature and independent of any final decision making a finding of an infringement of the competition rules.

In that regard, the opportunity which the undertaking has to bring an action against a final decision establishing that the competition rules have been infringed does not provide it with an adequate degree of protection of its rights. First, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. Second, if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege.

It follows that the Commission's decision rejecting a request for protection of a specific document under legal professional privilege – and ordering, where appropriate, the production of the document in question – brings to an end a special procedure distinct from that enabling the Commission to rule on the existence of an infringement of the competition rules and thus constitutes an act capable of being challenged by an action for annulment, coupled, if need be, with a request for interim relief, seeking, inter alia, to suspend its operation until the Court has ruled on the action in the main proceedings.

By the same token, where the Commission, during an investigation, seizes a document in respect of which legal professional privilege is claimed and places it on the investigation file without putting it in a sealed envelope and without having taken a formal rejection decision, that physical act necessarily entails a tacit decision by the Commission to reject the protection claimed by the undertaking, and allows the Commission to examine the document in question immediately. That tacit decision should therefore be open to challenge by an action for annulment.

(see paras 46-49, 55)

2. If an undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses, by claiming protection under legal professional privilege, to produce, as part of the business records demanded by the Commission, written communications between itself and its lawyer, it must provide the Commission officials with relevant material which demonstrates that the communications fulfil the conditions for the grant of legal protection, while not being bound to disclose their contents. Where the Commission considers that such evidence has not been provided, it must, pursuant to Article 14(3) of Regulation No 17, order production of the communications in question and, if necessary, impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the documents whose confidentiality, in the Commission's view, is not protected in law. The undertaking under investigation may subsequently bring an action for the annulment of such a Commission decision, where appropriate, coupled with a request for interim relief pursuant to Articles 242 EC and 243 EC.

Therefore, the mere fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind as to prove that it is actually protected by legal professional privilege. The undertaking concerned may, in particular, inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents.

In a significant number of cases, a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will enable them to confirm the accuracy of the reasons invoked by the undertaking and to determine whether the document at issue was confidential, when deciding whether to put it aside. Nevertheless, on certain occasions, there would be a risk that, even with a cursory look at the document, in spite of the superficial nature of their examination, the Commission officials would gain access to information covered by legal professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications.

The undertaking is not bound to reveal the contents of the documents in question when presenting the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for being granted legal protection. Accordingly, an undertaking subject to an investigation under Article 14(3) of Regulation No 17 is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by legal professional privilege, provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the

Commission officials appropriate reasons for its view.

Where, in the course of an investigation under Article 14(3) of Regulation No 17, the Commission considers that the material presented by the undertaking is not of such a nature as to prove that the documents in question are confidential, in particular where that undertaking refuses to give the Commission officials a cursory look at a document, the Commission officials may place a copy of the document or documents in question in a sealed envelope and then remove it with a view to a subsequent resolution of the dispute. This procedure enables risks of a breach of legal professional privilege to be avoided while at the same time enabling the Commission to retain a certain control over the documents forming the subject-matter of the investigation and avoiding the risk that the documents will subsequently disappear or be manipulated.

In any event, where the Commission is not satisfied with the material and explanations provided by the representatives of the undertaking for the purposes of proving that the document concerned is covered by legal professional privilege, the Commission must not read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance.

In that regard, the Commission is bound to wait until the time-limit for bringing an action against the rejection decision has expired before reading the contents of those documents. In any event, to the extent that such an action does not have suspensory effect, it is for the undertaking concerned to bring an application for interim relief seeking suspension of operation of the decision rejecting the request for legal professional privilege.

If an undertaking abuses the above procedure by making requests, merely as delaying tactics, for protection under legal professional privilege which are clearly unfounded, or by opposing, without objective justification, any cursory look at the documents during an investigation, the Commission has the means, where appropriate, to discourage and penalise such conduct. In fact, such conduct may be penalised under Article 23(1) of Regulation No 1/2003 (and previously under Article 15(1) of Regulation No 17) or be taken into account as aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty for infringement of the competition rules.

(see paras 79-83, 85, 88-89)

3. Having regard to the particular nature of the principle of legal professional privilege, the purpose of which is both to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer, the fact that the Commission reads the content of a confidential document is in itself a breach of this principle.

The protection of legal professional privilege therefore goes beyond the requirement that information provided by an undertaking to its lawyer or the content of the advice given by that lawyer cannot be used against it in a decision which penalises a breach of the competition rules. First, that protection seeks to safeguard the public interest in the proper administration of justice in ensuring that a client is free to consult his lawyer without fear that any confidences which he imparts may subsequently be disclosed. Secondly, its purpose is to avoid the harm which may be caused to the undertaking's rights of the defence as a result of the Commission reading the contents of a confidential document and improperly adding it to the investigation file.

Therefore, even if that document is not used as evidence in a decision imposing a penalty for infringement of the competition rules, the undertaking may suffer harm which cannot be made good or can only be made good with great difficulty. Information covered by legal professional privilege might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it. Moreover, harm which the undertaking concerned would suffer as a result of disclosure to third parties of information covered by legal professional privilege could not be made good, for example if that information were used in a statement of objections in the course of the Commission's administrative procedure. The mere fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.

(see paras 86-87)

4. Regulation No 17 falls to be interpreted as protecting the confidentiality of communications between lawyer and client provided that (i) such communications are made for the purposes of the exercise

of the client's rights of defence and (ii) they emanate from independent lawyers. As far as the first of those two conditions is concerned, such protection must, if it is to be effective, be recognised as covering as a matter of law all written communications exchanged after the initiation of the administrative procedure under the regulation which may lead to a decision on the application of Articles 81 EC and 82 EC or to a decision imposing a pecuniary sanction on the undertaking. That protection can also extend to earlier written communications which have a relationship to the subject-matter of that procedure. In view of its purpose, that protection must be regarded as extending also to the internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice.

So that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. Preparation of such documents may be particularly necessary in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC. In those circumstances, the fact that the Commission reads such documents during an investigation may well prejudice the rights of the defence of the undertaking under investigation and the public interest in ensuring that every client is able to consult his lawyer without constraint.

Accordingly, such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by legal professional privilege, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.

Protection under legal professional privilege is an exception to the Commission's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. Such infringements are often carefully concealed and usually very harmful to the proper functioning of the common market. For this reason, the possibility of treating a preparatory document as covered by legal professional privilege must be construed restrictively. It is for the undertaking relying on this protection to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves or the context in which those documents were prepared and found.

In relation to undertakings' competition law compliance programmes, the fact that a document was drawn up under such a programme is not sufficient in itself for that document to benefit from protection under legal professional privilege. Such programmes often encompass in scope duties and cover information which goes beyond the exercise of the rights of the defence. In particular, the fact that an outside lawyer has put together and/or coordinated a compliance programme cannot automatically confer protection under legal professional privilege on all the documents drawn up under that programme or in relation to it.

(see paras 117, 122-124, 127)

5. The protection accorded to legal professional privilege under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment. The requirement is based on a concept of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence and in the overriding interests of the administration of justice, such legal assistance as the client needs.

The concept of independent lawyer is therefore defined in negative terms in that it stipulates that such a lawyer should not be bound to his client by a relationship of employment, rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics. The test thus laid down is one of legal advice provided 'in full independence', which it identifies as that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.

It follows that communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, are expressly excluded from protection under legal professional privilege.

Since in-house lawyers and outside lawyers are clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employ them, no infringement of the principle of equal treatment arises from the fact of treating such professionals differently in respect of protection under legal professional privilege.

(see paras 166-168, 174)

6. The protection of legal professional privilege is an exception to the Commission's powers of investigation. Therefore, the protection directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition. For those reasons, the Court of Justice and the Court of First Instance have been at pains to develop a Community concept of legal professional privilege, which does not allow for the personal scope of the Community concept of confidentiality to be governed by national law.

(see para. 176)

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

17 September 2007 (*)

(Competition – Administrative procedure – Commission's powers of investigation – Documents seized in the course of an investigation – Legal professional privilege protecting communications between lawyers and their clients – Admissibility)

In Joined Cases T‑125/03 and T‑253/03,

Akzo Nobel Chemicals Ltd, established in Hersham, Walton on Thames, Surrey (United Kingdom),

Akcros Chemicals Ltd, established in Hersham, Walton on Thames, Surrey,

represented by C. Swaak, M. Mollica and M. van der Woude, lawyers,

applicants,

supported by

The Council of the Bars and Law Societies of the European Union (CCBE), established in Brussels (Belgium), represented by J. Flynn QC,

by

Algemene Raad van de Nederlandse Orde van Advocaten, established in The Hague (Netherlands), represented by O. Brouwer and C. Schillemans, lawyers,

by

European Company Lawyers Association (ECLA), established in Brussels, represented by M. Dolmans, K. Nordlander, lawyers, and J. Temple Lang, solicitor,

by

American Corporate Counsel Association (ACCA) – European Chapter, established in Paris (France), represented by G. Berrisch, lawyer, and D. Hull, solicitor,

and by

International Bar Association (IBA), established in London (United Kingdom), represented by J. Buhart, lawyer,

interveners,

v

Commission of the European Communities, represented initially by R. Wainwright and C. Ingen-Housz, and subsequently by F. Castillo de la Torre and X. Lewis, acting as Agents,

defendant,

APPLICATION, first, for the annulment of Commission decision C (2003) 559/4 of 10 February 2003 and, so far as necessary, of Commission decision C (2003) 85/4 of 30 January 2003 ordering Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd and Akcros Chemicals and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17 of 6 February 1962, First Council Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) (Case COMP/E-1/38.589) and for an order requiring the Commission to return certain documents seized in the course of the investigation in question and not to use their contents (Case T–125/03) and, second, for the annulment of Commission decision C(2003) 1533 final of 8 May 2003 rejecting a request for the protection of those documents on grounds of legal professional privilege protecting communications between lawyers and their clients (Case T-253/03),

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

composed of J. D. Cooke, President, R. García-Valdecasas, I. Labucka, and M. Prek and V. Ciucă, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2007,

gives the following

Judgment

Facts and procedure

1 On 10 February 2003 the Commission adopted decision C (2003) 559/4, amending its decision C (2003) 85/4 of 30 January 2003, whereby the Commission ordered, inter alia, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17 of 6 February 1962, First Council Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), aimed at seeking evidence of possible anti-competitive practices (together ‘the decision ordering the investigation’).

2 On 12 and 13 February 2003, Commission officials, assisted by representatives of the Office of Fair Trading (‘OFT’, the British competition authority), carried out an investigation on the basis of the decision ordering the investigation at the applicants’ premises in Eccles, Manchester (United Kingdom). During the investigation the Commission officials took copies of a considerable number of documents.

3 In the course of those operations the applicants’ representatives informed the Commission officials that certain documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients (‘legal professional privilege’ or ‘LPP’).

4 The Commission officials then informed the applicants’ representatives that it was necessary for them to examine briefly the documents in question so that they could form their own opinion as to whether the documents should be privileged. Following a long discussion, and after the Commission officials and the OFT officials had reminded the applicants’ representatives of the consequences of obstructing investigations, it was decided that the leader of the investigating team would briefly examine the documents in question, with a representative of the applicants at her side.

5 During the examination of the documents in question, a dispute arose in relation to five documents which were ultimately treated in two different ways by the Commission.

6 The first of those documents is a two-page typewritten memorandum dated 16 February 2000 from the general manager of Akcros Chemicals to one of his superiors. According to the applicants, this memorandum contains information gathered by the general manager in the course of internal discussions with other employees. The information was gathered for the purpose of obtaining outside legal advice in connection with the competition law compliance programme put in place by Akzo Nobel. The second document is a second copy of the memorandum, bearing manuscript notes referring to contacts with a lawyer of the applicants, including, in particular, mention of his name.

7 After obtaining the applicants’ observations concerning those first two documents, the Commission officials were not in a position to reach a final conclusion on the spot as to whether the documents should be privileged. They therefore took copies of them and placed them in a sealed envelope

which they took away on completion of the investigation. The applicants identified the two documents as 'Set A'.

8 The third document which gave rise to a dispute consists of a number of handwritten notes made by Akcros Chemicals' general manager, which are said by the applicants to have been written during discussions with employees and used for the purpose of preparing the typewritten memorandum of Set A. Finally, the last two documents in issue are two e-mails, exchanged between Akcros Chemicals' general manager and Mr S., Akzo Nobel's coordinator for competition law. The latter is enrolled as an Advocaat of the Netherlands Bar and, at the material time, was a member of Akzo Nobel's legal department and was therefore employed by that undertaking on a permanent basis.

9 After examining the last three documents and obtaining the applicants' observations, the head of the investigating team took the view that they were definitely not privileged. Consequently, she took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope. The applicants identified the three documents as 'Set B'.

10 On 17 February 2003 the applicants sent the Commission a letter setting out the reasons why, in their view, the documents in Set A and Set B were protected by LPP.

11 By letter of 1 April 2003, the Commission informed the applicants that the arguments set forth in their letter of 17 February 2003 were insufficient to show that the documents in question were covered by LPP. However, the Commission pointed out that the applicants could submit observations on those provisional conclusions within two weeks, after which the Commission would adopt a final decision.

12 By application lodged at the Registry of the Court of First Instance on 11 April 2003, the applicants brought an action under the fourth paragraph of Article 230 EC seeking, first, the annulment of the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003 and, second, the return of the disputed documents (Case T-125/03).

13 On 17 April 2003 the applicants informed the Commission that they had lodged their application in Case T-125/03. They also stated that the observations which they had been asked to submit on 1 April 2003 were contained in that application. On the same day the applicants lodged an application on the basis of Articles 242 EC and 243 EC for, in particular, suspension of the operation of the decision of 10 February 2003 (Case T-125/03 R).

14 On 8 May 2003 the Commission adopted decision C (2003) 1533 final concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Regulation No 17 ('the rejection decision of 8 May 2003'). In Article 1 of that decision the Commission rejects the applicants' request for the return of the documents in Set A and Set B and for confirmation by the Commission that all copies of those documents in its possession had been destroyed. In Article 2 of the decision the Commission gives notice of its intention to open the sealed envelope containing the documents of Set A and to add them to the file. The Commission states, however, that it will not undertake this before expiry of the time-limit for bringing an action against the decision.

15 By application lodged at the Registry of the Court of First Instance on 4 July 2003, the applicants brought an action under the fourth paragraph of Article 230 EC for the annulment of the rejection decision of 8 May 2003 (Case T-253/03). By separate document received on 11 July 2003 the applicants lodged an application for interim relief seeking, in particular, suspension of the operation of that decision (Case T-253/03 R).

16 By applications lodged on 30 July, 7 August and 11 and 18 August 2003 respectively, the Council of the Bars and Law Societies of the European Union (CCBE), the Algemene Raad van de Nederlandse Orde van Advocaten ('General Council of the Netherlands Bar') and the European Company Lawyers Association (ECLA) applied to intervene in Cases T-125/03 and T-253/03 in support of the form of order sought by the applicants. These associations were granted leave to intervene by two orders of the President of the Fifth Chamber of 4 November 2003.

17 By separate document lodged at the Court Registry on 1 August 2003, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, against the application lodged in Case T-125/03.

18 On 8 September 2003, in connection with the applications for interim relief in Cases T-125/03 R

and T-253/03 R and at the request of the President of the Court of First Instance, the Commission sent the President, under confidential cover, a copy of the Set B documents and the sealed envelope containing the Set A documents.

19 The application for interim relief in Case T-125/03 R was dismissed by order of the President of 30 October 2003 (Cases T–125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-4771), while the application for interim relief in Case T-253/03 R was granted in part. Accordingly, operation of the provisions of the rejection decision of 8 May 2003 whereby the Commission decided to open the sealed envelope containing the Set A documents was suspended. The President ordered those documents to be kept by the Court Registry pending the Court's decision in the main action. Similarly, the President took formal note of the Commission's statement that it would not permit third parties access to the Set B documents pending judgment in the main action in Case T-253/03.

20 By applications lodged on 17 October and 26 November 2003, and 25 November 2003, respectively, the European Council on Legal Affairs and the Section on Business Law of the International Bar Association applied to intervene in Cases T-125/03 and T-253/03 in support of the form of order sought by the applicants. The applications were dismissed by orders of the Court of 28 May 2004.

21 On 13 November 2003 the Commission lodged an application for priority treatment under Article 55 (2) of the Rules of Procedure of the Court of First Instance. It repeated this request on 8 October 2004.

22 By application lodged on 25 November 2003, the American Corporate Counsel Association – European Chapter (ACCA) applied to intervene in Case T-253/03 in support of the form of order sought by the applicants. The ACCA was granted leave to intervene by order of the President of the Fifth Chamber of 10 March 2004.

23 By order of the Court of First Instance of 5 March 2004 the objection of inadmissibility raised by the Commission in Case T-125/03 was joined with the substance of the case under Article 114(4) of the Rules of Procedure.

24 By order of 27 September 2004 in Case C-7/04 P(R) *Commission* v *Akzo and Akcros* [2004] ECR I-8739, the President of the Court of Justice, on appeal by the Commission, annulled the operative part of the order of the President of the Court of First Instance of 30 October 2003 in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* whereby the operation of the rejection decision of 8 May 2003 was suspended and it was decided that the Set A documents should be kept by the Registry of the Court of First Instance. However, formal note was taken of the Commission's statement that it would not allow third parties to have access to the Set A documents until judgment is given in the main action in Case T-253/03.

25 Following the order of the President of the Court of Justice in *Commission* v *Akzo and Akcros*, the Registry of the Court of First Instance returned the sealed envelope containing the Set A documents to the Commission by letter of 15 October 2004.

26 On 20 February 2006 the International Bar Association (IBA) lodged applications to intervene in Cases T-125/03 and T-253/03 in support of the form of order sought by the applicants. The IBA was given leave to intervene by two orders of the President of the First Chamber of 26 February 2007.

27 Pursuant to Article 14 of the Rules of Procedure, on the proposal of the First Chamber, the Court, after hearing the parties pursuant to Article 51 of the Rules, decided on 19 April 2007 to refer the cases to the First Chamber (Extended Composition).

28 By order of the President of the First Chamber (Extended Composition) of 20 April 2007, Cases T-125/03 and T-253/03 were joined for the purposes of the oral procedure and the judgment in accordance with Article 50 of the Rules of Procedure.

29 By order of the First Chamber (Extended Composition) of 25 April 2007 the Court, on the basis of the first paragraph of Article 24 of the Statute of the Court of Justice and Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure of the Court of First Instance, requested the Commission to produce the documents constituting Sets A and B. The Commission complied with that request within the prescribed period.

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

31 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 28 June 2007.

Forms of order sought

32 In Case T-125/03 the applicants claim that the Court should:

– dismiss the objection of inadmissibility raised by the Commission;

– annul the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, in so far as they have been interpreted by the Commission as legitimising and/or constituting the basis of its action of seizing and/or reviewing and/or reading the disputed documents;

– order the Commission to return the disputed documents and not to use their contents in any way;

– order the Commission to pay the costs.

33 In Case T-125/03 the CCBE, the ECLA and the IBA submit that the Court should:

– annul the decision of 10 February 2003;

– order the Commission to pay the costs.

34 The Netherlands Bar Association also supports the form of order sought by the applicants in Case T-125/03.

35 The Commission, for its part, contends in Case T-125/03 that the Court should:

– dismiss the action as inadmissible;

– alternatively, dismiss the action as unfounded;

– order the applicants to pay the costs.

36 In Case T-253/03 the applicants claim that the Court should:

– annul the rejection decision of 8 May 2003;

– order the Commission to pay the costs.

37 In Case T-253/03 the CCBE, the ECLA, the ACCA and the IBA submit that the Court should:

– annul the rejection decision of 8 May 2003;

– order the Commission to pay the costs.

38 The Netherlands Bar Association also supports the form of order sought by the applicants in Case T-253/03.

39 The Commission, for its part, contends in Case T-253/03 that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Admissibility of the action in Case T-125/03

Arguments of the parties

40 The Commission contends that the application in Case T-125/03 is inadmissible, because the act challenged in that case, namely the decision ordering the investigation, is not the act which produced the legal effects constituting the subject-matter of the present proceedings. It observes that an action for annulment is admissible only if, first, the contested act produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9) and, second, if the applicant has an interest in the annulment of that act (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32). To determine whether an act or decision produces such legal effects, it is necessary to look to its substance (Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraphs 63 and 64). In the present case, however, the decision ordering the investigation has no direct connection with the subject-matter of the present proceedings. The seizure of the documents at issue is in fact clearly separable from the decision ordering the investigation, which is only the legal basis thereof.

41 The Commission observes that, in the circumstances of the case, the action which directly affected the applicants' legal position is the subject of a procedure which is separate from that ordering the investigation, that is, the specific procedure concerning LPP established in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575. In the context of that procedure, seizure of the documents at issue was only a preparatory act to the rejection decision of 8 May 2003 in which the Commission finally addressed the specific issue of whether the documents were legally privileged. In itself, the action of seizure does not therefore constitute a challengeable act. In any case, even accepting that the decision ordering the investigation could have been challenged initially, the subsequent adoption of the rejection decision of 8 May 2003 made the application pointless. Furthermore, the Commission submits that, even without a specific procedure for reviewing the legality of procedural acts performed in the course of an investigation, their potential irregularity may be raised in an action against the final decision finding a breach of the competition rules.

42 The applicants reply that annulment of the decision ordering the investigation is likely to have legal consequences for them, including, in particular, that of rendering illegal the Commission's possession and use of the documents seized. They accept that the decision is not specifically directed at those documents and that, in fact, it is the Commission's subsequent seizure and review of the documents, and not the decision, which adversely affected their legal situation. They claim in any event that, where, before adopting an ad hoc act likely to be challengeable, concerning a request for LPP, the Commission ascertains their content, the legal position of the undertaking in question is immediately and irreversibly affected. Then the challengeable act cannot be anything but the decision ordering the investigation.

43 The applicants submit that, in the present case, they did not have to wait until the possible adoption of a subsequent ad hoc decision by the Commission rejecting protection of the disputed documents under LPP before bringing the matter before the Community Courts. That decision, whatever it may be, cannot be considered to be the act affecting their legal position, which already occurred when the Commission read the documents which are the subject of the dispute. Furthermore, contrary to what it claims, the Commission did not provide any guarantee to the applicants, on completion of the investigation, that a decision on the confidentiality of the documents would be taken within a reasonable timeframe. The applicants further maintain that they should not also have to wait until the adoption of a possible final decision by the Commission imposing a penalty before bringing the matter before the Community judicature. They must be able to protect their right to confidentiality even if the case is not closed by a decision finding an infringement or a decision to stop the investigation. Similarly, an action against a decision imposing a penalty is not sufficient to provide adequate protection of their legal position.

44 The applicants also submit that the Commission's seizure of the disputed documents and examination of their contents cannot by themselves be considered to have altered their legal position, since those acts of disclosure are only the implementation of the decision ordering the investigation and are not separable from it. The applicants also dispute the Commission's argument that the action of seizing the documents in question was only a preparatory act to the rejection decision of 8 May 2003. There is therefore no doubt that, at least in connection with the Set B documents, during the investigation the Commission decided unilaterally that they were not

protected by LPP, and ordered the applicants to produce them and ascertained their contents. The rejection decision of 8 May 2003 could have been the challengeable act in the present case only if the Commission had put the two sets of documents in a sealed envelope without examining them beforehand. In the present case, by contrast, the rejection decision merely confirmed the Commission's decision ordering the disclosure of the Set B documents.

Findings of the Court

45 According to settled case-law, only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission*, paragraph 9, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28). In principle, a provisional measure intended to pave the way for the final decision is not therefore a challengeable act. However, according to case-law, acts adopted in the course of the preparatory proceedings which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, also constitute challengeable acts (*IBM* v *Commission*, paragraphs 10 and 11, and Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission* [2006] ECR II-1601, paragraph 65).

46 Where an undertaking relies on LPP for the purpose of opposing the seizure of a document in the course of an investigation pursuant to Article 14 of Regulation No 17, the decision whereby the Commission rejects that request produces legal effects for that undertaking, by bringing about a distinct change in its legal position. That decision in effect withholds from the undertaking the protection provided by Community law and is definitive in nature and independent of any final decision making a finding of an infringement of the competition rules (see, to that effect, *AM & S*, paragraphs 27 and 29 to 32; see also, by analogy, Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraphs 18 to 20).

47 In that regard, the Court would point out that the opportunity which the undertaking has to bring an action against a final decision establishing that the competition rules have been infringed does not provide it with an adequate degree of protection of its rights. First, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. Second, if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege (see, by analogy, *AKZO Chemie* v *Commission*, paragraph 20).

48 It follows that the Commission's decision rejecting a request for protection of a specific document under LPP – and ordering, where appropriate, the production of the document in question – brings to an end a special procedure distinct from that enabling the Commission to rule on the existence of an infringement of the competition rules and thus constitutes an act capable of being challenged by an action for annulment, coupled, if need be, with a request for interim relief, seeking, inter alia, to suspend its operation until the Court has ruled on the action in the main proceedings.

49 By the same token, where the Commission, during an investigation, seizes a document in respect of which LPP is claimed and places it on the investigation file without putting it in a sealed envelope and without having taken a formal rejection decision, that physical act necessarily entails a tacit decision by the Commission to reject the protection claimed by the undertaking (see, by analogy, *AKZO Chemie* v *Commission*, paragraph 17), and allows the Commission to examine the document in question immediately (see paragraph 86 below). That tacit decision should therefore be open to challenge by an action for annulment.

50 In the present case, as regards, first of all, the Set A documents, it must be pointed out that during the investigation at the applicants' premises the Commission officials were not in a position to reach a final conclusion as to whether the documents should be privileged and merely took copies of them and placed them in a sealed envelope which they took away with them (see paragraph 7 above). Only in the rejection decision of 8 May 2003 did the Commission finally refuse the applicants' request for protection of the documents under legal professional privilege. In that decision the Commission also gave notice of its intention to open the sealed envelope containing the documents in question and to add them to the file after expiry of the time-limit for bringing an action against that decision (see paragraph 14 above). It is not disputed, moreover, that the Commission took the rejection decision without opening the sealed envelope and, therefore, without examining the

contents of the Set A documents.

51 As regards, secondly, the Set B documents, unlike those in Set A, it must be pointed out that at the time of the investigation the Commission considered that they were clearly not protected by LPP, notwithstanding the claim made by the applicants to this end. Consequently, it made copies and added them to the file without placing them in a sealed envelope (see paragraph 9 above). Protection under LPP in respect of the Set B documents was therefore rejected at the time of the investigation. It was at that moment, moreover, that the Commission was able to examine the contents of those documents.

52 In the light of the above, the Court concludes that, for the purpose of the present cases, the measures which produced binding legal effects affecting the applicants' interests by bringing about a distinct change in their legal position were, as regards the Set B documents, the tacit rejection decision expressed through the physical act of seizing and placing those documents on the file without placing them in a sealed envelope, and, as regards the Set A documents, the formal decision of 8 May 2003 rejecting the claim for protection under legal professional privilege. Those two decisions are thus open to challenge by action for annulment.

53 Similarly, in its decision of 8 May 2003, the Commission finally rejected, also as regards the Set B documents, the applicants' claim to protection under legal professional privilege (see paragraph 14 above). By so doing, the Commission fulfilled its duty to adopt a formal decision rejecting the claim for protection of those documents under LPP and thereby finally brought to an end the distinct special procedure provided in that regard. That decision is thus not merely confirmatory in relation to the Set B documents. As a result, the Court concludes that the applicants were entitled to challenge that decision as regards the Set B documents as well. In addition, it should be noted that the Commission did not challenge the admissibility of the action brought by the applicants in Case T-253/03 against the rejection decision of 8 May 2003 in relation to those documents.

54 On the other hand, the Court holds that the decision ordering the investigation – the contested measure in Case T-125/03 – did not produce the legal effects claimed by the applicants in their action for annulment.

55 In that regard, the Court would point out that the lawfulness of an act must be determined in the light of the matters of law and fact existing at the time when the decision was adopted and that acts subsequent to a decision cannot therefore affect its validity (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 16, and Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 49). Thus, it is settled case-law that, in the context of an investigation based on Article 14 of Regulation No 17, an undertaking cannot plead unlawfulness of the investigation procedures to support claims for annulment of the measure on the basis of which the Commission carries out that investigation (see, to that effect, *Dow Benelux* v *Commission*, paragraph 49, and Joined Cases T–305/94 to T–307/94, T–313/94 to T–316/94, T–318/94, T–325/94, T–328/94, T–329/94 and T–335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II–931, paragraph 413). Accordingly, the use made of a decision ordering an investigation has no effect on the lawfulness of the decision ordering the inspection (Case T–339/04 *France Télécom* v *Commission* [2007] ECR II-0000, paragraph 54, and Case T–340/04 *France Télécom* v *Commission* [2007] ECR II-0000, paragraph 126).

56 In the present case, it is clear that the acts and decisions disputed by the applicants occurred after adoption of the decision ordering the inspection. That decision merely authorises the Commission to enter the applicants' premises and to take copies of the relevant business records. It does not contain any reference to the documents in Sets A and B and does not refer to the issue of legal professional privilege. As the applicants accept, moreover, it was the subsequent seizure and inspection of those documents by the Commission which changed their legal position, and not that decision (see paragraph 42 above). However, as has been held, those measures constitute a distinct, special procedure aimed specifically at the issue of the application of legal professional privilege to specific documents (see paragraphs 45 to 48 above).

57 In the light of the foregoing, the Court holds that the action brought in Case T-125/03 against the decision ordering the investigation must be rejected as inadmissible. It is therefore appropriate to examine the substance of the action in Case T-253/03.

The substance in Case T–253/03

58 The applicants submit that the Commission breached the principle of legal professional privilege and, in doing so, violated the EC Treaty and Regulation No 17. They rely on three particular pleas in support of their action. The first plea is that the procedures relating to the application of LPP were infringed. The second is that LPP was unjustifiably refused in relation to the five documents in question. The third is that the fundamental rights which form the basis of LPP were violated.

The first plea, alleging breach of the procedures relating to the application of the principle of LPP

Arguments of the parties

59 The applicants maintain that the Commission breached the procedure relating to the application of the principle of LPP, violated Article 242 EC and the applicants' right of access to the Community Courts, and breached the principle of equal treatment.

60 They observe that, in the *AM & S* judgment, the Court of Justice set out the procedure to be followed by the Commission in cases where an undertaking subject to an investigation under Article 14 of Regulation No 17 refuses to produce certain business records by relying on LPP. The procedure consists of three steps. First, the undertaking must provide the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for LPP, although it is not bound to reveal the contents of the documents in question. Second, if the Commission considers that such evidence has not been supplied, it must order, pursuant to Article 14(3) of Regulation No 17, production of the documents in question. The applicants concede that, alternatively, in accordance with the rationale behind the *AM & S* judgment, the Commission may, in the course of an investigation, take copies of the documents in question and place them in a sealed envelope. Third, and finally, if the undertaking concerned continues to plead the privilege of confidentiality, it is for the Community judicature to settle the dispute.

61 The applicants consider that two fundamental points must be noted. First, the Court of Justice did not intend to permit the Commission to examine the contents of a document to determine whether LPP applies. Second, it is for the Community judicature alone to determine disputes concerning the application of LPP. The applicants also observe that merely reading, at the time of the investigation procedure, the documents for which LPP is claimed is contrary to the very substance of the principle of LPP. That principle is immediately and irremediably violated as soon as there is disclosure of the contents of a privileged document (Opinions of Advocates General Warner and Sir Gordon Slynn in *AM & S*, respectively pp. 1619, 1638 and 1639, and pp. 1642 and 1662). Instead of a cursory examination, the Commission, in the case of doubt, ought to place copies of the documents concerned in a sealed envelope, without first looking at them, with a view to subsequent resolution of the dispute.

62 According to the applicants, however, the Commission did not follow any of the three procedural steps laid down in the *AM & S* judgment.

63 With regard to the first step, the applicants submit that the Commission forced them to reveal the contents of the documents in question although they had claimed that they were covered by LPP. Following disclosure of those documents, long discussions ensued between the applicants' in-house counsel and the Commission as to the procedure to be followed for examining those documents. The Commission informed the applicants that any further delay in the handing over and examination of the documents would amount to obstruction of the investigation and could constitute a criminal offence under section 65 of the UK Competition Act, which is punishable by a term of imprisonment and a fine. It was only under strong protest that the applicants handed the Set B documents to the Commission for examination. Furthermore, during the investigation the Commission inspectors read and described to each other the contents of the Set A and Set B documents for several minutes at a time.

64 With regard to the second step of the procedure, the applicants submit that, as the Commission considered that the information and arguments adduced were not sufficient to demonstrate that the disputed documents were covered by LPP, it ought to have adopted a decision ordering them to produce those documents, before actually removing them from the premises. However, it did not do so. So far as the Set A documents are concerned, the Commission placed them in a sealed envelope and took them to Brussels. According to the applicants, although the sealed envelope procedure does not in itself breach the substance of LPP, it does not accord with the procedure established by the Court of Justice in *AM & S*. With regard to the Set B documents, the Commission rejected the applicants' proposal that they could be placed in a sealed envelope and added them to the other documents seized, depriving the applicants of any opportunity to show that they should be protected under the principle of LPP.

65 With regard to the third step, the applicants maintain that the Commission manifestly breached the procedure set down in *AM & S* by deciding unilaterally, in the rejection decision of 8 May 2003, that the disputed documents were not protected by LPP. By conferring upon itself the right to decide at first instance, the Commission deprived the Community judicature of the opportunity to settle the dispute at a time when the protection of LPP was not yet compromised.

66 The CCBE submits that the procedure established by the Court in *AM & S* is designed to ensure that, if the Commission and the undertaking under investigation are unable to resolve a dispute as to the privileged status of a communication, the Court should rule and, before it does so, the Commission should not read the document. The Commission is not entitled to take a cursory look at the documents either, there being a risk that this may disclose their contents. The CCBE accepts that claims of LPP should not give the undertaking an opportunity to conceal or destroy documents, but does not, however, consider it satisfactory that the Commission inspectors should take copies and take them away with them, albeit in a sealed envelope. If the documents are to be retained by the Commission, they should at least be sent directly to one of the Commission's hearing officers, whose terms of reference should be widened to provide an assurance that those documents will not be accessible to anyone from the Directorate-General for Competition. The CCBE is inclined, in any event, to the view that documents should be lodged with the Registry of the Court of First Instance or entrusted to a neutral third party.

67 The Netherlands Bar Association submits that principle of LPP has the object of preventing not only the use of privileged documents, but also their disclosure. A mere cursory look at a document could entail a breach of that principle. The ECLA observes that, in the *AM & S* judgment, the Court of Justice developed a procedure based on the principle of confidentiality which prohibits disclosure of the privileged document. The proportionate approach consists in placing the documents under seals and having them examined by an independent third party, such as the hearing officer. It is for the Court in any case to decide the privilege issue. Finally, the ACCA submits that the task of settling disputes concerning the applicability of LPP should be entrusted to an independent arbitrator.

68 The Commission stresses that, although the Court of Justice set out in the *AM & S* case a specific procedure to resolve disputes concerning LPP, it did not attach an absolute value to that procedure. The judgment does not require the Commission to refrain from copying documents and subsequently requesting them from the undertaking whenever that principle is relied on. In *AM & S* the initial investigation was based on Article 14(2) of Regulation No 17 – allowing the undertaking to refuse to produce the documents – and not, as in the present case, on Article 14(3), which requires the undertaking to submit to the investigation. In reality, the only principle laid down by that judgment is that the Commission must adopt a reasoned decision on whether or not the documents at issue are covered by LPP in order to give the undertaking an opportunity to have the case decided by the Community judicature.

69 The Commission currently adopts the following procedure: when there can be no doubt that LPP applies to a document, based on a cursory look at the general layout of the document, heading, title and other characteristics and relevant explanations provided by the undertaking, it is set aside; when, on the basis of the cursory look, there can be no doubt that the document cannot be covered by LPP, it is copied and added to the investigation file; finally, when the cursory look gives rise to doubt as to the issue of LPP, no examination is carried out, the assessment is postponed and a copy of the document is placed in a sealed envelope to be taken away by the Commission.

70 According to the Commission, a cursory look on the spot at a document has no other purpose than to ascertain whether LPP cannot be ruled out, any doubt being construed in favour of the undertaking concerned by leading automatically to the sealed envelope procedure. The Commission's ability to form a preliminary opinion as to the existence of doubt regarding the applicability of LPP has the advantage of reducing the risk of unfounded claims of privilege and is in line with the *AM & S* judgment. The sealed envelope procedure also obviates the risk of documents being destroyed by the undertaking. The Commission observes further that, in the majority of Member States, the competition authorities deal with the issue of LPP in the context of on-the-spot inspections in the same way.

71 The Commission adds that the procedure described above cannot affect the procedural rights of the undertakings concerned. Even if it were shown that the undertaking's rights of defence were adversely affected as a result of reading potentially privileged documents, such harm could easily be remedied. In fact the Commission would be unable to use documents protected by LPP to prove an infringement.

72 In the present case, the Commission contends that it strictly followed a legitimate and proportionate procedure for determining, in accordance with the *AM & S* case-law, whether the disputed documents were protected, and that the applicants' procedural rights were fully respected. It states that it was agreed with the applicants that the Commission's case team leader would examine the file, with a representative of the applicants sitting next to her. If LPP were claimed for a particular document, the applicants had to make the claim, basing it on the document itself. The Commission considers furthermore that the applicants' production, at the reply stage, of minutes of the investigation drawn up by their lawyers, without explaining the delay, is a violation of Article 48 (1) of the Rules of Procedure.

73 With regard to the Set A documents, the Commission observes that a doubt arose from a cursory look at them, in particular because of the presence of a handwritten note referring to the name of an external lawyer on the first page of one of the documents. As none of the explanations given on the spot by the applicants was sufficient to remove the doubt, the Commission officials put the documents into a sealed envelope. So far as the Set B documents are concerned, the Commission inspector considered, on the basis of a cursory look at those documents and the information given by the undertaking and on the basis of uncontested case-law, that there was not the slightest doubt that they were not covered by LPP. Consequently the Commission officials made copies and added them to the investigation file.

74 The Commission also maintains that a cursory look is not the same as reading a document. Although the leader of the investigation team was able to take a cursory look at the Set A documents during the investigation, it is wrong to claim that the Commission officials read them before putting them in an envelope. With regard to the Set B documents, it was only after the investigation that the Commission read them and acquired knowledge of their contents. The Commission also denies the applicants' suggestion that their final consent to hand over the Set B documents was obtained by the threat of criminal sanctions. These allegations are manifestly untrue in so far as the alleged refusal related to the entire file. In any case, informing an undertaking that its failure to cooperate could entail the application of national law and, possibly, criminal sanctions is in accordance with Regulation No 17.

75 The Commission observes that the applicants were informed of their rights at the outset of the investigation and were thereafter at all times in a position to have access to the Court of First Instance. In the case of the Set A documents, the applicants knew from the beginning that the procedure would lead to the adoption of a challengeable decision. With regard to the Set B documents, the Commission left open the possibility for the applicants to challenge the assessment conducted on the spot by one of its officials.

Findings of the Court

76 It should be pointed out at the outset that Regulation No 17 confers on the Commission wide powers of investigation and of examination in order to uncover infringements of Articles 81 EC and 82 EC. According to, in particular, Articles 11 and 14 of that regulation, the Commission may obtain information and undertake the necessary examinations for the purpose of proceedings in respect of infringements of the rules governing competition (from 1 May 2004, the Commission's powers of investigation in this area are set out, in particular, in Articles 17 to 22 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)). Article 14(1) of Regulation No 17, in particular, empowers the Commission to require production of business records, that is to say, documents concerning the market activities of the undertaking. As the Court of Justice has pointed out, written communications between lawyer and client fall, in so far as they have a bearing on such activities, within the category of documents referred to in Articles 11 and 14 of Regulation No 17 (*AM & S*, paragraph 16). The Court also held that it is for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it (*AM & S*, paragraph 17).

77 However, the Court held that Regulation No 17 does not exclude the possible recognition, subject to certain conditions, of certain business records as confidential in character. It thus stated that Community law, which derives from not only the economic but also the legal interconnection between the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all of the Member States, that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. Similarly, the Court considered that the protection of the

confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence (*AM & S*, paragraphs 18 and 23).

78 The Court therefore concludes that Regulation No 17 must be interpreted as protecting the confidentiality of written communications between lawyer and client, subject to certain conditions (*AM & S*, paragraph 22).

79 As regards the procedure to be followed when applying that protection, the Court held that if an undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses, by claiming protection under LPP, to produce, as part of the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission officials with relevant material which demonstrates that the communications fulfil the conditions for the grant of legal protection, while not being bound to disclose their contents. The Court went on to state that, where the Commission considers that such evidence has not been provided, it must, pursuant to Article 14(3) of Regulation No 17, order production of the communications in question and, if necessary, impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the documents whose confidentiality, in the Commission's view, is not protected in law (*AM & S*, paragraphs 29 to 31). The undertaking under investigation may subsequently bring an action for the annulment of such a Commission decision, where appropriate, coupled with a request for interim relief pursuant to Articles 242 EC and 243 EC (see, to that effect, *AM & S*, paragraph 32).

80 It is apparent, therefore, that the mere fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind as to prove that it is actually protected by LPP. The undertaking concerned may, in particular, inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents.

81 In a significant number of cases, a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will enable them to confirm the accuracy of the reasons invoked by the undertaking and to determine whether the document at issue was confidential, when deciding whether to put it aside. Nevertheless, on certain occasions, there would be a risk that, even with a cursory look at the document, in spite of the superficial nature of their examination, the Commission officials would gain access to information covered by legal professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications.

82 As stated in paragraph 79 above, it is clear from *AM & S* that the undertaking concerned is not bound to reveal their contents when presenting the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for being granted legal protection (paragraph 29 of the judgment). Accordingly, the Court concludes that an undertaking subject to an investigation under Article 14(3) of Regulation No 17 is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by LPP, provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view.

83 Where, in the course of an investigation under Article 14(3) of Regulation No 17, the Commission considers that the material presented by the undertaking is not of such a nature as to prove that the documents in question are confidential, in particular where that undertaking refuses to give the Commission officials a cursory look at a document, the Commission officials may place a copy of the document or documents in question in a sealed envelope and then remove it with a view to a subsequent resolution of the dispute. This procedure enables risks of a breach of legal professional privilege to be avoided while at the same time enabling the Commission to retain a certain control over the documents forming the subject-matter of the investigation and avoiding the risk that the documents will subsequently disappear or be manipulated.

84 Use of the sealed envelope procedure cannot, moreover, be considered to be at odds with the requirement set out in paragraph 31 of *AM & S* that, in the case of a dispute with the undertaking concerned as to whether a particular document is confidential, the Commission must adopt a

decision ordering that document to be produced. The reason for such a requirement lies in the specific context of the judgment in *AM & S*, in particular the fact that the initial decision ordering an inspection at the premises of the undertaking in question was not a formal decision under Article 14 (3) of Regulation No 17 (Opinion of Advocate General Warner in *AM & S*, p. 1624) and the undertaking in question was therefore entitled, as it in fact did, to refuse to produce the documents requested by the Commission.

85 In any event, the Court would point out that where the Commission is not satisfied with the material and explanations provided by the representatives of the undertaking for the purposes of proving that the document concerned is covered by LPP, the Commission must not read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance, and, if appropriate, to make an application for interim relief (see, to that effect, *AM & S*, paragraph 32).

86 Having regard to the particular nature of the principle of LPP, the purpose of which is both to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer (see paragraph 77 above), the Court considers that the fact that the Commission reads the content of a confidential document is in itself a breach of this principle. Contrary to what the Commission seems to submit, the protection of LPP therefore goes beyond the requirement that information provided by an undertaking to its lawyer or the content of the advice given by that lawyer cannot be used against it in a decision which penalises a breach of the competition rules.

87 First, that protection seeks to safeguard the public interest in the proper administration of justice in ensuring that a client is free to consult his lawyer without fear that any confidences which he imparts may subsequently be disclosed. Secondly, its purpose is to avoid the harm which may be caused to the undertaking's rights of the defence as a result of the Commission reading the contents of a confidential document and improperly adding it to the investigation file. Therefore, even if that document is not used as evidence in a decision imposing a penalty under the competition rules, the undertaking may suffer harm which cannot be made good or can only be made good with great difficulty. Information covered by LPP might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it. Moreover, harm which the undertaking concerned would suffer as a result of disclosure to third parties of information covered by LPP could not be made good, for example if that information were used in a statement of objections in the course of the Commission's administrative procedure. The mere fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.

88 Protection under LPP also requires the Commission, once it has adopted its decision rejecting a request under that head, not to read the content of the documents in question until it has given the undertaking concerned the opportunity to refer the matter to the Court of First Instance. In that regard, the Commission is bound to wait until the time-limit for bringing an action against the rejection decision has expired before reading the contents of those documents. In any event, to the extent that such an action does not have suspensory effect, it is for the undertaking concerned to bring an application for interim relief seeking suspension of operation of the decision rejecting the request for LPP (see, to that effect, *AM & S*, paragraph 32).

89 Furthermore, as regards the Commission's claims regarding the possibility that undertakings may abuse the above procedure by making requests, merely as delaying tactics, for protection under LPP which are clearly unfounded, or by opposing, without objective justification, any cursory look at the documents during an investigation, the Court would point out that the Commission has the means, where appropriate, to discourage and penalise such conduct. In fact, such conduct may be penalised under Article 23(1) of Regulation No 1/2003 (and previously under Article 15(1) of Regulation No 17) or be taken into account as aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty under the competition rules.

90 Finally, it must be observed, as the Court of Justice pointed out in *AM & S*, that the principle of LPP does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so (paragraph 28 of the judgment).

91 It is in the light of these considerations and principles that the applicants' complaints should be examined.

92 As a preliminary point, the Court must reject the Commission's claim that the fact that the applicants, at the stage of the reply, presented minutes of the investigation drawn up by their lawyers, infringes Article 48(1) of the Rules of Procedure (see paragraph 72 above). Contrary to the Commission's claims, the applicants explained why they had not produced those minutes beforehand, namely because they were confidential and because they needed to dispute the arguments advanced by the Commission in its defence (see, in particular, paragraphs 21 to 26 of the reply). Moreover, production of those minutes followed the Commission's presentation, in the defence, of the record of the inspection drawn up by its officials. Finally, where the parties disagree on the facts set out in the application and the defence, it is in the reply and the rejoinder that they must put forward evidence in support of their respective presentations of the facts.

93 As regards the complaints raised by the applicants, first of all, they submit that during the investigation the Commission forced them to divulge the contents of the documents at issue, even though they had claimed that they were covered by LPP. In particular, they complain that the Commission officials examined those documents on the spot, in spite of protests on the part of their representatives.

94 It is clear both from the Annex to the report of the inspection drawn up by the Commission officials and the non-confidential version of the minutes of the inspection drawn up by the applicants' lawyers that, during the investigation, the Commission officials and the applicants' representatives had long discussions on how to examine the documents at issue. During those discussions, the applicants strongly opposed a cursory look at the documents by the Commission officials, claiming inter alia that at least some of those documents might not appear on their face to be covered by LPP, as they did not necessarily refer to outside lawyers or to their confidential nature. The applicants submitted, however, that those documents had been prepared for the purposes of seeking legal advice or contained legal advice, and maintained that cursory examination would not enable a determination to be made as to their confidentiality without at the same time revealing their contents. It is also apparent from the report and the minutes mentioned above that the Commission insisted on taking a cursory look at those documents and that the applicants' representatives only agreed to this after the Commission and the OFT officials informed them that refusal to allow them to do so would be tantamount to obstructing the investigation, an action which would be punishable by administrative and criminal penalties.

95 In those circumstances, the Court considers that the Commission forced the applicants to accept the cursory look at the disputed documents, even though, as regards the two copies of the typewritten memorandum in Set A and the handwritten notes in Set B, the applicants' representatives claimed, and provided supporting justification, that such an examination would require the contents of those documents to be disclosed. The Court would point out that a cursory look at the documents was unlikely to allow the Commission officials to assess whether they were confidential without at the same time giving them the opportunity to read their content. Accordingly, the Court concludes that the Commission infringed the procedure for protection under LPP in this regard.

96 Secondly, the applicants maintain that the Commission, by making copies of the documents in Set A and putting them in a sealed envelope, did not follow the procedure laid down by the Court in *AM & S* to the letter, and claim that the Commission ought to have adopted a formal decision ordering those documents to be produced. This complaint cannot however be upheld. In fact, as the Court has already held, the use of the sealed envelope procedure in circumstances such as those in the present case does not infringe the procedure laid down in that judgment (see paragraph 84 above). Furthermore, it is apparent from the report and the minutes mentioned above that, during the investigation, the applicants' representatives repeatedly requested the Commission officials to use the sealed envelope procedure for the disputed documents.

97 Thirdly, the applicants complain that the Commission rejected their claim for protection of the documents in Set B under LPP at the time of the investigation. The Court would point out in this regard that, during the inspection, the applicants in fact claimed such protection and advanced a number of arguments in support of that claim, including, in particular, the fact that the documents in question had been drawn up for the purposes of seeking legal advice or that they contained such legal advice. In those circumstances, the Court concludes that, as the Commission was not satisfied with the explanations provided by the applicants, it should, before reading the contents of the documents in question, have adopted a formal decision rejecting the request for protection under LPP, allowing the applicants to bring the matter effectively before the Court of First Instance (see paragraph 85 above).

98 However, the Commission did not give the applicants an opportunity to bring the matter effectively

before the Court in order to prevent the Commission from reading the contents of the documents in Set B. It must be borne in mind that the Commission officials concluded during the investigation that the documents in Set B were clearly not covered by LPP and that they made copies of them and added them to the investigation file without placing them in a sealed envelope. At that same time, therefore, the Commission was able to read the contents of the documents in full (see paragraph 51 above). Accordingly, the Court concludes that the Commission infringed the procedure for protection under LPP in this regard.

99 Fourthly, the applicants maintain that, by the rejection decision of 8 May 2003, the Commission breached the procedure laid down in *AM & S* by deciding unilaterally that the disputed documents were not covered by LPP. It must be pointed out, however, that, contrary to what the applicants claim, the mere fact that the Commission adopts a decision rejecting a claim for confidentiality does not undermine the procedure applying to such protection, inasmuch as the Commission does not read the documents in question before giving the undertaking concerned the opportunity to bring the matter effectively before the Court of First Instance, and, if appropriate, to apply for interim relief to challenge the rejection decision (see paragraph 85 above).

100 However, in the present case, as regards the documents in Set B, even if they are covered by the rejection decision of 8 May 2003, it is not disputed that the Commission had read their contents well before adopting the decision. On the other hand, in relation to the documents in Set A, it must be borne in mind that the Commission made copies of them during the investigation and placed them in a sealed envelope. It then adopted a preliminary decision at the applicants' request, without opening the sealed envelope or examining its contents, a decision which it sent to them by letter of 1 April 2003. On 8 May 2003 the Commission finally adopted a decision rejecting the claim to protection, still without reading the contents of the documents in Set A. It was only after the annulment of the order of the President of the Court of First Instance in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* by the order of the President of the Court of Justice in *Commission* v *Akzo and Akcros* in the interim relief cases that the Commission finally read the documents in Set A. In those circumstances, the Court concludes that the adoption of the rejection decision of 8 May 2003 did not infringe the procedure applying to protection under LPP.

101 In the light of the foregoing, the Court holds that the Commission infringed the procedure for protection under LPP, first, by forcing the applicants to allow a cursory look at the documents in Set A and the manuscript notes in Set B, and, secondly, by reading the documents in Set B without having given the applicants the opportunity to contest the rejection of their claim to protection in respect of those documents before the Court of First Instance. However, the Court rejects the first plea as regards the applicants' complaints relating to the cursory look at the e-mails in Set B, the use of the sealed envelope procedure in respect of the documents in Set A, and the adoption of the rejection decision of 8 May 2003.

The second plea in law, alleging unjustified rejection of the claim to protection of LPP for the documents at issue

102 The applicants maintain that the five documents at issue are covered by LPP. The documents in Set A and the handwritten notes in Set B should in fact be viewed as the written basis of an oral communication between client and outside counsel, made for the purpose of obtaining legal advice, while the e-mails in Set B are communications between lawyer and client for the purposes and in the interest of the latter's rights of defence.

103 The Commission argues that, in the light of the criteria laid down in the case-law, the five documents at issue are clearly not covered by LPP.

The two copies of the typewritten memorandum in Set A

– Arguments of the parties

104 The applicants observe that Set A contains two separate copies of a typewritten two-page memorandum from the General Manager of Akcros Chemicals to his superior, the Sub-Business Unit Manager ('the SBU Manager'), dated 16 February 2000. The two copies are identical, apart from the fact that one copy has the following handwritten notes on the first page:

' – given to [SBU manager] 2/16/00

– returned by [SBU manager] 2/17/2000

– discussed with [X, outside counsel of the applicants] 2/22/00 by tel.'

105 The applicants submit that the document has to be examined in the context of the internal competition law compliance programme put in place by the Akzo Nobel group of companies on the advice of, and in coordination with, outside counsel. In the context of that programme, the applicants' employees and management identify potential questions relating to competition law in their respective fields of responsibility which they then put to outside counsel, who provides legal advice in reply.

106 Therefore, according to the applicants, that memorandum contains information gathered by the General Manager of Akcros Chemicals on the basis of internal discussions which he had with other employees, for the purpose of seeking legal advice regarding the compliance programme. That document is thus the direct result of – and inseparable from – the effort made by the applicants to identify potential competition law compliance issues and seek legal advice from outside counsel.

107 The sequence of events corroborates this version of the facts. After receiving the letter of 28 January 2000 from the Chairman of the Board of Management of Akzo Nobel concerning the draft compliance programme, the General Manager of Akcros Chemicals spoke with his employees about matters of competition law compliance. During these discussions, he took notes (the Set B handwritten notes). On Wednesday 16 February 2000, the copies of the Set A memorandum were given to the SBU Manager by the General Manager. On Thursday 17 February 2000, the SBU Manager returned them to the General Manager. On Tuesday 22 February 2000, the memorandum served as a basis for the discussion with Mr X, the applicants' outside counsel.

108 The applicants maintain that the two criteria identified by the Court of Justice in *AM & S* as being common to the laws of the various Member States in the context of protection under LPP, namely that the relevant communications are made for the purposes of and in the interests of the client's rights of defence and that those communications involve independent lawyers, are satisfied in the present case. The applicants explain that they do not claim that the mere fact that the document at issue was created in the context of the compliance programme is sufficient to guarantee the confidentiality of that document. However, by denying the possibility that such a programme can provide the context within which legally privileged communications are produced, the Commission overlooks fundamental aspects of its own competition law enforcement regime. Thus, first, in the light of the abolition of the notification scheme under Article 81(3) EC, if documents produced in the context of a self-assessment exercise could be divulged, the undertaking would be prevented from establishing freely and without fear, with the aid of external or internal counsel, whether its practices are in compliance with competition law. Secondly, due to the nature of a leniency application and to the requirement to undertake a fact-finding exercise and gather material evidence, documents produced in the context of a self-assessment exercise must be considered to be covered by LPP.

109 The applicants also dispute the Commission's view that there is no indication in the typewritten memorandum linking the observations of the General Manager to the seeking of legal advice from external counsel and that it has not been established that such legal advice was indeed sought and given. They thus assert that the handwritten notes on the first page of one of the two copies of the memorandum incontestably demonstrate that that document served as a vehicle for seeking legal advice from that lawyer. Similarly, an internal report from the lawyer of 22 February 2000 and the time sheet filled in by him on that day confirm that legal advice was sought and given. Later that day, the General Manager faxed additional information to the outside counsel, referring to their earlier telephone conversation. The applicants also contend that *AM & S* and the order in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, published in extracts, at no point state that there must be an indication in the privileged communication establishing a connection with the seeking of legal advice or that the communications were prepared for the sole purpose of seeking such advice.

110 According to the applicants, the only particularity here, as compared with the classical situation contemplated in *AM & S*, is that the information was transmitted to the outside counsel orally on the basis of the memorandum drawn up by the General Manager. The applicants maintain that, had the General Manager reported the result of his fact-finding efforts in a memorandum to outside counsel with a copy to his superior, the Commission would certainly have acknowledged the application of the protection of LPP to that document. However, as the order in *Hilti* v *Commission* demonstrates, application of LPP does not depend on both the form and substance of the document.

111 The CCBE submits that the documents drawn up for the purpose of seeking legal advice are covered by the principle of LPP and that account must be taken of the 'dominant' purpose for which

a communication was made. In order for a document to be protected, however, it is not sufficient for an undertaking to declare that it has been prepared in the context of a competition law compliance programme, even if that programme was put together with help of outside counsel and carried out under his supervision. In this case, the fact that it is not possible to tell from the outward form of the Set A documents that they were prepared for the purposes of seeking legal advice cannot be a determinative test. The Netherlands Bar Association, the ECLA, the ACCA and the IBA each submit that preparatory documents drawn up for the purpose of seeking legal advice must be regarded as protected by LPP.

112 The Commission observes that, according to the judgment in *AM & S* (paragraphs 21 to 23) and the order in *Hilti* v *Commission* (paragraph 18), LPP covers only written communications between lawyer and client which are made for the purposes of and in the interests of the client's rights of defence, and internal notes which do no more than report the text or the content of those communications.

113 In the present case, according to the Commission, the documents at issue do not fall within the category of written communications between lawyer and client and do not report the contents of such communications. The observations contained in the memorandum at issue reflect internal discussions that the General Manager had with other employees in the context of the compliance programme, not discussions that he had with an external lawyer.

114 The Commission is opposed to extension of the material scope of LPP to include documents made for the purpose of seeking legal advice. Such extension finds no basis either in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) or in the constitutional traditions common to the Member States. In actual fact, *AM & S* establishes a high level of protection in Community law, more extensive than that provided in a large number of Member States, since *AM & S* covers documents kept at the premises of the client and may also encompass documents exchanged with an external lawyer before any proceedings have been started against the client.

115 In any event, the Commission also disputes the applicants' view that the memorandum, the two typewritten copies of which constitute the Set A documents, was prepared for the purpose of seeking legal advice. There is no indication in the typed memorandum linking the observations of the General Manager of Akcros to the seeking of legal advice by an outside lawyer. The manuscript reference, in one of the copies of the memorandum, to the name of an outside lawyer, establishes at most that a conversation regarding the memorandum occurred. The fact that the handwritten name of the outside lawyer was added after completion of the memorandum, and to only one of the two copies, suggests that the memorandum was not prepared for the purpose of seeking legal advice. Similarly, apart from an abstract of the time sheets of Mr X and a reference to an alleged note drawn up by him of the contents of the conversation which he had with the General Manager, the applicants have not produced any documents proving that legal advice was actually sought and given.

116 As regards the applicants' reliance on Akzo Nobel's compliance programme, the Commission expresses doubts as to its probative value. The Set A documents make no mention of that programme. In any event, the fact that a document was drawn up in the context of a compliance programme is not sufficient evidence that that document is confidential. Such a programme is a process of internal assessment comprising contacts between members of staff and for the purposes of ascertaining whether the undertaking is complying with competition law and has a pedagogical, disciplinary and supervisory dimension, and thus is not limited to protection of the rights of the defence. To allow an undertaking to invoke protection of a document on the sole ground that, in the absence of the compliance programme and guidance from an outside lawyer that document would never have been drawn up, could lead to all manner of abuse.

– Findings of the Court

117 It must be pointed out at the outset that, according to the judgment in *AM & S*, Regulation No 17 falls to be interpreted as protecting the confidentiality of communications between lawyer and client provided that (i) such communications are made for the purposes of the exercise of the client's rights of defence and (ii) they emanate from independent lawyers (paragraphs 21, 22 and 27 of the judgment). As far as the first of those two conditions is concerned, such protection must, if it is to be effective, be recognised as covering as a matter of law all written communications exchanged after the initiation of the administrative procedure under the regulation which may lead to a decision on the application of Articles 81 EC and 82 EC or to a decision imposing a pecuniary sanction on the undertaking. That protection can also extend to earlier written communications which have a

relationship to the subject-matter of that procedure (*AM & S*, paragraph 23). In the order in *Hilti* v *Commission*, it was held that LPP must, in view of its purpose, be regarded as extending also to the internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice (paragraphs 13 and 16 to 18 of the order).

118 In the present case, the Court finds that the Set A documents do not by themselves constitute written communications with an independent lawyer or an internal note reporting the content of a communication with such a lawyer. Nor do the applicants submit that those documents were prepared in order to be sent physically to an independent lawyer. Accordingly, it must be held that those documents do not formally come within the categories of documents expressly identified in the abovementioned case-law.

119 The applicants claim, nevertheless, that those documents must be recognised as being covered by LPP, since, in their view, they were prepared in order to seek legal advice. According to the applicants, those documents were drawn up, for the particular purpose of a conference call with a lawyer with the aim of obtaining legal advice.

120 In that regard, it must be pointed out that the principle of the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the effective exercise of the rights of the defence (*AM & S*, paragraph 23) (see paragraph 77 above). According to settled case-law, observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 9, and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 39). Therefore, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures, including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15).

121 Similarly, it must be pointed out that LPP meets the need to ensure that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it (*AM & S*, paragraph 18). That principle is thus closely linked to the concept of the lawyer's role as collaborating in the administration of justice by the courts (*AM & S*, paragraph 24) (see paragraph 77 above).

122 However, so that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. Preparation of such documents may be particularly necessary in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC. In those circumstances, the Court holds that the fact that the Commission reads such documents during an investigation may well prejudice the rights of the defence of the undertaking under investigation and the public interest in ensuring that every client is able to consult his lawyer without constraint.

123 Accordingly, the Court concludes that such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.

124 It must be borne in mind that protection under LPP is an exception to the Commission's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. Such infringements are often carefully concealed and usually very harmful to the proper functioning of the common market. For this reason, the possibility of treating a preparatory document as covered by LPP must be construed restrictively. It is for the undertaking relying on this protection to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the

content of the documents themselves or the context in which those documents were prepared and found.

125 It is therefore necessary, in the present case, to determine whether the applicants have proved that the memorandum of 16 February 2000 of the General Manager of Akcros Chemicals, the two copies of which make up the Set A documents, was prepared exclusively for the purposes of seeking legal advice from a lawyer in exercise of the rights of the defence.

126 The applicants maintain in this respect, first of all, that the memorandum was drawn up in connection with their competition law compliance programme, put in place and coordinated by a law firm, for the purposes of identifying potential problems of competition law and seeking legal advice. They go on to state that the memorandum contains information gathered by the General Manager of Akcros Chemicals on the basis of internal discussions with other employees in order to obtain legal advice on the programme. They contend, finally, that a number of factors prove that the purpose of the memorandum was to seek legal advice and that that advice was in fact requested and provided.

127 In relation, first of all, to the reference to the applicants' competition law compliance programme, it must be pointed out that the fact that a document was drawn up under such a programme is not sufficient in itself for that document to benefit from protection under LPP. Such programmes often encompass in scope duties and cover information which goes beyond the exercise of the rights of the defence. In particular, the fact that an outside lawyer has put together and/or coordinated a compliance programme cannot automatically confer protection under LPP on all the documents drawn up under that programme or in relation to it.

128 As regards, first, the handwritten notes on one of the two copies of the memorandum and referring to a telephone call with an outside lawyer, second, the time sheet filled in by the latter confirming that conversation, third, the fact that the lawyer allegedly prepared an internal note dealing with this, and fourth, the fact that the General Manager of Akcros Chemicals faxed further information to the lawyer, the Court considers that those various factors merely show that the content of the memorandum at issue was discussed on the telephone by the General Manager of Akcros Chemicals and the lawyer. These factors are not, however, in themselves proof that the memorandum was drawn up for the purpose – and, a fortiori, for the exclusive purpose – of seeking legal advice.

129 In that regard, it must be borne in mind that the memorandum was not addressed to the lawyer, but to one of the immediate superiors of the Akcros Chemicals' General Manager, namely the SBU Manager. It is in fact apparent from the first sentence of that document that it was prepared at the latter's request. In fact, the memorandum was in response to a question from the SBU Manager as to whether any activities in one of the applicants' divisions for which the General Manager of Akcros Chemicals was responsible were contrary to the competition rules. The memorandum describes a number of activities and practices which could attract the application of these rules. By way of conclusion, the General Manager of Akcros Chemicals makes two recommendations to his immediate superior and asks for his agreement.

130 It must be pointed out that the memorandum makes no mention of seeking legal advice or a legal consultation. Thus, no mention is made of the need to assess whether certain practices were in conformity with competition law or of the possibility of submitting an application for leniency. Finally, neither of the two recommendations put forward in the memorandum concerns the necessity or appropriateness of seeking legal advice on the conduct examined or on any follow-up action to be taken.

131 Furthermore, even if the gathering of the information in question might in fact be part of the implementation of the applicants' compliance programme, the preparation of the memorandum is clearly not in line with the methodology laid down in that programme. As is apparent from the letter of 28 January 2000 from the Chairman of the Board of Management of Akzo Nobel, sent to, amongst others, the SBU Manager, that compliance programme required that any information or question concerning conduct likely to infringe competition law had to be sent orally and directly to the applicants' outside counsel, except in cases concerning the United States or Canada.

132 In those circumstances, the Court considers that it is not apparent either from the content of the document or the factors and explanations put forward by the applicants, whether taken individually or as a whole, that the memorandum at issue was drawn up by the General Manager of Akcros Chemicals exclusively for the purposes of seeking legal advice. By contrast, the Court considers that the most plausible explanation is that the memorandum was drawn up by the General Manager of Akcros Chemicals with the primary purpose of seeking the agreement of his immediate superior on the recommendations he put forward regarding the conduct he identified. This interpretation is also

confirmed by the Set B handwritten notes. In fact, the General Manager of Akcros Chemicals expressly stated in those notes that his superior, the SBU Manager, could have a different view as to the strategy to be adopted regarding some of the situations identified in the memorandum. This explains why the Managing Director of Akcros Chemicals drew up a memorandum for the attention of his superior, presenting to him the conduct identified, putting forward recommendations as to the action to be taken and asking for his agreement.

133 By the same token, the sequence of events, as presented by the applicants, does not contradict this version of the facts. In fact, on 16 February 2000, the General Manager of Akcros Chemicals sent the SBU Manager the memorandum at issue. On 17 February 2000, the memorandum was returned to him by the SBU Manager. It was only subsequently, on 22 February 2000, that the General Manager of Akcros Chemicals discussed the content of the memorandum with the lawyer. However, as has been stated above, that subsequent consultation with the lawyer does not suffice to prove that the memorandum at issue was drawn up for the exclusive purpose of seeking legal advice (see paragraph 123 above).

134 In the light of the foregoing, the Court concludes that the applicants have not proved that the memorandum of 16 February 2000 from the General Manager of Akcros Chemicals was drawn up for the exclusive purpose of seeking legal advice from a lawyer in exercising rights of defence.

135 Consequently, the Court concludes that the Commission did not err in considering that the two copies of the memorandum constituting the Set A documents were not protected under LPP.

The handwritten notes in Set B

– Arguments of the parties

136 The applicants state that the first document in Set B consists of handwritten notes by the General Manager of Akcros Chemicals, taken during his discussions with lower-level employees and used for the purpose of preparing the typewritten memorandum constituting the Set A documents. The applicants, supported by the CCBE, submit that if the protection of LPP is accepted for the Set A documents, it should be extended to those preparatory notes.

137 The Commission contends that the handwritten notes cannot be protected under LPP, as they were made in preparation of documents which are not covered by that principle.

– Findings of the Court

138 It is clear from the analysis of the Set B handwritten notes that, as the applicants contend, they were made with the main aim of preparing the memorandum, the two copies of which make up the Set A documents. However, since the Court concluded that the memorandum is not protected under LPP, it must also conclude that those notes are not covered by such protection either.

139 Furthermore, it must be pointed out that the handwritten notes do not constitute a communication with a lawyer and do not report the text or the content of communications with a lawyer containing legal advice. The applicants have also not proved that the manuscript notes were made exclusively for the purpose of seeking legal advice from a lawyer in the exercise of rights of the defence.

140 Accordingly, the Court finds that the Commission did not err in refusing to accord the Set B manuscript notes the protection under LPP claimed by the applicants.

The e-mails exchanged with a member of the applicants' legal department, forming part of the Set B documents

– Arguments of the parties

141 The applicants point out that the two other documents constituting Set B concern e-mail correspondence exchanged between the General Manager of Akcros Chemicals and Mr S., a member of the legal department of Akzo Nobel. That e-mail correspondence should be considered to be protected from disclosure under LPP.

142 In that regard, the applicants put forward two arguments. They submit, principally, that

communications with in-house lawyers who are members of the Bar or Law Society of a Member State – and, in any event, communications with in-house lawyers who are members of the Netherlands Bar, such as Mr S. in the present case – must be protected under the principles laid down in *AM & S*. In the alternative, they claim that, if the *AM & S* judgment is to be interpreted as precluding such protection, it would then be necessary to widen the personal scope of the protection, such as stems from that judgment, and to accord the documents in question the protection claimed.

143 With regard, first of all, to their main argument, the applicants submit that, contrary to the Commission's narrow interpretation of the judgment in *AM & S*, communications emanating from in-house lawyers, in particular those who are members of a Bar or Law Society, are covered by LPP. They admit that in that judgment, the Court of Justice limited that protection to 'independent' lawyers, a group that did not, according to the Court of Justice, include lawyers 'employed' by their clients. However, the relevant element laid down in *AM & S* is that of the independence of the lawyer. The applicants consider that it is not appropriate to attribute the notion of independence only to outside lawyers. In-house lawyers do not appear to be any less under an obligation not to participate in illegal activities, withhold information or obstruct the administration of justice. That is even more true in jurisdictions where in-house lawyers can be admitted to the Bar or Law Society and where, as such, they have a position of independence vis-à-vis their employers.

144 The applicants submit that Mr S. is a member of the Netherlands Bar and is the reference point of the Akzo Nobel competition law compliance programme. While at Akzo Nobel, he has acted only as a legal adviser and has not held any management position. His membership of the Netherlands Bar makes him subject to the professional and ethical rules of that body and gives him a particular level of independence. Under Netherlands law, Mr S. is also covered by the agreement on employment conditions which he concluded with his employer, under which the management of the Akzo Nobel Group of companies has agreed that the obligation of independence and compliance with the Bar rules under Netherlands law prevails over loyalty to the group. Consequently, for the purpose of the principle of LPP, correspondence between Mr S. and the General Manager of Akcros Chemicals is identical to correspondence between that company and an outside lawyer. Mr S. should therefore not be seen solely as in-house counsel, but rather as a qualified independent lawyer, who is a member of the Netherlands Bar and practises as an in-house lawyer within an undertaking.

145 In addition, the applicants assert that, in the correspondence at issue, Mr S. was giving legal advice on how to deal with certain issues that had arisen in the context of Akzo Nobel's competition law compliance programme. That legal advice was based, in turn, on the advice of the applicants' outside lawyer.

146 The CCBE submits that, in the context of applying protection of LPP, a distinction should be made not between legal advisers who are employed and those who are not employed by the company to which they give advice, but between those who are and those who are not subject to professional obligations, compliance with which is supervised by the Bar or Law Society in the Member State concerned. This solution gives full effect to the principles underlying the judgment in *AM & S*, namely the criteria of independence and of being subject to official professional discipline. The CCBE takes the view that Mr S., notwithstanding his employed status, meets all the criteria of independence required by that judgment.

147 The ECLA argues that, in its judgment in *AM & S,* the Court did not specifically hold that an employed lawyer could never be considered 'independent'. A company must have the right to obtain legal advice from the lawyer of its choice without thereby creating evidence against itself, provided that the lawyer is properly qualified and subject to appropriate rules of ethics and discipline. Moreover, Member States' labour laws protect internal advisers against dismissal for failure to follow an order contrary to professional ethical rules.

148 The Netherlands Bar Association states that, in its judgment in *AM & S*, the Court of Justice did not categorically refuse to extend protection of LPP to communications emanating from all in-house counsel. According to that judgment, such protection is closely related to the lawyer's independent status. Lawyers admitted to the Netherlands Bar who are employed in a company are just as independent of their client/employer as other lawyers and have the same status, rights and obligations as the latter, including the privilege of LPP, and the same sanctions can be imposed upon them.

149 The Netherlands Bar Association observes that in 1996 a new regulation was adopted expressly allowing Advocaten to be employed by companies. The independence of lawyers in employment is guaranteed by the conclusion of an agreement on their conditions of employment, in combination

with the disciplinary and ethical rules stemming from their membership of the Netherlands Bar. That agreement governing their conditions of employment contains a number of strict requirements, which are such as to reinforce the independence of the lawyer vis-à-vis his employer. In addition, that agreement obliges the employer to allow the employed lawyer to comply with the disciplinary and ethical rules for practising his profession. The Netherlands Bar Association concludes that the principles that form the basis of the judgment in *AM & S* require the application of LPP to Mr S.

150 The Commission contends that the e-mails at issue neither contain any communication or any intention to communicate with an independent lawyer, nor are limited to reporting the text or the content of written communications with an independent lawyer for the purpose and in the interests of the applicants' rights of defence. The core issue which arises is therefore whether they should be protected precisely because they involve an internal communication with a member of the applicants' legal department. However, contrary to what the applicants seem to claim, the Court of Justice explicitly ruled in *AM & S* that communications between an undertaking and its in-house lawyer are not covered by the principle of LPP.

151 As regards their alternative argument, the applicants put forward, in essence, five reasons why they consider that, if the judgment in *AM & S* is to be interpreted as wholly excluding in-house lawyers from the protection of LPP, it would be appropriate to extend the personal scope of that protection beyond that laid down in the case-law.

152 First of all, the applicants submit that, since *AM & S*, certain Member States have expanded the scope of the protection of LPP and have developed new possibilities for in-house lawyers to be admitted to their national Bar or Law Societies. According to the applicants, the majority of Member States presently accept that in-house lawyers are covered by that protection.

153 The ECLA points out, on the basis of a comparative examination of legislation, that most Member States' laws now recognise the independence of in-house lawyers and legal privilege for their communications. The ACCA points out that, since 1982, there has been an increasing trend among Member States to recognise in-house lawyer privilege. The CCBE observes, however, that LPP is not recognised for in-house lawyers in France, Italy, Luxembourg, Finland, Austria and Sweden. However, for the CCBE, the key question is whether, in each Member State, salaried in-house lawyers are regulated or non-regulated professionals, since the obligation to protect professional privilege is generally linked to membership of a Bar or Law Society. In some countries, however, lawyers admitted to a Bar or Law Society are prohibited absolutely from employment – such as in Belgium and Greece – whereas in others, in particular Denmark, Germany, Ireland, the Netherlands, Portugal, Spain and the United Kingdom, it is permitted.

154 The Commission observes that, at the time of the judgment in *AM & S*, certain Member States already accorded a special status to in-house lawyers. The situation is not different today. Thus, it is not contested that the benefit of LPP is not granted to in-house lawyers in France, Italy, Luxembourg, Finland and Austria. It further contends that the conclusions drawn by the ECLA in its report do not have the unequivocal value which it claims they have.

155 As regards the question of in-house lawyers' membership of a Bar or Law Society, the Commission contends that, while in certain Member States it is possible to be employed and to be a member of a Bar or Law Society (notably in the United Kingdom and Spain) and in others it is possible for employed lawyers to be members of the Bar or Law Society subject to certain conditions (notably in Germany and the Netherlands), the fact remains that, in a considerable number of Member States, employment and membership of the Bar or Law Society are incompatible (for example, in Italy, France, Lithuania, Latvia, the Czech Republic, Hungary, Sweden and Austria). This latter group of States does not confer LPP on documents exchanged with employed lawyers. Finally, in Finland, practice of the profession of independent lawyer does not require membership of a Bar or Law Society. The Commission concludes that, in their great majority, the Member States do not grant LPP to in-house lawyers, even where they can be members of a Bar or Law Society. In any event, turning the developments observed in certain Member States into a principle of Community law would create a situation of legal uncertainty.

156 Secondly, the applicants submit that, since the judgment in *AM & S*, Community competition law has undergone a series of fundamental reforms, the effects of which warrant a re-evaluation of the applicability of the principle of LPP to in-house lawyers, particularly those who are members of their national Bars or Law Societies. Consequently, in the context of the modernisation of Community competition law, both Regulation No 1/2003 and the Commission's Notice on immunity from fines and the reduction of fines in cartel cases (OJ 2002 C 45, p. 3) impose increasing responsibilities on

undertakings to perform self-assessments of their compliance with those rules. Even if those self-assessments are usually performed under the guidance in principle of outside lawyers, in-house lawyers play a central role in them, which would be impeded by the non-recognition of the protection in question.

157 The Commission contends, however, that the replacement of Regulation No 17 by Regulation No 1/2003, which requires from undertakings a greater self-assessment as to whether their agreements are compatible with the conditions of Article 81(3) EC, does not appear relevant in the present case, since the issue of LPP would barely arise in that connection.

158 Thirdly, the applicants submit that the differential treatment, for the purpose of applying LPP, of external lawyers and in-house lawyers admitted to the national Bar or Law Society is arbitrary and thus contrary to the principle of equal treatment and raises issues of freedom of establishment and the freedom to provide services. The ACCA also supports this argument, adding that the *AM & S* ruling also discriminates against non-Community lawyers, since such protection is only accorded to lawyers who are entitled to practise in a Member State (paragraph 25 of the judgment).

159 The Commission takes the view that the fundamental principle whereby undertakings have a right to a fair trial and, in particular, to consult freely with a lawyer of their choice is not unduly restricted by the limitations defined in the judgment in *AM & S* with regard to in-house lawyers. The Commission further argues that the ACCA raises a new issue which was not raised by the applicants, which is therefore inadmissible and, in any event, not the subject-matter of the present proceedings.

160 Fourthly, the applicants refer to Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521, confirmed by the Court of Justice in Case C–41/00 P *Interporc* v *Commission* [2003] ECR I-2125, in which it was held that the correspondence between the lawyers in the legal service of the Commission and the latter was protected by LPP. However, there is no difference between the independence of the members of the Commission’s legal service from the institution and the independence of an in-house lawyer admitted to the Bar or Law Society from his employer.

161 The Commission rejects this analogy. The protection afforded in the *Interporc* judgments to communications emanating from members of its legal service stems from the public interest precluding disclosure of documents drawn up for the purposes of specific court proceedings.

162 Fifthly and finally, the applicants argue that the communication between Mr S. and the General Manager of Akcros Chemicals constitutes correspondence between two persons established, respectively, in the Netherlands and the United Kingdom. According to Netherlands law, Mr S.’s correspondence benefits from protection of LPP under Article 51 of the Netherlands Law on competition. Such protection is also afforded in the United Kingdom. Community law should therefore not be more stringent than these two national laws.

163 The CCBE submits that, since there is no Community harmonisation of the rules organising the legal profession, the personal scope of the Community concept of LPP should be governed by national law. The ECLA argues that since a lawyer’s status, rights and obligations are governed by national law, the Commission has no right to ignore the protection conferred by this law, pursuant to the principle of national procedural autonomy. Finally, the Netherlands Bar Association supports this argument and confirms that, under Netherlands competition law, in relation to inspections, the protection applies to all lawyers admitted to the Netherlands Bar, regardless of whether or not they are employed.

164 The Commission contests that it must be bound by national rules on LPP. This would be contrary to the primacy of Regulation No 1/2003 – and previously, Regulation No 17 – and the ruling in *AM & S*, which took pains to develop a Community concept of LPP. In addition, the Commission asserts that since its investigatory powers extend to the whole European Union, the scope of that protection cannot be determined on the basis of legislation and of rules of the Bars or Law Societies of the Member States. This would create huge legal and practical difficulties. The Commission maintains, in any event, that the right to protection of LPP in the Netherlands is far more limited than the applicants and interveners claim.

– Findings of the Court

165 The Set B documents contain, in addition to the manuscript notes already examined, e-mail

correspondance of May and June 2000 exchanged between the General Manager of Akcros Chemicals and Mr S., an Advocaat on the roll of the Netherlands Bar, who at the material time was a member of the legal department of Akzo Nobel, in which capacity he coordinated competition-law matters.

166 As regards, first of all, the applicants' principal argument, it must be pointed out that in its judgment in *AM & S*, the Court of Justice expressly held that the protection accorded to LPP under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment (paragraphs 21, 22 and 27 of the judgment). The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which may be protected emanate, is based on a concept of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs (*AM & S*, paragraph 24).

167 It follows that the Court expressly excluded communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, from protection under LPP. It must also be pointed out that the Court reached a conscious decision on that exception, given that the issue had been debated at length during the proceeding and that Advocate General Sir Gordon Slynn had expressly proposed in his Opinion for that judgment that where a lawyer bound by an employment contract remains a member of the profession and subject to its discipline and ethics, he should be treated in the same way as independent lawyers (Opinion of Advocate General Sir Gordon Slynn in *AM & S*, p. 1655).

168 The Court therefore concludes that, contrary to what the applicants and certain interveners submit, the Court in its judgment in *AM & S* defined the concept of independent lawyer in negative terms in that it stipulated that such a lawyer should not be bound to his client by a relationship of employment (see paragraph 166 above), rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics. The Court thus laid down the test of legal advice provided 'in full independence' (*AM & S*, paragraph 24), which it identifies as that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.

169 Accordingly, this Court rejects the applicants' principal argument and holds that the correspondence exchanged between a lawyer bound to Akzo Nobel by a relationship of employment and a manager of a company belonging to that group is not covered by LPP, as defined in *AM & S*.

170 As regards, secondly, the argument advanced by the applicants in the alternative, to the effect that the Court of First Instance should extend the personal scope of LPP beyond the limits established by the Court of Justice in *AM & S*, the Court would point out, first, that an examination of the laws of the Member States shows that, even though it is the case, as the applicants and certain interveners submit, that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under LPP is relatively more common today than when the judgment in *AM & S* was handed down, it is not possible, nevertheless, to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States.

171 In particular, first, a comparative examination of laws shows that a large number of Member States still exclude in-house lawyers from protection under LPP. In addition, in certain Member States, the issue seems not to have been decided unequivocally or definitively. Furthermore, various Member States have aligned their regimes with the Community system, following upon the judgment in *AM & S*. Secondly, such an examination shows that a considerable number of Member States do not allow in-house lawyers to be admitted to the Bar or Law Society and, accordingly, do not recognise them as lawyers established in private practice. In fact, in a number of countries, to be a lawyer employed by a person who is not a lawyer in private practice is incompatible with the status of 'avocat'. Moreover, even in countries which do permit this possibility, the fact that in-house lawyers are admitted to a Bar or Law Society and are subject to professional ethical rules does not always mean that communications with such persons are protected under LPP.

172 As regards, secondly, the applicants' argument that the evolution of Community competition law requires the solution adopted by the Court of Justice in *AM & S* to be reconsidered, it must be pointed out that protection under LPP represents a limitation on the Commission's investigatory powers and that those powers are exercised primarily for the purpose of combating the most serious infringements of Article 81(1) EC, including, in particular, price-fixing cartels and market-sharing, together with infringements of Article 82 EC. Accordingly, it must be considered that abolishing, in

the context of the modernisation of Community competition law, the notification system, and consequently conferring on undertakings under Regulation No 1/2003 greater responsibility in assessing whether their conduct is lawful in the light of Article 81(3) EC, are not directly relevant to this problem area.

173 Furthermore, even if the adoption of Regulation No 1/2003 and of the Commission Notice on Immunity from fines and reduction of fines in cartel cases may have increased the need for undertakings to examine their conduct and to define legal strategies in respect of competition law with the help of a lawyer who has in-depth knowledge of the particular undertaking and of the market in question, the fact remains that such exercises of self-assessment and strategy definition may be conducted by an outside lawyer in full cooperation with the relevant departments of the undertaking, including its internal legal department. In that context, communications between in-house lawyers and outside lawyers are in principle protected under LPP, provided that they are made for the purpose of the undertaking's exercise of the rights of defence. It is therefore clear that the personal scope of that protection, as laid down in *AM & S*, is not a real obstacle preventing undertakings from seeking the legal advice they need and does not prevent their in-house lawyers from taking part in self-assessment exercises or strategy definition. Finally, it must be pointed out that the modernisation of competition law does not necessarily mean that the respective roles of outside lawyers and in-house lawyers have changed substantially in this respect since the judgment in *AM & S*. In any event, since Community competition law is aimed at undertakings, it would not be permissible, in principle, for purely internal communications within a particular undertaking to fall outside the Commission's investigatory powers, with the exception, as has been stated above, of notes which do no more than report the text or the content of communications with outside lawyers containing legal advice, and of preparatory documents drawn up exclusively in order to seek legal advice from an outside lawyer in exercise of the rights of defence.

174 Thirdly, as regards the arguments of the applicants and of certain interveners that the differential treatment of in-house lawyers in *AM & S* is contrary to the principle of equal treatment and raises problems from the point of view of the free movement of services and the freedom of establishment, it is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case C–174/89 *Hoche* [1990] ECR I-2681, paragraph 25; Case T–311/94 *BPB de Eendracht* v *Commission* [1998] ECR II–1129, paragraph 309, and Case T–304/02 *Hoek Loos* v *Commission* [2006] ECR II–1887, paragraph 96). It must be pointed out, however, that in-house lawyers and outside lawyers are clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employ them. Accordingly, no infringement of the principle of equal treatment arises from the fact of treating such professionals differently in respect of protection under LPP. Moreover, as regards the applicants' claim as to the harm which might be caused to the free movement of services and the freedom of establishment by restricting the personal scope of protection of confidentiality, it suffices to say that this claim has not been substantiated. Finally, as the Commission points out, the arguments advanced by ACCA regarding the protection afforded to lawyers who are not members of a Bar or Law Society in a Member State are not at all relevant to the present proceedings.

175 As regards, fourthly, the case of *Interporc* v *Commission*, it should be borne in mind that this case concerns individuals' access to Commission documents, and not limitations on the Commission's powers to investigate infringements of the competition rules. In any event, contrary to what the applicants submit, the Court, in Case T-92/98 *Interporc* v *Commission*, did not hold that correspondence between the members of the Commission's legal service and the Commission was covered by LPP. The Court in fact applied the exception to disclosure based on LPP only to exchanges between the Commission and its outside lawyers; on the other hand, the Commission's correspondence with members of its legal service was not disclosed on the basis of the exception relating to the protection of work done within the Commission (Case T-92/98 *Interporc* v *Commission*, paragraph 41).

176 Fifthly and finally, the applicants claim that, since the correspondence between Mr S. and the General Manager of Akcros Chemicals is protected under their respective national laws, Community law should also afford them such protection under LPP. More generally, the CCBE, and, less explicitly, the ECLA and the Netherlands Bar Association, maintain that the personal scope of the Community concept of confidentiality should be governed by national law. In that respect, it should be recalled that the protection of LPP is an exception to the Commission's powers of investigation. Therefore, the protection directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition (*AM & S*, paragraph 30). For those reasons, the Court of Justice and the Court of First

Instance have been at pains to develop a Community concept of LPP. The argument of the applicants and the interveners is at odds both with the development of that Community concept and with the uniform application of the Commission's powers in the common market and must therefore be rejected.

177 In the light of the foregoing, the Court rejects the argument advanced by the applicants in the alternative, concerning extension of the personal scope of protection of LPP beyond the limits laid down by the Court of Justice in *AM & S*.

178 Moreover, it must be pointed out that the applicants also appear to indicate that the e-mails in dispute report, among other information, the advice provided by their external lawyer (see paragraph 145 above). However, on examination of the documents in question, this claim cannot be upheld.

179 Consequently, it must be concluded that the Commission did not err in taking the view that the correspondence exchanged between the General Manager of Akcros Chemicals and the member of Akzo Nobel's legal department, forming part of the Set B documents, should not be covered by LPP.

180 Accordingly, the Court must reject the second plea in law.

The third plea in law, alleging violation of the fundamental rights which form the basis of LPP

181 By their third plea, the applicants submit that, by violating the protection of LPP, the Commission also infringed the fundamental rights on which that principle is based. They consider that protection of LPP is based on a number of fundamental rights recognised in the laws of the various Member States and in Community law, including the rights of defence, respect for privacy and freedom of expression. However, they merely set out this third plea in a very succinct manner, without supporting their claim with specific arguments.

182 The Court considers that this third plea cannot be considered to be independent from the two pleas examined earlier. In fact, the applicants' claim that fundamental rights were infringed is not based on grounds of complaint different from those made to establish the alleged infringement of the principle of protection of LPP. However, those complaints have already been analysed in the context of the first and second pleas in this case.

183 Consequently, there is no further need to examine this third plea in law.

184 In the light of the foregoing, it must be concluded that the infringements on the part of the Commission found to have been committed during the procedure for examination of the documents for which the applicants claimed protection of LPP has not unlawfully deprived the applicants of that protection in respect of the disputed documents, since, as has been held, the Commission did not err in deciding that none of those documents fell within the scope of that protection.

185 The action in Case T–253/03 must therefore be dismissed.

Costs

186 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

187 In the present case, although the applicants have been unsuccessful, the Court considers that the Commission had, in any event, committed various irregularities in the administrative procedure on which the present cases are based. Accordingly, the Court considers that it will make an equitable assessment of the case by holding that the applicants are to bear three fifths of their own costs and three fifths of those incurred by the Commission in relation to the main proceedings and to the proceedings for interim relief. As regards the Commission, it is to bear two fifths of its own costs and pay two fifths of those incurred by the applicants in relation to the main proceedings and to the proceedings for interim relief.

188 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In this case, the interveners intervening in support of the applicants are to bear their own costs in relation to the main proceedings and to the proceedings for interim relief.

On those grounds,

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

hereby:

1. Dismisses the action in Case T–125/03 as inadmissible;

2. Dismisses the action in Case T–253/03 as unfounded;

3. Orders Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd to bear three fifths of their own costs relating to the main proceedings and to the proceedings for interim relief, and to pay three fifths of the costs incurred by the Commission relating to the main proceedings and to the proceedings for interim relief;

4. Orders the Commission to bear two fifths of its own costs relating to the main proceedings and to the proceedings for interim relief, and to pay two fifths of the costs incurred by Akzo Nobel Chemicals and Akcros Chemicals relating to the main proceedings and to the proceedings for interim relief;

5. Orders the interveners to bear their own costs relating to the main proceedings and to the proceedings for interim relief.

Cooke	García-Valdecasas	Labucka
Prek		Ciucă

Delivered in open court in Luxembourg on 17 September 2007.

Registrar		President
E. Coulon		J. D. Cooke

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* Language of the case: English.

ORDER OF THE PRESIDENT OF THE FIRST CHAMBER OF THE COURT OF FIRST INSTANCE

26 February 2007(*)

(Intervention – Admission – Representative association whose object is the protection of its members)

In Case T‑125/03,

Akzo Nobel Chemicals Ltd, established in Surrey (United Kingdom),

Akcros Chemicals Ltd, established in Surrey,

represented by C. Swaak and M. Mollica, lawyers,

applicants,

supported by

Council of Bars and Law Societies of the European Union (CCBE), established in Brussels (Belgium), represented by J. Flynn QC,

by

Algemene Raad van de Nederlandse Orde van Advocaten, established in The Hague (Netherlands), represented by O. Brouwer, lawyer,

and by

European Company Lawyers Association (ECLA), established in Brussels, represented by M. Dolmans and K. Nordlander, lawyers, and J. Temple Lang, Solicitor,

interveners,

v

Commission of the European Communities, represented initially by R. Wainwright and C. Ingen-Housz, and subsequently by R. Wainwright and F. Castillo de la Torre, acting as Agents,

defendant,

APPLICATION by the International Bar Association for leave to intervene in support of the forms of order sought by the applicants in this case, which, first, seeks annulment of Commission Decision C (2003) 559/4 of 10 February 2003 and, as far as necessary, of Commission Decision C(2003) 85/4 of 30 January 2003 requiring the applicants and their subsidiaries to submit to an investigation, in so far as those decisions were interpreted by the Commission as justifying and constituting the basis of its action of seizing, inspecting and/or reading documents supposedly covered by legal professional privilege, and, second, seeks an application for an order that the Commission return those documents and prohibiting it from using their contents,

THE PRESIDENT OF THE FIRST CHAMBER OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES,

makes the following

Order

Facts and procedure

1 On 30 January 2003, the Commission adopted Decision C(2003) 85/4 on the basis of 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), ordering Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd ('the applicants') and their subsidiaries to submit to an investigation aimed at seeking evidence of possible anticompetitive practices ('the decision of 30 January 2003'). On 10 February 2003 the Commission adopted Decision C(2003) 559/4, also on the basis of Article 14(3) of Regulation No 17 ('the decision of 10 February 2003'), amending the decision of 30 January 2003.

2 On 12 and 13 February 2003, on-the-spot investigations were carried out on the basis of those decisions at the applicants' premises in Eccles, Manchester (United Kingdom). In the course of that investigation, the Commission officials took copies of a large number of documents. During those operations, the applicants' representatives indicated to the Commission officials that a number of documents were likely to be covered by legal professional privilege. While the documents concerned were being examined, a disagreement arose as regards five documents which were subject to two kinds of treatment. The Commission officials did not reach a definitive conclusion there and then as to the protection to be afforded to two documents. They, therefore, took copies of them and placed them in a sealed envelope which they took away with them at the end of their investigation. As regards the three other documents at issue, the Commission official responsible for the investigation took the view that they were not covered by legal professional privilege and therefore took copies and added them to the file without placing them in a separate sealed envelope.

3 By application lodged at the Court Registry on 11 April 2003, the applicants brought an action for annulment of the decision of 10 February 2003 and, so far as necessary, of the decision of 30 January 2003 requiring those companies and their respective subsidiaries to submit to the investigation in question. The applicants ask the Court, essentially, first, to annul the decisions in so far as they were interpreted by the Commission as justifying and constituting the basis of its action in seizing, inspecting and/or reading documents covered by legal professional privilege and, second, to order the Commission to return those documents and to prohibit it from using their contents.

4 On 8 May 2003, the Commission adopted Decision C(2003) 1533 final on the basis of Article 14(3) of Regulation No 17, refusing the applicants' request to preserve the confidentiality of the documents at issue. By application lodged at the Court Registry on 4 July 2003, the applicants brought an action for annulment of that decision (Case T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*).

5 By applications lodged on 30 July and 7 and 11 August 2003 respectively, the Council of Bars and Law Societies of the European Union ('CCBE'), the Algemene Raad van de Nederlandse Orde van Advocaten ('Netherlands Bar') and the European Company Lawyers Association ('ECLA') applied for leave to intervene in support of the form of order sought by the applicants. By the same order of the President of the Fifth Chamber of 4 November 2003, the CCBE, the Netherlands Bar and the ECLA were granted leave to intervene.

6 By application lodged on 25 November 2003, the Section on Business Law of the International Bar Association applied for leave to intervene in support of the form of order sought by the applicants. By order of 28 May 2004, the Court rejected that application for leave to intervene.

7 On 20 February 2006, the International Bar Association ('IBA'), represented by J. Buhart, lawyer, lodged an application for leave to intervene in support of the forms of order sought by the applicants.

8 In its application for leave to intervene, the IBA submits that it has a direct and particular interest in this case and that it satisfies the conditions laid down in the case-law concerning applications for leave to intervene by associations. First, the IBA is an international association with legal personality representing a large number of practitioners active in the sector concerned. It is in fact the largest association in the world representing the legal profession. Second, its objectives include the protection, defence and representation of its members' interests – of which the principle of legal

professional privilege is one – if necessary before the courts, to ensure in particular that its members are able to exercise their profession freely and without interference. Third, this case raises fundamental issues regarding the principle of legal professional privilege and the IBA claims that the position adopted by the Court on those issues will undoubtedly affect its members at all levels – individual members, Bars and company lawyers' associations.

9 The application for leave to intervene was notified to the parties, pursuant to the first subparagraph of Article 116(1) of the Rules of Procedure of the Court of First Instance.

10 By document of 11 April 2006, the applicants submitted that the IBA had shown that it had an interest in the result of this case and asked the Court to declare its application for leave to intervene to be admissible. By separate document lodged on the same day, the applicants made an application for confidential treatment as against the IBA.

11 By document of 29 March 2006, the Commission asked the Court to reject the IBA's application for leave to intervene. It submits, inter alia, that the IBA's objects, as defined by Article 1 of its Constitution, do not include either the protection of its members' interests or their representation, as the purpose of that association involves simply 'assisting' its members and 'promoting' the rule of law and the administration of justice. The case-law attaches great importance to the fact that the object of an association is clearly stated in its statutes (order of the Court of First Instance in Case T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2004] ECR II-1603, paragraph 20, rejecting the application for leave to intervene by the Section on Business Law of the International Bar Association). The Commission also observes that the Court appears to establish a clear distinction between 'promotion' and 'representation and protection' by an association of its members' interests. An association seeking to promote the general and collective interests of a profession does not have sufficient interest to be granted leave to intervene (order of the President of the Third Chamber of 25 June 1999 in Case T-13/99 *Pfizer Animal Health* v *Council*, not published in the ECR, paragraph 28).

12 By documents of 7 and 10 April 2006, the CCBE and the Netherlands Bar expressed support for the IBA's application for leave to intervene. The other intervener did not raise any objections to the application.

Findings of the Court

13 Pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 thereof, the right to intervene in cases submitted to the Court of First Instance is open not only to the Member States and institutions of the Communities, but also to any other person establishing an interest in the result of the case.

14 According to settled case-law, representative associations whose object is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene (orders of the President of the Court in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 66, and Case C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6). More particularly, an association may be granted leave to intervene in a case if it represents an appreciable number of operators active in the sector concerned, its objects include that of protecting its members' interests, the case may raise questions of principle affecting the functioning of the sector concerned and the interests of its members may therefore be affected to an appreciable extent by the judgment to be given (see, to that effect, order of the Court of First Instance in Case T-87/92 *Kruidvat* v *Commission* [1993] ECR II-1375, paragraph 14, refusing the application for leave to intervene by Yves Saint Laurent Parfums SA, and the order in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, cited above, paragraph 18).

15 In this case, the Court finds, first of all, that the IBA is an organisation which represents an appreciable number of practitioners active in the sector concerned in this case. Its members include more than 20 000 individual lawyers – including approximately 3 000 in-house counsel – and also 195 Bars and numerous company lawyers' associations – including the Institut des jurists d'entreprise.

16 Second, it is clear from the IBA's Constitution that its objects include the protection of its members' interests. Thus, according to Article 1(2) and (3) of the IBA's Constitution, its object is to assist bar

associations, law societies and their members to develop and improve the profession's organisation and status, to assist members of the legal profession throughout the world, whether in the field of legal education or otherwise, and to develop and improve their legal services to the public. Contrary to the Commission's submissions, the reference to the IBA's objects being, inter alia, to 'assist' its members must be understood as meaning that one of the aims of that association is to protect its members' interests. Therefore, the cases covered by the provisions in question go beyond the mere promotion of general and collective interests of a profession, within the meaning of the order in *Pfizer Animal Health* v *Council*. The IBA's Constitution covers issues likely to affect directly the particular interests of its members, such as the organisation and status of the legal profession and the provision of legal services.

17 Third and finally, in the light of the fact that the case concerned raises fundamental issues concerning confidentiality of communications between a lawyer and his client, the Court finds that the judgment to be given may significantly affect both the functioning of the sector concerned and the interests of the IBA's members.

18 It is clear from the foregoing that the IBA has established its interest in the result of the case and, therefore, it is appropriate to admit it as an intervener pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice. As its application for leave to intervene was submitted after the expiry of the six-week period prescribed in Article 115(1) of the Rules of Procedure of the Court of First Instance, the IBA's intervention is to be limited to the submission of observations during the oral procedure, pursuant to Article 116(6) of those rules. Therefore, the IBA will, in due course, receive only the Report for the Hearing which will be drawn up in this case. There is no need, therefore, to rule upon the application for confidential treatment brought by the applicants as against the IBA.

On those grounds,

THE PRESIDENT OF THE FIRST CHAMBER OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The International Bar Association is granted leave to intervene in Case T-125/03 in support of the form of order sought by the applicants. Pursuant to Article 116(6) of the Rules of Procedure of the Court of First Instance, the Registrar shall communicate to it in due course the Report for the Hearing, on the basis of which it may submit any observations during the oral procedure.**

2. **Costs are reserved**

Luxembourg, 26 February 2007.

E. Coulon	J.D. Cooke
Registrar	President

* Language of the case: English.

Affaires jointes T-125/03 R et T-253/03 R

Akzo Nobel Chemicals Ltd et Akcros Chemicals Ltd

contre

Commission des Communautés européennes

«Procédure de référé - Concurrence - Pouvoirs de vérification

de la Commission - Protection de la confidentialité -

Correspondance entre avocats et clients - Limites»

Ordonnance du président du Tribunal du 30 octobre 2003

?II - 0000

Sommaire de l'ordonnance

1. *Procédure - Intervention - Référé - Personnes intéressées - Demande de sursis à l'exécution d'une décision de la Commission rejetant une demande de protection de la confidentialité de documents copiés lors d'une vérification fondée sur l'article 14 du règlement n° 17 - Litige relatif à la protection de la confidentialité de la correspondance avec des avocats et des juristes d'entreprise - Demande d'intervention d'associations d'avocats et de juristes d'entreprise - Recevabilité*

   (Statut de la Cour de justice, art. 40, alinéa 2)

2. *Référé - Conditions de recevabilité - Recevabilité du recours principal - Défaut de pertinence - Limites*

   (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 1)

3. *Actes des institutions - Décision - Validité - Décision de vérification fondée sur l'article 14 du règlement n° 17 - Circonstances de droit et de fait concernant le déroulement de la procédure de vérification - Circonstances n'affectant pas la validité de ladite décision*

   (Art. 230 CE; règlement du Conseil n° 17, art. 14, § 3)

4. *Référé - Sursis à exécution - Conditions d'octroi - Fumus boni juris - Atteinte prima facie aux droits de la défense lors d'une vérification effectuée en application du règlement n° 17 - Notes rédigées en vue de la consultation d'un avocat ou correspondance échangée avec un avocat salarié de l'entreprise*

   (Art. 242 CE et 243 CE; règlement du Conseil n° 17, art. 14)

5. *Concurrence - Procédure administrative - Pouvoirs de vérification de la Commission - Refus de l'entreprise de produire une correspondance avec son avocat en invoquant sa confidentialité - Pouvoirs de la Commission*

   (Règlement du Conseil n° 17, art. 14)

6. *Référé - Sursis à exécution - Conditions d'octroi - Préjudice grave et irréparable - Notion - Demande de sursis à l'exécution d'une décision de la Commission rejetant une demande de protection de la confidentialité de documents copiés lors d'une vérification fondée sur l'article 14 du règlement n° 17*

   (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2)

7. *Référé - Sursis à exécution - Conditions d'octroi - Mise en balance de l'ensemble des intérêts en cause - Notion - Demande de sursis à l'exécution d'une décision de la Commission rejetant une demande de protection de la confidentialité de documents copiés lors d'une vérification fondée sur l'article 14 du règlement n° 17 - Mise en balance de l'intérêt des requérantes à la non-divulgation des informations y contenues et de l'intérêt général de la Commission au respect des règles de concurrence*

(Art. 242 CE et 243 CE)

1. En vertu de l'article 40, deuxième alinéa, du statut de la Cour de justice, applicable au Tribunal en vertu de l'article 53, premier alinéa, du même statut, le droit d'intervenir d'un particulier est soumis à la condition que ce dernier puisse justifier d'un intérêt à la solution du litige. Est admise l'intervention d'associations représentatives qui ont pour objet la protection de leurs membres dans des affaires soulevant des questions de principe de nature à affecter ces derniers.

   Dès lors, des associations d'avocats et de juristes d'entreprise représentant les intérêts de leurs membres et ayant pour objet la défense de ces intérêts ont le droit d'intervenir dans une procédure en référé posant directement des questions de principe relatives, d'une part, à la confidentialité de la correspondance échangée avec des avocats et des juristes d'entreprises et, d'autre part, aux conditions dans lesquelles le juge des référés peut ordonner des mesures provisoires concernant les documents dont la Commission entend prendre connaissance sur le fondement de l'article 14, paragraphe 3, du règlement n° 17, mais dont les entreprises soutiennent qu'ils sont protégés par le secret professionnel. En effet, la définition de ces conditions est de nature à affecter directement les intérêts desdits membres, en ce qu'elles peuvent limiter ou étendre la protection juridictionnelle provisoire applicable, notamment, aux documents émanant des avocats et des juristes d'entreprise et que lesdites associations considèrent comme couverts par le secret professionnel.

   (voir points 43, 45-46, 50, 52-53)

2. La recevabilité du recours au principal ne doit pas, en principe, être examinée dans le cadre d'une procédure en référé sous peine de préjuger le fond de l'affaire. Il peut, néanmoins, s'avérer nécessaire, lorsque l'irrecevabilité manifeste du recours au principal sur lequel se greffe la demande en référé est soulevée, d'établir l'existence de certains éléments permettant de conclure, à première vue, à la recevabilité d'un tel recours.

   (voir point 56)

3. Selon un principe général de droit communautaire, la légalité d'un acte doit être appréciée au regard des circonstances de droit et de fait existant au moment où cette décision a été adoptée, de telle sorte que des actes postérieurs à une décision ne peuvent pas en affecter la validité. Dès lors, dans le cadre d'une vérification fondée sur l'article 14 du règlement n° 17, une entreprise ne saurait se prévaloir de l'illégalité dont serait entaché le déroulement de procédures de vérification au soutien de conclusions en annulation dirigées contre l'acte sur le fondement duquel la Commission a procédé à cette vérification.

   (voir points 68-69)

4. Le règlement n° 17 doit être interprété comme protégeant la confidentialité de la correspondance entre avocats et clients pour autant, d'une part, qu'il s'agisse de correspondance échangée dans le cadre et aux fins du droit de la défense du client et, d'autre part, qu'elle émane d'avocats indépendants, c'est-à-dire d'avocats non liés au client par un rapport d'emploi.

   Ce principe de protection accordée aux communications entre l'avocat et son client doit être regardé comme s'étendant également aux notes internes qui se bornent à reprendre le texte ou le contenu de ces communications.

   Un moyen visant à démontrer que des documents rédigés en vue de la consultation d'un avocat et pour les fins des droits de la défense, d'une part, et des correspondances échangées avec un avocat employé de façon permanente par une entreprise, d'autre part, sont également couverts par le secret professionnel pose des questions de principe très importantes et complexes. Un tel moyen nécessite, par conséquent, un examen détaillé au principal. Au stade du référé, ce moyen n'apparaît donc pas comme étant manifestement infondé et satisfait la condition relative au «fumus boni juris».

(voir points 95-98, 114, 119-120, 130)

5. Lorsqu'une entreprise, soumise à vérification en vertu de l'article 14 du règlement n° 17, refuse, en invoquant un droit à la protection de la confidentialité, de produire, parmi les documents professionnels exigés par la Commission, la correspondance échangée avec son avocat, il lui incombe en tout cas de fournir aux agents mandatés de la Commission, sans pour autant devoir leur dévoiler le contenu de la correspondance en question, les éléments utiles de nature à prouver que celle-ci remplit les conditions justifiant sa protection légale. Si la Commission estime qu'une telle preuve n'est pas rapportée, il appartient à la Commission d'ordonner, en application de l'article 14, paragraphe 3, du règlement n° 17, la production de la correspondance en cause. Il est possible ensuite pour l'entreprise contrôlée de déposer un recours en annulation contre cette décision de la Commission, le cas échéant assorti d'une demande de mesures provisoires sur le fondement des articles 242 CE et 243 CE.

(voir point 132)

6. Le caractère urgent d'une demande en référé doit s'apprécier par rapport à la nécessité qu'il y a de statuer provisoirement, afin d'éviter qu'un préjudice grave et irréparable ne soit occasionné à la partie qui sollicite la mesure provisoire.

Doit être considérée comme urgente une demande en référé visant à ce qu'il soit sursis à l'exécution d'une décision de la Commission dans laquelle cette dernière indique qu'elle va prendre connaissance de documents qui ont été copiés lors d'une vérification fondée sur l'article 14, paragraphe 3, du règlement n° 17 et placés dans une enveloppe scellée, et dont par ailleurs une entreprise soutient qu'il sont protégés par le secret professionnel.

En effet, si la Commission prenait connaissance de ces documents et si, ultérieurement, le juge communautaire annulait cette décision, il serait impossible en pratique pour la Commission de tirer toutes les conséquences de cet arrêt, dès lors que les fonctionnaires de la Commission auraient d'ores et déjà pris connaissance du contenu des documents. En ce sens, la prise de connaissance par la Commission des informations contenues dans ces documents constituerait, en tant que telle, une atteinte substantielle et irréversible au droit des requérantes de faire respecter le secret protégeant ces documents.

De plus, même si, en cas d'annulation de la décision, les informations contenues dans ces documents ne pouvaient être utilisées contre l'entreprise, une telle impossibilité n'aurait aucune incidence sur le préjudice grave et irréparable qui résulterait de leur simple divulgation, dans la mesure où l'objet du secret professionnel ne consiste pas uniquement à protéger l'intérêt privé qu'ont les justiciables à ne pas voir leurs droits de la défense irrémédiablement affectés, mais, également, à protéger l'exigence que tout justiciable doit avoir la possibilité de s'adresser en toute liberté à son avocat. Cette exigence, qui est formulée dans l'intérêt public d'une bonne administration de la justice et du respect de la légalité, suppose nécessairement qu'un client ait la liberté de s'adresser à son avocat sans craindre que les confidences dont il ferait état puissent être ultérieurement divulguées à une tierce personne. Par conséquent, la réduction du secret professionnel à la seule garantie que les informations confiées par un justiciable ne seront pas utilisées contre lui édulcore l'essence de ce droit, dès lors que c'est la divulgation, même provisoire, de telles informations, qui pourrait être de nature à porter irrémédiablement atteinte à la confiance que ce justiciable plaçait, en faisant des confidences à son avocat, dans le fait que celles-ci ne seraient jamais divulguées.

(voir points 159, 163-164, 167)

7. Lorsque, dans le cadre d'une demande de mesures provisoires, le juge des référés devant lequel il est fait état du risque pour le demandeur de subir un préjudice grave et irréparable met en balance les différents intérêts en cause, il lui faut examiner si l'annulation éventuelle de la décision litigieuse par le juge du fond permettrait le renversement de la situation qui aurait été provoquée en l'absence de mesures provisoires et, inversement, si le sursis à l'exécution de cette décision serait de nature à faire obstacle à son plein effet au cas où le recours au principal serait rejeté.

Dès lors, dans le cadre de l'examen d'une demande en référé visant à ce qu'il soit sursis à l'exécution d'une décision de la Commission dans laquelle cette dernière indique qu'elle va prendre connaissance de documents copiés lors d'une vérification fondée sur l'article 14, paragraphe 3, du règlement n° 17 et placés dans une enveloppe scellée, et dont par ailleurs une entreprise soutient qu'il sont protégés par le secret professionnel, il convient de mettre en balance, d'une part, l'intérêt de cette entreprise à ce que les documents ne soient pas divulgués et, d'autre part, l'intérêt général et l'intérêt de la Commission tenant au respect des règles de concurrence du traité.

L'intérêt d'une entreprise à ce que des documents dont elle soutient qu'ils sont couverts par le secret professionnel ne soient pas divulgués doit faire l'objet d'une évaluation en fonction des circonstances de chaque affaire et, en particulier, de la nature et du contenu des documents concernés. Par ailleurs, dès lors qu'il est établi que le fait pour la Commission de prendre connaissance de documents risque de porter une atteinte grave et irréparable au secret professionnel et aux droits de la défense d'une entreprise, des considérations d'efficacité administrative et d'allocation des ressources, malgré leur importance, ne peuvent, en principe, prévaloir sur les droits de la défense qu'à la condition que la Commission fasse état de circonstances très spéciales justifiant une telle atteinte.

(voir points 180-182, 186)

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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

30 October 2003 (1)

(Interim measures - Competition - Commission's powers of investigation - Protection of confidentiality - Communications between lawyers and clients - Limits)

In Joined Cases T-125/03 R and T-253/03 R,

Akzo Nobel Chemicals Ltd, established in London (United Kingdom),

Akcros Chemicals Ltd, established in Surrey (United Kingdom),

represented by C. Swaak and M. Mollica, lawyers,

applicants,

v

Commission of the European Communities, represented by R. Wainwright and C. Ingen-Housz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for, first, suspension of the operation of the Commission's decision of 10 February 2003 amending the decision of 30 January 2003 ordering Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd and Akcros Chemicals and their subsidiaries to submit to an investigation under 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), and also other interim measures to protect the applicants' interests (Case T-125/03 R), and, second, suspension of the operation of the Commission's decision of 8 May 2003 rejecting a claim of legal privilege in respect of five documents copied during an investigation and also other interim measures to protect the applicants' interests (Case T-253/03 R),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES

Registrar: J. Plingers, Administrator,

makes the following

Order

1. On 10 February 2003, the Commission adopted a decision under 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) ('the decision of 10 February 2003'), amending the decision of 30 January 2003 whereby the Commission ordered, among other undertakings, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd ('the applicants') and their respective subsidiaries to submit to an investigation aimed at seeking evidence of possible anti-competitive practices ('the decision of 30 January 2003').

2. On 12 and 13 February 2003, Commission officials accompanied by representatives of the Office of Fair Trading carried out an investigation on the basis of those decisions at the applicants' premises in Eccles, Manchester (United Kingdom). During the investigation, the Commission officials made copies of a large number of documents.

3. In the course of the investigation, the applicants' representatives informed the Commission officials that certain documents in a particular file might be covered by the legal professional privilege that protects communications with lawyers and that the Commission could not therefore have access to them.

4. The Commission officials then informed the applicants' representatives that they needed to look at the documents briefly, without examining them, so that they could form their own opinion as to whether the documents should be privileged. Following a long discussion, and after the Commission officials and those from the Office of Fair Trading had reminded the applicants of the criminal consequences of obstructing an investigation, it was decided that the leader of the investigating team would briefly review the documents in question, with a representative of the applicants at her side. It was also decided that, should the applicants' representative claim that a document was covered by professional privilege, he was to provide more detailed reasons for his request.

5. In the course of the examination of the documents in the file indicated by the applicants' representatives, a dispute arose in respect of five documents which were ultimately treated in two different ways.

6. The first of these documents is a two-page typewritten memorandum dated 16 February 2000 from the General Manager of Akcros Chemicals to one of his superiors. According to the applicants, this memorandum contains information gathered by the General Manager of Akcros Chemicals in the course of internal discussions with other employees. They state that the information was gathered for the purpose of obtaining outside legal advice in connection with the competition law compliance programme already put in place by Akzo Nobel.

7. The second of these documents is a second copy of the two-page memorandum described in the preceding paragraph, which also contains handwritten notes referring to contacts with one of the lawyers representing the applicants and mentioning him by name.

8. After receiving the applicants' explanations about these first two documents, the Commission officials were not in a position to reach a definitive conclusion on the spot about whether the documents should be privileged. They therefore made copies and placed them in a sealed envelope, which they removed at the close of the investigation. In their application, the applicants have designated these documents as belonging to ‘Set A’.

9. The third document at issue between the Commission officials and the applicants consists of a series of handwritten notes by the General Manager of Akcros Chemicals, which, the applicants maintain, were drafted during discussions with lower-level employees and used for the purpose of preparing the typewritten memorandum in Set A.

10. Finally, the last two documents in question represent an exchange of e-mails between the General Manager of Akcros Chemicals and Akzo Nobel's competition law coordinator, who is registered as an attorney at the Netherlands Bar and, at the material time, was also a member of Akzo Nobel's Legal Department and, consequently, employed by that undertaking on a permanent basis.

11. After reviewing the last three documents and receiving the applicants' explanations, the leader of the investigating team formed the view that they were definitely not protected by legal privilege. She therefore copied the documents and placed the copies with the rest of the file, but did not place them in a sealed envelope, unlike the documents in Set A. In their application, the applicants have designated these documents as belonging to ‘Set B’.

12. On 17 February 2003, the applicants wrote to the Commission explaining why in their view both the documents in Set A and those in Set B were protected by legal privilege.

13. By letter of 1 April 2003, the Commission informed the applicants that it was not convinced by the arguments, set out in their letter of 17 February 2003, that the documents referred to were covered by professional privilege. In that letter, however, the Commission informed the applicants that they could submit observations on those preliminary conclusions within two weeks, following which it would adopt a final decision.

14. By application lodged at the Registry of the Court of First Instance on 11 April 2003, the applicants brought an action under the fourth paragraph of Article 230 EC for, in particular, annulment of the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, ‘in as far as

it has been interpreted by the Commission as legitimating and/or constituting the basis of the Commission's action (which is not severable from the decision), of seizing and/or reviewing and/or reading documents covered by [legal professional privilege]'. That case is Case T-125/03.

15. On 17 April 2003, the applicants informed the Commission that they had lodged their application in Case T-125/03. They also informed the Commission that the observations which they had been invited to submit on 1 April 2003 were incorporated in the application.

16. On the same day, the applicants lodged an application under Articles 242 EC and 243 EC requesting the President of the Court of First Instance, inter alia, to suspend the operation of the decision of 10 February 2003 and, so far as necessary, the operation of the decision of 30 January 2003. That case was registered by the Registry as Case T-125/03 R.

17. On 8 May 2003, the Commission adopted a decision under Article 14(3) of Regulation No 17 ('the decision of 8 May 2003'). In Article 1 of that decision, the Commission rejects the applicants' request for the return of the documents in Set A and Set B and for confirmation that all the copies of those documents in the Commission's possession have been destroyed. In Article 2 of the decision of 8 May, moreover, the Commission states that it intends to open the sealed envelope containing the documents in Set A. The Commission states, however, that it will not do so before the expiry of the period prescribed for lodging an appeal against the decision of 8 May 2003.

18. On 14 May 2003, the Commission presented its written observations on the application for interim measures in Case T-125/03 R.

19. On 22 May 2003, the President of the Court of First Instance invited the applicants to submit their observations on the inferences which in their view should be drawn, in Case T-125/03 R, from the decision of 8 May 2003. The applicants submitted their observations on 9 June 2003 and the Commission replied on 3 July 2003.

20. By application under the fourth paragraph of Article 230 EC, lodged at the Registry of the Court of First Instance on 4 July 2003, the applicants brought an action for annulment of the decision of 8 May 2003 and for an order that the Commission should pay the costs of the action. By separate document registered on 11 July 2003, the applicants lodged an application for interim measures, requesting the President of the Court of First Instance, in particular, to suspend the operation of the decision of 8 May 2003. That case is Case T-253/03 R.

21. In their application, the applicants also request that Cases T-125/03 R and T-253/03 R be joined, in application of Article 50 of the Rules of Procedure of the Court of First Instance.

22. On 1 August 2003, the Commission submitted its observations in writing on the application for interim measures in Case T-253/03 R.

23. On 7 and 8 August 2003 respectively, the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Netherlands Bar), represented by O. Brouwer, lawyer, and the Council of the Bars and Law Societies of the European Union ('the CCBE'), represented by J.E. Flynn QC, lodged applications for leave to intervene in Cases T-125/03 R and T-253/03 R in support of the forms of order sought by the applicants.

24. On 12 August 2003, the European Company Lawyers Association ('ECLA'), represented by M. Dolmans, lawyer, and J. Temple Lang, Solicitor, lodged an application for leave to intervene in Case T-125/03 R in support of the form of order sought by the applicants. On 18 August 2003, ECLA also lodged an application to intervene in Case T-253/03 R, again in support of the form of order sought by the applicants.

25. On 1 September 2003 and 2 September 2003 respectively, the Commission and the applicants lodged their observations on the applications for leave to intervene in Cases T-125/03 R and Case T-253/03 R. On 2 September 2003, the applicants also lodged an application for confidential treatment of certain items in the file, on the basis of Article 116(2) of the Rules of Procedure.

26. On 8 September 2003, at the request of the President of the Court of First Instance in application of Articles 64(3)(d) and 67(3) of the Rules of Procedure, the Commission sent the President, under confidential cover, a copy of the Set B documents and also the sealed envelope containing the Set A documents.

27. By letters of 4 and 5 September 2003, the Registry requested the applicants for leave to intervene to attend the hearing.

28. On 15 September 2003, in the presence of a representative of the Registry, the President of the Court of First Instance opened the sealed envelope containing the Set A documents and examined their contents. Following that operation, the documents were again placed in a sealed envelope and a report was drawn up and placed in the file in Cases T-125/03 R and T-253/03 R.

29. On the same day, both the CCBE and the Algemene Raad van de Nederlandse Orde van Advocaten submitted objections on a number of points in the application for confidential treatment lodged by the applicants under Article 116(2) of the Rules of Procedure. In application of that article, the President of the Court of First Instance on 16 September 2003 granted in part, and provisionally, the applicants' request for confidential treatment, at the stage of the application for interim measures.

30. On 19 September 2003, the Registry communicated to the applicants for leave to intervene a new non-confidential version of the procedural documents in Cases T-125/03 R and T-253/03 R.

31. On 23 September 2003, the applicants, the Commission, the Algemene Raad van de Nederlandse Orde van Advocaten, the CCBE and ECLA presented oral argument at a hearing.

Forms of order sought by the parties

32. In Case T-125/03 R, the applicants request the President to adopt the following measures:

- suspend the operation of the decision of 10 February 2003 and, so far as necessary, the operation of the decision of 30 January 2003, in so far as it has been interpreted by the Commission as legitimating and/or constituting the basis of the Commission's action of seizing and/or reviewing and/or reading documents covered by professional privilege;

- order the Commission to keep the Set A documents in the sealed envelope, which should be given to an independent third party (whose identity should be agreed between the parties within five days of the date of the decision in these interim proceedings) to keep pending the resolution of the dispute to which the main application relates;

- order the Commission to place the Set B documents in a sealed envelope to be given to an independent third party (whose identity is to be agreed between the parties within five days of the date of the decision in these interim proceedings) to keep pending the resolution of the dispute to which the main application relates;

- order the Commission to dispose of any additional copies it may have of the Set B documents and to confirm that they have been destroyed within five days of the decision to be taken;

- order the Commission not to take any steps in reviewing (further) or using the documents in either Set A or Set B pending the resolution of the main dispute;

- order the Commission to pay the costs.

33. The Commission contends, in Case T-125/03 R, that the President should:

- dismiss the application for interim measures;

- order the applicants to pay the costs;

- order the Algemene Raad van de Nederlandse Orde van Advocaten, the CCBE and ECLA to pay the costs incurred by the Commission in connection with their intervention.

34. In Case T-253/03 R, the applicants request the President to adopt the following measures:

- suspend the operation of the decision of 8 May 2003;

- order the Commission to keep the Set A documents in the sealed envelope pending the resolution of the dispute to which the main application relates;

- order the Commission to place the Set B documents in a sealed envelope pending the resolution of the dispute to which the main application relates;

- order the Commission to dispose of any additional copies it may have of the Set B documents and to confirm that they have been destroyed within five days of the decision in these proceedings;

- order the Commission not to take any steps in reviewing (further) or using the documents in either Set A or Set B pending the resolution of the main action;

- order the Commission to pay the costs.

35. The Commission contends in Case T-253/03 R that the President should:

- dismiss the application for interim measures;

- order the applicants to pay the costs;

- order the Algemene Raad van de Nederlandse Orde van Advocaten, the CCBE and ECLA to pay the costs incurred by the Commission in connection with their intervention.

Law

36. As a preliminary point, it should be borne in mind that Article 104(2) of the Rules of Procedure provides that an application for interim measures is to state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (*fumus boni juris*) for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of the President of the Court of Justice of 23 February 2001 in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

37. The measure requested must further be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice of 19 July 1995 in Case C-149/95 P (R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

38. Furthermore, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order in *Commission* v *Atlantic Container Line and Others*, cited at paragraph 37 above, paragraph 23).

1. *The joinder of Cases T-125/03 R and T-253/03 R*

39. In their application for interim measures in Case T-253/03 R, the applicants requested that Cases T-125/03 R and T-253/03 R be joined. In its observations in Case T-253/03 R, the Commission opposes the application for joinder on the ground that the main application in Case T-125/03 R is manifestly inadmissible.

40. Since, however, Cases T-125/03 R and T-253/03 R concern the same facts, involve the same parties and have related subject-matter, it is appropriate to order, under Article 50 of the Rules of Procedure, that they be joined for the purposes of this order.

2. *The applications for leave to intervene*

41. As noted at paragraphs 23 and 24 above, the CCBE, the Algemene Raad van de Nederlandse Orde

van Advocaten and ECLA have lodged applications to intervene in Case T-125/03 R and in Case T-253/03 R in support of the forms of order sought by the applicants.

42. The Commission has stated that it had no comments to make on the three applications for leave to intervene. The applicants, moreover, have stated that they supported the applications.

43. Under the second paragraph of Article 40 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 thereof, is applicable to the Court of First Instance, the right of an individual to intervene is subject to the condition that he is able to establish an interest in the result of the case. Representative associations whose object it is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene (orders of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 66, and of 28 September 1998 in Case C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6; orders of the President of the Court of First Instance of 22 March 1999 in Case T-13/99 R *Pfizer* v *Council*, not published in the European Court Reports, paragraph 15, and of 28 May 2001 in Case T-53/01 R *Post Italiane* v *Commission* [2001] ECR II-1479, paragraph 51).

44. In the present case, the CCBE, an association governed by Belgian law, stated in its application for leave to intervene that it is authorised by its members to take all steps of whatever nature necessary to realise its objectives, namely, in particular, to act in matters involving the application of the Treaties of the European Union to the profession of lawyer.

45. It must therefore be held that the CCBE has demonstrated, first, that it represents the interests of the Bars of the European Union and, second, that its objective is to defend the interests of its members. Since, moreover, the present case directly raises questions of principle in relation to the confidentiality of written communications with lawyers, those questions are liable to affect the members of the CCBE, whose function is, inter alia, to define and approve the rules of professional conduct applicable to lawyers.

46. Furthermore, these proceedings directly raise questions of principle relating to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to peruse pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings under investigation are protected by professional privilege. The definition of those conditions is liable to impinge directly on the interests of the members of the CCBE, in that those conditions limit or extend the provisional legal protection applicable, in particular, to documents originating from those members and regarded by the CCBE as covered by professional privilege.

47. The CCBE has therefore demonstrated, at this stage, that it has an interest in the applications for interim measures being granted. Consequently, the CCBE must be granted leave to intervene in Cases T-125/03 R and T-253/03 R.

48. The Algemene Raad van de Nederlandse Orde van Advocaten states that it is the body responsible under Netherlands law for ensuring compliance with the principles governing the profession of lawyer in the Netherlands, for defining the rules of the Netherlands Bar and also for protecting its rights and interests.

49. The Algemene Raad van de Nederlandse Orde van Advocaten has therefore adduced evidence of such a kind as to demonstrate that its object is the protection of the interests of its members. Since, moreover, the present case touches directly on the status of Netherlands lawyers employed by an undertaking on a permanent basis, it raises questions of principle liable to affect the interests of the members of the Netherlands Bar and those of the Bar itself.

50. Furthermore, as already held at paragraph 46 above, these proceedings directly raise questions of principle relating to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to peruse pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings under investigation are protected by professional privilege. The definition of those conditions is liable to impinge directly on the interests of the members of the Algemene Raad van de Nederlandse Orde van Advocaten, in that those conditions limit or extend the provisional legal protection applicable, in particular, to documents originating from those members and regarded by the Algemene Raad van de Nederlandse Orde van Advocaten as covered by professional privilege.

51. The Algemene Raad van de Nederlandse Orde van Advocaten has therefore demonstrated, at this stage, that it has an interest in the applications for interim measures being granted. Consequently, the Algemene Raad van de Nederlandse Orde van Advocaten must be granted leave to intervene in Cases T-125/03 R and T-253/03 R.

52. Last, ECLA has adduced in its application for leave to intervene evidence establishing that it represents organisations which themselves represent the vast majority of in-house lawyers in Europe. ECLA has also stated that its principal activity is representing the interests of those in-house lawyers and, in particular, defending their position on the question of the confidentiality of written communications with them. ECLA has therefore demonstrated, at this stage, that it represents the interests of its members and that its objective is, in particular, the defence of their interests. Since, moreover, the present case directly concerns the question of the confidentiality of written communications with in-house lawyers, it raises questions of principle liable to have a direct effect on the interests of the members of ECLA.

53. Furthermore, as already held at paragraphs 46 and 50 above, these proceedings directly raise questions of principle relating to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to peruse pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings under investigation are protected by professional privilege. The definition of those conditions is liable to impinge directly on the interests of the members of ECLA, in that those conditions limit or extend the provisional legal protection applicable, in particular, to documents originating from those members and regarded by ECLA as covered by professional privilege.

54. ECLA has therefore demonstrated, at this stage, that it has an interest in the applications for interim measures being granted. Consequently, ECLA must be granted leave to intervene in Cases T-125/03 R and T-253/03 R.

3. *The application for confidential treatment*

55. At the stage of the application for interim measures, confidential treatment should be granted in respect of the information referred to as such in the letter of 16 September 2003 from the Registry to the applicants, since such information may prima facie be regarded as secret or confidential within the meaning of Article 116(2) of the Rules of Procedure.

4. *The application in Case T-125/03 R*

Admissibility of the application for interim measures

56. It is settled case-law that the admissibility of an action before the court adjudicating on the substance should not, in principle, be examined in proceedings relating to an application for interim measures so as not to prejudge the case in the main proceedings. However, where it is contended that the main action from which the application for interim measures is derived is manifestly inadmissible, it may be necessary to establish certain grounds for the conclusion that such an action is prima facie admissible (order of the President of the Court of Justice of 12 October 2000 in Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraph 34; orders of the President of the Court of First Instance of 15 January 2001 in Case T-236/00 R *Stauner and Others* v *Parliament and Commission* [2001] ECR II-15, paragraph 42, and of 8 August 2002 in Case T-155/02 R *VVG International and Others* v *Commission* [2002] ECR II-3239, paragraph 18).

57. In this case, the Commission contends that the main action in Case T-125/03 is inadmissible. It must therefore be determined whether there are none the less grounds for the conclusion that the main action in this case is prima facie admissible.

Arguments of the parties concerning the admissibility of the main action

58. In Case T-125/03 R, the applicants claim that the Court should annul the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, 'in so far as it has been interpreted by the Commission as legitimating and/or constituting the basis of the Commission's action (which is not severable from the Decision), of seizing and/or reviewing and/or reading documents covered by [legal professional privilege]'.

59. The applicants contend that their action is admissible, in that the decision of 30 January 2003, the decision of 10 February 2003 and the subsequent treatment of both sets of documents in issue in reality constitute one and the same decision of the Commission, the legality of which may be challenged before the Court. Next, as regards *locus standi*, the applicants observe that the decision of 30 January 2003 and that of 10 February 2003 are directly addressed to them.

60. The Commission contends that the main action is manifestly inadmissible.

Findings of the President

61. The fourth paragraph of Article 230 EC provides that '[a]ny natural or legal person may ... institute proceedings against a decision addressed to that person ...'.

62. It is not disputed, in the present case, that the applicants are addressees of the decisions of 30 January 2003 and of 10 February 2003 and that each of those decisions produces mandatory legal effects liable to affect their interests.

63. The Commission submits, however, that the legal effects complained of in the main application are not the consequence of the decisions of 30 January 2003 and 10 February 2003, but of measures adopted subsequent to those decisions. The Commission's arguments none the less tend to show, in essence, that, on the substance, none of the pleas put forward by the applicants can be properly invoked in support of the claims for annulment of the decision of 10 February 2003 and, so far as necessary, of the decision of 30 January 2003. These arguments should therefore, at first sight, be taken into account in the context of assessing whether a prima facie case (*fumus boni juris*) can be made for the main application.

64. As regards, next, the Commission's arguments that certain of the applicants' pleas seek annulment of only part of the decision of 10 February 2003 amending the decision of 30 January 2003 and should therefore be rejected in so far as annulment of that decision would require the Court to adjudicate *ultra petita*, it is apparent from the file that in their observations of 3 July 2003 the applicants denied having sought annulment of only part of that decision.

65. There are therefore grounds on which it may be concluded that the admissibility of the claims for annulment in Case T-125/03 R cannot be precluded.

A prima facie case

66. The applicants raise three pleas in law against the decision of 10 February 2003 and, so far as necessary, against the decision of 30 January 2003. First, during the investigation, the Commission infringed the general procedural principles laid down in the case-law (Case 155/79 *AM & S* v *Commission* [1982] ECR 1575) and also the applicants' right to request interim measures under Article 242 EC, since, first, the Commission's officials read and discussed among themselves certain Set A and Set B documents and, second, they immediately placed the Set B documents in their file. Second, still during the investigation, the Commission substantially infringed the professional privilege protecting communications with lawyers, first by refusing on the spot to regard the Set B documents as covered by professional privilege and, second, by seizing the Set A documents. Third, those same facts also constitute a breach of the fundamental rights forming the very foundation of professional privilege.

67. It follows from the foregoing that all the pleas which the applicants direct against the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, in reality relate, as the Commission submits, to measures taken subsequent to and, moreover, distinct from those decisions. Contrary to the applicants' contention, the decision of 10 February 2003 and that of 30 January 2003 are clearly severable from the contested operations, especially since they contain no particular reference to the documents in Set A and Set B. Consequently, the individualisation of and the contested treatment given to those documents, by comparison with the other documents covered by the decisions of 10 February 2003 and 30 January 2003, are necessarily the consequence of distinct, subsequent measures.

68. It is sufficient to recall, in that regard, that, according to a consistent line of decisions, in connection with an investigation based on Article 14 of Regulation No 17, an undertaking cannot plead the illegality of the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation (see, to that effect, Case 85/87 *Dow Benelux* v

Commission [1989] ECR 3137, paragraph 49, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 413).

69. That impossibility merely reflects the general principle that the legality of a measure must be assessed in the light of the circumstances of law and of fact existing at the time when the decision was adopted, so that the validity of a decision cannot be affected by acts subsequent to its adoption (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 16, and *Dow Benelux* v *Commission*, cited at paragraph 68 above, paragraph 49).

70. Without its being necessary to examine the applicants' submissions in greater detail, it must therefore be concluded that even on the assumption that they were well founded, they could not be properly invoked in support of the claims for annulment of the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003.

71. Consequently, the applicants have failed to establish the existence of a prima facie case, which is sufficient ground to dismiss the application in Case T-125/03 R.

5. *The application in Case T-253/03 R*

72. It is appropriate, first, to consider whether the applicants have demonstrated the existence of a prima facie case, then, second, to consider whether they have demonstrated the urgency of the interim measures sought and, last, to balance the interests involved.

A prima facie case

Arguments of the parties

73. The applicants maintain that their action against the decision of 8 May 2003, which is based on three pleas in law, is not unfounded.

74. First, the applicants maintain that the Commission has infringed the procedural principles laid down in *AM & S* v *Commission*, cited at paragraph 66 above, concerning professional privilege. Where an undertaking subject to an investigation on the basis of Article 14(3) of Regulation No 17 relies on the protection of documents covered by professional privilege, the procedure that the Commission must follow consists of the following three stages. First of all, if the undertaking in question relies on professional privilege and on that ground refuses to produce documents, it must demonstrate that the substantive conditions required by the case-law are satisfied, although it is not obliged to reveal the contents of the documents concerned. Second, if the Commission is not satisfied by the explanations given by the undertaking subject to an investigation, it must order, by a decision adopted pursuant to Article 14(3) of Regulation No 17, production of the documents in question. Third, and last, if the undertaking continues to maintain that the documents are covered by professional privilege, it is for the Community Courts to resolve the dispute.

75. In the present case, the applicants submit that the Commission reversed the order of the stages of that procedure, since, during the investigation, the Commission's officials took possession of and discussed among themselves, for several minutes, certain Set A and Set B documents and, second, placed the Set B documents in the file without placing them in a sealed envelope. The applicants maintain, essentially, that instead of taking copies of the documents in question and adopting the decision of 8 May 2003, the Commission should have left them where they were and adopted a decision ordering the applicants to produce them. That decision could then have formed the subject-matter of an action before the Community Courts. The applicants also contend that the different treatment of the Set A and the Set B documents constitutes a breach of the principle of non-discrimination.

76. In their second plea, the applicants maintain, essentially, that at the investigation stage the Commission breached the principle of professional privilege, first, by denying all protection to the Set B documents and, second, by exhaustively examining the Set A documents. The decision of 8 May 2003 also breached the principle of professional privilege in so far as it reflects, in particular, the Commission's refusal to return and destroy the Set A and Set B documents and, moreover, manifests the Commission's intention to open the sealed envelope containing the Set A documents.

77. The applicants state in that regard that the two Set A documents and the Set B handwritten memoranda are covered by professional privilege, since they are the direct result of the competition law compliance programme which they put in place with the assistance of outside counsel.

78. The applicants then set out their arguments in respect of each of the documents in question, maintaining, first, that the memorandum forming the basis of the two Set A documents must be regarded as the written basis of a telephone conversation with an external counsel, as evidenced by the handwritten reference to that lawyer's name on one of the two copies of the memorandum.

79. Next, in the applicants' submission, the Set B handwritten memoranda are also covered by professional privilege, since they were used to prepare the Set A memoranda, which are themselves protected.

80. As regards, last, the Set B e-mails, the applicants maintain that they constitute written communications between the General Manager of Akcros Chemicals and a member of Akzo Nobel's Legal Department. The latter person is a member of the Netherlands Bar, subject to professional obligations as regards independence and respect for the rules of the Bar comparable to those of an external lawyer. Those rules prevail over his duty of loyalty towards his employer. In that regard, the applicants are agreed that the Community case-law does not at present recognise that the work of in-house lawyers is protected by professional privilege; none the less, they maintain, essentially, that numerous changes in the professional rules of the Member States have occurred since the judgment in *AM & S* v *Commission*, cited at paragraph 66 above, tending, in particular, to extend the cover of professional privilege to the activities of certain in-house lawyers. The applicants also rely, by analogy, on the judgment in Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521, paragraph 41, where the Court of First Instance considered that correspondence between the Commission's Legal Service and its various Directorates-General could not be disclosed. Furthermore, the limitation of professional privilege to written communications with outside counsel constitutes a breach of the principle of non-discrimination and, against the background of the modernisation of competition law, adversely affects an undertaking's assessment of the compliance of its activities with competition law. Last, the communications in question were between two persons in the United Kingdom and the Netherlands respectively, i.e. in two States which recognise that written communications from in-house lawyers are protected by professional privilege when the lawyers belong to a Bar.

81. Last, in their third plea the applicants submit that the decision of 8 May 2003 breaches the fundamental rights which are the very foundation of professional privilege, namely the rights of defence, respect for private life and freedom of expression, as defined in the case-law of the European Court of Human Rights.

82. The Commission rejects all of those arguments and contends that none of the pleas put forward by the applicants is able to satisfy the condition relating to a prima facie case.

83. The Commission thus disputes the applicants' first plea, alleging that it breached the procedural principles applicable when undertakings claim that certain documents are protected by professional privilege. As a preliminary point, the Commission observes that the procedure defined in *AM & S* v *Commission*, cited at paragraph 66 above, is not absolute and does not require that, when an undertaking relies on professional privilege, the Commission should be required to refrain from copying the documents in question and subsequently to request them from the undertaking. Still by way of preliminary point, the Commission disputes the applicants' assertion that its officials took possession of the documents in question during the investigation and discussed them among themselves for several minutes.

84. Next, the Commission contends that the adoption of preventive measures to ensure that the documents will not be destroyed is not inconsistent with the principles laid down in *AM & S* v *Commission*, cited at paragraph 66 above. By adopting such measures, the Commission is able to avoid having to request the assistance of the national authorities in making a formal order for production of the documents concerned.

85. Last, the Commission submits that it did not breach the principle of non-discrimination by treating the Set A and the Set B documents differently, since those documents were not identical.

86. The Commission also contends that the applicants' second plea is manifestly unfounded.

87. The Commission contends, first, that the two Set A documents are not covered by professional

privilege, since they consist of two copies of the same memorandum, with no indication that it was drafted in the context of or for the purpose of a legal opinion by an outside counsel. The only indication to that effect is a handwritten reference on one of the two copies to the name of a lawyer, which establishes at most that a conversation with that lawyer regarding the memorandum had taken place. The evidence adduced by the applicants is insufficient to demonstrate that the memorandum in question was drawn up with a view to seeking legal advice or that such advice was given.

88. In any event, the applicants themselves agree that the memorandum reflects internal discussions between the General Manager of Akcros Chemicals and other employees in connection with a competition law compliance programme set up by the applicants. It therefore does not reflect discussions with an outside counsel, contrary to the requirements of case-law (order of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, publication by way of extracts, paragraph 18). Furthermore, the fact that a document was drawn up in the context of a competition law compliance programme is not sufficient for that document to be covered by professional privilege, in so far as, by its scope, such a programme exceeds the exercise of the rights of the defence, at least in the absence of an investigation or actual proceedings against the undertaking. Nor does the fact that the document was drawn up on the instructions of an outside counsel in the context of such a programme suffice to bring it within the scope of professional privilege. The Commission concludes its observations on the competition law compliance programme set up by the applicants by stating, first, that the applicants do not claim that that programme is mentioned in the Set A documents; second, that the documents produced by the applicants demonstrate that they sought to divert professional privilege from its purpose; and, third, that the existence of the competition law compliance programme was never mentioned during the investigation of 12 and 13 February 2003.

89. The Commission also contends that the Set B handwritten memoranda are not protected by professional privilege, since they do not give the impression of being a communication with an external lawyer, do not indicate that the applicants had any intention of having such communication and do not report the text or the content of written communications with an independent lawyer for the purposes of the exercise of the rights of defence. There is no indication that the documents have any link with the competition law compliance programme set up by the applicants; in any event, such a link is not sufficient to protect the documents; and, last, according to the applicants themselves, the memoranda were drafted in preparation for the Set A notes, which are not covered by professional privilege.

90. As regards, last, the Set B e-mails, the Commission contends that they are clearly not covered by professional privilege, since they neither constitute a communication with an independent lawyer, nor reveal any intention to communicate with an independent lawyer nor, last, report the text or the content of written communications with an independent lawyer for the purpose of the exercise of the rights of defence. The Commission observes in that regard that in Community law correspondence with in-house lawyers is not covered by professional privilege (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 24). Furthermore, the contents of the e-mails in question show that the applicants' in-house lawyer was acting not as a lawyer but as an employee.

91. With more specific regard to the question of the protection of written communications with lawyers employed on a permanent basis, the Commission observes that to accept the applicants' arguments would be to create different systems within the European Union, depending on whether or not Member States allow in-house lawyers to be members of a Bar. The Commission also submits that the principles laid down in *AM & S* v *Commission*, cited at paragraph 66 above, must not be altered, since, first, in-house lawyers do not enjoy the same independence as outside lawyers, second, the principle established in *Interporc* v *Commission*, cited at paragraph 80 above, is not justified on grounds related to professional privilege and, third, to extend the scope of professional privilege would lead to abuse. Last, the Commission claims that the fact that undertakings are increasingly required to undertake self-assessment of the compatibility of their activities with competition law pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) is unrelated to questions of professional privilege. Self-assessment will be increasingly common in connection with the application of Article 81(3) EC, whereas questions associated with professional privilege arise essentially in connection with the application of Articles 81(1) EC and 82 EC.

92. Third, the Commission contends that the applicants' final plea, whereby they allege that the Commission breached the fundamental rights forming the basis of professional privilege, is unfounded. The applicants have failed to establish a link between the fundamental rights on which

they rely and the alleged breach and their rights of defence were not breached in any event, since the Commission followed a procedure consistent in every respect with the principles laid down in *AM & S* v *Commission*, cited at paragraph 66 above. Last, the Commission contends that, contrary to what the applicants maintain, the case-law of the European Court of Human Rights which they cite in their application makes no reference to the protection of private life.

Findings of the President

93. In the present case, the President considers it appropriate to examine the pleas in the following order: first, the second plea in so far as it relates to the Set A documents; then, that plea in so far as it relates to the Set B documents; and, finally, the first plea.

- Second plea, alleging breach of professional privilege, in so far as it relates to the Set A documents

94. In their second plea, the applicants maintain that the decision of 8 May 2003 breached the professional privilege which, in their submission, covers the Set A documents.

95. In that regard, Regulation No 17 must be interpreted as protecting the confidentiality of written communications between lawyers and clients provided, first, that such communications are made for the purposes and in the interests of the client's rights of defence and, second, that they emanate from independent lawyers, i.e. lawyers who are not bound to the client by a relationship of employment (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 21).

96. Furthermore, the principle of protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications (order in *Hilti* v *Commission*, cited at paragraph 88 above, paragraph 18).

97. In the present case, the applicants do not claim that the Set A documents constitute in themselves a communication with an outside lawyer or a document reporting the text or the content of such a communication. They maintain, on the contrary, that both documents are memoranda drafted for the purpose of a telephone conversation with a lawyer.

98. The President considers that the applicants' plea raises very important and complex questions concerning the possible need to extend, to a certain degree, the scope of professional privilege as currently delimited by the case-law.

99. It should be observed, first of all, that according to settled case-law, in all proceedings in which sanctions, especially fines or periodic penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law, which must be complied with even if the proceedings in question are administrative proceedings (see, in particular, 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, paragraph 85, and Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 80).

100. Second, the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence, the protection of which Regulation No 17 itself, in particular in the 11th recital in its preamble and in the provisions contained in Article 19, takes care to ensure (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 23).

101. Third, professional privilege is intimately linked to the conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 24).

102. In order that a lawyer may effectively and usefully exercise his role of collaborating in the administration of justice by the courts with a view to the full exercise of the rights of the defence, it may prove necessary, in certain circumstances, for the client to prepare working or summary documents, notably for the purpose of gathering the information which the lawyer may find useful, or indeed indispensable, in understanding the context, the nature and the scope of the facts in respect of which his assistance is sought. Furthermore, the preparation of such documents may

prove particularly necessary in matters involving considerable and complex information, which is the case, in particular, of proceedings initiated with a view to imposing sanctions for infringements of Articles 81 EC and 82 EC.

103. In that context, although Regulation No 17 has given the Commission wide powers of investigation and placed undertakings under an obligation to cooperate in the measures of investigation, it is settled case-law that it is none the less necessary to prevent the rights of the defence from being irremediably impaired during preliminary inquiry proceedings including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15, and Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 33).

104. If, in the context of investigations ordered under Article 14(3) of Regulation No 17, the Commission were able to copy working or summary documents prepared by an undertaking solely for the purpose of the exercise of the rights of defence by its lawyer, the consequence might prima facie be an irremediable impairment of the rights of defence of that undertaking, since the Commission would have evidence of such a kind as to provide it with immediate information on the defence options available to the undertaking. There is reason to conclude, therefore, that such documents are capable of being covered by professional privilege.

105. It is therefore necessary to determine whether, in the present case, the Set A documents may belong to such a category.

106. The applicants claim that the Set A typewritten memoranda were drafted in the context of a competition law compliance programme set up by outside lawyers. More specifically, the Set A memoranda were drawn up by the General Manager of Akcros Chemicals on the basis of discussions with lower-level employees, initially communicated to his superior and then, finally, discussed with the applicants' external counsel.

107. The President considers at this stage that, as the Commission has stated, the mere existence of a competition law compliance programme set up by outside lawyers is not prima facie sufficient to establish that a document prepared in the context of such a programme is covered by professional privilege. Owing to their extent, those programmes include tasks which frequently extend far beyond the exercise of the rights of the defence.

108. Having made that clear, the President none the less considers that, in the present case, it cannot be precluded prima facie that, because of other factors, the Set A typewritten memoranda were in fact drafted for the sole purpose of obtaining legal advice from the applicants' lawyer in the context of the exercise of the rights of the defence.

109. First, after examining the Set A memoranda, the President found that, in the light of their content, virtually the sole purpose of those documents was prima facie to compile information of the kind which would be communicated to a lawyer for the purpose of obtaining his assistance on questions involving the possible application of Articles 81 EC and 82 EC. The first sentence of the memoranda gives the clear impression that the General Manager of Akcros Chemicals intended to assemble, in the Set A documents, information relating to certain competition law matters. Owing to their content and their scope, moreover, there are serious doubts as to the possibility that the memoranda might have been drafted for a purpose other than the subsequent consultation of a lawyer. Furthermore, even if at this stage their content does not indicate beyond doubt that the documents were drafted for the sole purpose of obtaining the assistance of a lawyer, the President none the less considers that the absence of express reference in the memoranda to seeking legal assistance is not in the present case sufficient reason to reject outright the possibility that such assistance was in fact the reason why they were drafted.

110. Second, the applicants produced before the President the minute of a telephone conversation drafted by one of the applicants' lawyers on the day on which the conversation took place. As this minute might itself be protected by professional privilege, it could not be communicated to the Commission. It gives the impression, however, that certain points discussed did in fact relate prima facie to information contained in the Set A documents.

111. Third, one of the two copies of the Set A memorandum bears handwritten notes mentioning the name of the applicants' counsel and tends to indicate that a telephone conversation did indeed take place with him on the actual day on which he drafted the minute of his telephone conversation

referred to in the preceding paragraph.

112. Consequently, in the circumstances of the present case, the President considers that this evidence tends to confirm the possibility that the Set A memoranda were drafted for the sole purpose of obtaining the assistance of a lawyer.

113. As regards, last, the condition relating to the exercise of the rights of the defence, it is apparent upon examining the Set A documents that they relate to facts which are prima facie capable of justifying consultation of a lawyer and of being connected either with the investigation currently being carried out by the Commission or with other investigations which the applicants were reasonably able to fear or anticipate and in view whereof they intended to draw up a strategy and prepare in advance, if necessary, the exercise of their rights of defence. Prima facie, however, it remains necessary, for the purpose of examining the present plea, to determine the precise conditions in which such documents may, particularly from a temporal and material viewpoint, constitute a means of exercising the rights of the defence.

114. It follows from the foregoing, therefore, that, in so far as it concerns the Set A documents, the applicants' second plea raises numerous delicate questions of principle requiring a detailed examination in the main proceedings and that it does not therefore appear, at this stage, to be manifestly unfounded.

- Second plea, alleging breach of professional privilege, in so far as it concerns the Set B documents

115. As stated at paragraphs 9 and 10 above, the Set B documents consist, first, of handwritten memoranda which, according to the applicants, were taken with a view to drafting the Set A memoranda and, second, of e-mails. It is necessary to examine those three documents in the light of the second plea raised by the applicants, alleging breach of professional privilege by the Commission.

116. As regards, first, the Set B handwritten memoranda, it is apparent, on the basis of a comparison with the typewritten Set A memoranda, that both have the same overall structure. They also contain, in substance, numerous common points. It cannot be precluded prima facie, therefore, that, like the Set A memoranda, the Set B handwritten memoranda would never have been drafted had the author not envisaged consulting a lawyer about their contents. The applicants' second plea, as regards the Set B handwritten memoranda, is therefore not wholly unfounded.

117. It is necessary to examine, last, the two Set B e-mails between the General Manager of Akcros Chemicals and the Akzo Nobel's competition law coordinator.

118. In that regard, it should be pointed out that, in application of the principles laid down in *AM & S* v *Commission*, cited at paragraph 66 above, the protection afforded by Community law, especially in the context of Regulation No 17, to written communications between lawyer and client applies only in so far as those lawyers are independent, i.e. not bound to the client by a relationship of employment (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 21).

119. In the present case, it is common ground that the e-mails in question were exchanged between the General Manager of Akcros Chemicals and a lawyer employed on a permanent basis by Akzo Nobel. Following *AM & S* v *Commission*, cited at paragraph 66 above, those communications are therefore not in principle covered by professional privilege.

120. None the less, the President considers that the arguments put forward by the applicants and the interveners raise a question of principle which merits very special attention and which cannot be resolved in the present interim proceedings.

121. On the one hand, as the Commission emphasises, the Member States do not unanimously recognise the principle that written communications with in-house lawyers must be covered by professional privilege. Furthermore, as the Commission also points out, it is necessary to ensure that an extension of professional privilege cannot facilitate abuses which would enable evidence of an infringement of the Treaty competition rules to be concealed and thus prevent the Commission from carrying out its task of ensuring compliance with those rules.

122. On the other hand, however, the solution in *AM & S* v *Commission*, cited at paragraph 66 above, is based, inter alia, on an interpretation of the principles common to the Member States dating from

1982. It is therefore necessary to determine whether, in the present case, the applicants and the interveners have adduced serious evidence of such a kind as to demonstrate that, taking into account developments in Community law and in the legal orders of the Member States since the judgment in *AM & S* v *Commission*, cited at paragraph 66 above, it cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis.

123. The President considers that arguments to that effect have been submitted in the present case and that they are not wholly unfounded.

124. First, the applicants, the Algemene Raad van de Nederlandse Orde van Advocaten and ECLA have adduced evidence which indicates that, since 1982, a number of Member States have adopted rules designed to protect written communications with a lawyer employed by an undertaking on a permanent basis, provided that he is subject to certain rules of professional conduct. That appears to be the position, in particular, in Belgium and the Netherlands. At the hearing, ECLA further stated that in most Member States written communications with in-house lawyers subject to particular rules of professional conduct were protected by professional privilege. The Commission, on the other hand, contended in its observations that it was only in a minority of Member States that communications with in-house lawyers were covered by professional privilege.

125. Without its being possible at this stage to ascertain and to embark upon a thorough and detailed analysis of the evidence adduced by the applicants and the interveners, that evidence none the less appears prima facie to be capable of showing that the role assigned to independent lawyers of collaborating in the administration of justice by the courts, which proved decisive for the recognition of the protection of written communications to which they are parties (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 24), is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct.

126. The evidence therefore tends to show that increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status.

127. It must therefore be held that the applicants and the interveners have presented arguments which are not wholly unfounded and which are apt to justify raising again the complex question of the circumstances in which written communications with a lawyer employed by an undertaking on a permanent basis may possibly be protected by professional privilege, provided that the lawyer is subject to rules of professional conduct equivalent to those imposed on an independent lawyer. In the present case, the applicants maintained at the hearing, without being clearly contradicted on that point by the Commission, that the lawyer whom they employed on a permanent basis was in fact bound by professional rules equivalent to those governing independent lawyers of the Netherlands Bar.

128. Nor does that question of principle appear prima facie to have to be rejected at this stage as a result of the Commission's argument that recognition of professional privilege for written communications with lawyers employed on a permanent basis would give rise to different regimes within the European Union, depending on whether or not in-house lawyers are authorised by the Member States to be members of a Bar.

129. This complex question must be examined thoroughly, in particular as regards, first, the precise scope of the right which would then be recognised, second, the Community rules and national rules applicable to the professions of lawyer and in-house lawyer and, third, the legal and practical alternatives available to companies established in Member States which do not allow in-house lawyers to be members of a Bar.

130. It must therefore be concluded that, in the present case, the applicants have, by their second plea, raised a delicate question of principle, which requires a complex legal assessment and must be reserved for the Court when it adjudicates on the main application.

131. It is also necessary, in the present case, to examine the first plea put forward by the applicants.

- First plea, alleging breach of the procedural principles laid down in *AM & S* v *Commission* and of Article 242 EC

132. In principle, where the undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission's authorised agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection, although it is not bound to reveal the contents of the communications in question. Where the Commission is not satisfied that such evidence has been supplied, it is for the latter to order, pursuant to Article 14(3) of Regulation No 17, production of the communications in question and, if necessary, to impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the communications in question whose confidentiality, in the Commission's view, is not protected by law (*AM & S* v *Commission*, cited at paragraph 66 above, paragraphs 29 to 31). It is then open to the undertaking subject to the investigation to lodge an application for annulment of the Commission's decision, together where appropriate with an application for interim measures, under Articles 242 EC and 243 EC.

133. The principles thus recited tend to demonstrate that, in principle, where the representatives of the undertaking under investigation have produced relevant material of such a nature as to demonstrate that a particular document is protected by professional privilege and where the Commission is not satisfied with those explanations, the Commission is not prima facie entitled to examine the document concerned before it has adopted a decision allowing the undertaking under investigation to bring the matter before the Court of First Instance and, where appropriate, the judge with jurisdiction to order interim measures.

134. It is apparent, on the contrary, that the mere fact that an undertaking claims that a document is protected by professional privilege is not prima facie sufficient to prevent the Commission from reading that document if, in addition, the undertaking produces no relevant material of such a kind as to prove that it is actually protected by professional privilege.

135. In the present case, paragraph 6 of the decision of 8 May 2003 states that, when examining the Set A documents, the applicants' representatives, first, had a ‘detailed discussion’ with the Commission's officials, second, mentioned a manuscript reference to the name of an external lawyer on one of the copies of those memoranda and, third, claimed that the memoranda had been prepared with a view to seeking legal advice. Those statements tend prima facie to indicate that the applicants produced relevant material of such a kind as to prove that the documents should be protected.

136. As regards, next, the Set B documents, it is apparent from paragraph 7 of the decision of 8 May 2003 and also from the Commission's observations that the applicants' representatives and the Commission's officials also had a ‘detailed discussion’ about the contents of the three documents, which, too, does not preclude prima facie that the applicants' representatives produced, during that discussion, material of such a kind as to justify the possible protection of the three Set B documents, as in the case of the Set A documents.

137. However, the applicants' present plea raises a further delicate question. It is necessary to consider, in addition, whether, in the light of the duty of an undertaking subject to an investigation to submit relevant material of such a kind as to prove that a document must in fact be protected, the Commission officials were prima facie entitled, as they did in the present case, to cast a cursory glance over that document in order to form their own view of its eligibility for protection.

138. It follows from *AM & S* v *Commission*, cited at paragraph 66 above, that the undertaking under investigation ‘is not bound to reveal the contents’ of the documents in question when it is required to present to the Commission's officials relevant material of such a kind as to prove that the documents merit protection (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 29). Furthermore, if the Commission's officials were able to cast even a cursory glance over the documents concerned, there would be a risk that, in spite of the superficial nature of their examination, they would read information covered by professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications such as a lawyer's letterhead or a clear reference by that lawyer to the confidentiality from which the document should benefit. In such a situation, it would frequently happen that the only way in

which the Commission's officials would be able to satisfy themselves that the protected information was confidential would be by looking at the information itself. On the other hand, if those officials, without first consulting the documents concerned, simply placed copies of them in a sealed envelope which they removed with a view to a subsequent resolution of the dispute, then prima facie the risks of a breach of professional privilege could be avoided and at the same time the Commission would be able to retain a certain control over the documents forming the subject-matter of the investigation.

139. The President therefore considers that it is not precluded at this stage that, in the context of an investigation under Article 14(3) of Regulation No 17, the Commission's officials must refrain from casting even a cursory glance over the documents which an undertaking claims to be protected by professional privilege, at least if the undertaking has not given its consent.

140. In the present case, it follows from the minute of the investigation prepared by the Commission that the applicants' representatives were firmly opposed to a cursory examination of the documents in the file in question and also that it was only when they were reminded of the possible criminal consequences of obstructing the investigation that they agreed to allow the leader of the investigating team to glance quickly at the documents. At this stage, the President is unable to determine whether the Commission's warnings were sufficient to vitiate the consent of the applicants' representatives. However, the circumstances in which the warnings were formulated do not make it possible to conclude, at this stage, that the applicants gave their unreserved consent to the brief review of the Set A and Set B documents subsequently carried out by the leader of the investigating team, as may be seen from points 14 and 15 of the minute of the investigation.

141. Furthermore, it is common ground between the parties that it was subsequently, at the stage of the investigation, that the Commission placed the Set B documents in its file, without first adopting a decision under Article 14(3) of Regulation No 17, which would have allowed the applicants to bring the matter before the Court of First Instance and, if appropriate, the judge with jurisdiction to make interim orders.

142. At this stage, therefore, it appears that the applicants' first plea raises a complex question of interpretation of the procedure defined in *AM & S* v *Commission*, cited at paragraph 66 above, and that it cannot be precluded that the Commission failed to observe the procedural principles laid down in that judgment.

143. The arguments put forward by the Commission do not call in question either the importance of that question of interpretation or the possibility that the Commission acted unlawfully in regard to the Set A and Set B documents.

144. The Commission contends, first, that in *AM & S* v *Commission*, cited at paragraph 66 above, its initial investigation was based on Article 14(2) of Regulation No 17 and that it therefore had no option other than subsequently to order production of the documents concerned on the basis of Article 14(3) of Regulation No 17. The situation is different in the present case, since its decision to carry out an investigation was based from the outset on Article 14(3) of Regulation No 17.

145. It should be observed, however, that at paragraph 29 of *AM & S* v *Commission*, cited at paragraph 66 above, the Court of Justice drew no distinction according to whether the decision to carry out an investigation, on the basis of which communication of documents is initially demanded, is based on Article 14(2) of Regulation No 17 or on Article 14(3) thereof. The Court of Justice merely referred generally to investigations decided under Article 14 of Regulation No 17. It cannot therefore be inferred prima facie that the outcome must necessarily be different where the initial decision to carry out an investigation is based on Article 14(3) of Regulation No 17 rather than on Article 14(2) thereof.

146. In any event, the Commission has not shown how the fact that it ordered an investigation on the basis of Article 14(3) of Regulation No 17 would prima facie be sufficient to allow it to read immediately documents potentially protected by professional privilege without having first adopted a second decision which would give the undertaking forming the subject of an investigation the proper opportunity to challenge the Commission's position before the Court of First Instance and, where appropriate, the judge with jurisdiction to make interim orders. Admittedly, the Commission stated at the hearing that the undertaking under investigation could challenge the first decision, adopted under Article 14(3) of Regulation No 17. However, as already held at paragraph 68 above, an undertaking cannot plead the illegality affecting the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation (see,

in particular, *Dow Benelux* v *Commission*, cited at paragraph 68 above, paragraph 49, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited at paragraph 68 above, paragraph 413). Furthermore, it is apparent that where, during an investigation, the Commission intends to read immediately documents which the undertaking concerned claims to be covered by professional privilege, it is prima facie unrealistic to consider that that undertaking, which has just learnt of the decision to carry out an investigation, has the actual and effective possibility to challenge it before the Court of First Instance and, in particular, before the judge with jurisdiction to make interim orders, before the Commission reads the documents in question. In such a circumstance, the interests of the undertaking do not seem to be sufficiently protected by the possibility available under Articles 242 EC and 243 EC to obtain an order suspending the decision or any other interim measure (see, by analogy, *AM & S* v *Commission*, cited at paragraph 66 above, paragraph 32).

147. Second, the Commission maintained in its observations that it was entitled, where there can be no doubt that the document cannot be covered by professional privilege, to place it immediately with the rest of its file, as it did in the case of the Set B documents.

148. That solution cannot be accepted at this stage without a thorough analysis in the main action. First, as stated at paragraphs 137 to 140 above, it cannot be precluded that the Commission's officials must refrain from casting even a cursory glance over the documents in respect of which an undertaking produces relevant material of such a kind as to prove that they are covered by professional privilege. Second, even on the assumption that the Commission's officials were entitled to do so, the fact would remain that certain documents covered by professional privilege, in particular the documents reporting the contents of a communication with a lawyer, appear to be purely internal documents and do not necessarily give any external indication that they are confidential. Consequently, in such a circumstance, the only way in which the Commission's officials could have no doubt that a document did not have protection would ultimately be to read it in full on the spot and, consequently, to know what is in it before first giving the undertaking under investigation the opportunity to challenge the Commission's decision before the Court of First Instance and, where appropriate, the judge with jurisdiction to make interim orders.

149. The Commission's arguments therefore do not affect the reality of the question of principle raised by the applicants' first plea, namely the question of the circumstances in which, in procedural terms, the requirements of professional privilege and the material and practical constraints which bind the Commission in matters of investigation must be reconciled.

150. The condition relating to a prima facie case is therefore satisfied as regards the Set A and Set B documents. It is therefore appropriate to consider whether the applicants have shown an urgent need to order the interim measures requested for each of the documents concerned.

Urgency

Arguments of the parties

151. The applicants maintain that a distinction must be drawn between the Set A and Set B documents for the purpose of assessing the urgency of ordering the interim measures sought.

152. First, as regards the Set A documents, the applicants observe that, in the decision of 8 May 2003, the Commission stated that it would not open the sealed envelope before expiry of the period within which an appeal could be lodged against the decision. The applicants state that they are prepared to withdraw their application for interim measures in respect of the Set A documents if the Commission guarantees in writing that the envelope containing those documents will remain sealed until the end of the main proceedings.

153. Second, the applicants state that the Set B documents have been in the Commission's possession since February 2003 and that the Commission has already read them, so that it is necessary to adopt urgent measures in order to ensure that the Commission does not take irreversible steps on the basis of those documents.

154. Third, the applicants submit that they could suffer irreparable damage if the effects of the decision of 8 May 2003 were not suspended. In particular, the status of the documents may have an effect on the applicants' position in the current investigation, since the Set B documents have already been reviewed and since, on the basis of all the documents concerned, the Commission may adopt other measures of investigation or address a statement of objections to the applicants. The applicants acknowledge, in that regard, that procedural irregularities may be invoked in an action

against a decision adopted on the basis of Article 81(1) EC but maintain that it is not in the Commission's interest that that evaluation should be made at such a late stage. Furthermore, the applicants contend that the possibility that third parties may have access to the documents may cause them irreparable harm, in particular since authorities other than the Commission may order those third parties to communicate documents to them in the context of 'discovery' procedures. Last, the status of the documents is of the greatest importance in the light of the investigations taking place in Canada, the United States and Japan.

155. The Commission, on the other hand, contends that there is no urgency in ordering the interim measures sought.

156. On that point, the Commission states, first, that it will not open the envelope containing the Set A documents until the President has adjudicated on the application in this case. As regards, next, both the Set A and the Set B documents, the Commission states that if the Court should hold in the main proceedings that the decision of 8 May 2003 is unlawful, the Commission would be obliged to remove from its file the documents affected by that illegality and would be prevented from using the information as evidence. The Commission none the less contends that it may base its future strategy on the documents removed from the file, since it is not required to suffer 'acute amnesia' (Case C-67/91 *Dirección General de Defensa de la Competencia* v *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 39, referring to *Dow Benelux* v *Commission*, cited at paragraph 68 above, paragraphs 18 and 19).

157. The Commission also states that it will not give third parties access to the documents in question before the Court has adjudicated on the main application, thus preventing any risk of disclosure in the hands of third parties.

158. Last, the risk that contentious proceedings will be initiated outside the Community is purely hypothetical and as such cannot be taken into account in examining the urgency of ordering interim measures (order of the President of the Court of Justice of 14 December 1999 in Case C-335/99 P (R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67).

Findings of the President

159. It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity to give interim judgment in order to prevent serious and irreparable harm being occasioned to the party seeking the interim measure. It is for the latter to adduce evidence that it cannot await the outcome of the main proceedings without being required to sustain harm of that nature (see, in particular, orders of the President of the Court of First Instance of 30 April 1999 in Case T-44/98 R II [1999] ECR II-1427, paragraph 128, and of 7 April 2000 in Case T-326/99 R *Fern Olivieri* v *Commission* [2000] ECR II-1985, paragraph 136).

160. It is sufficient, however, particularly where the occurrence of the harm depends on the occurrence of a number of factors, that the harm is foreseeable with a sufficient degree of probability (see, in particular, order of the Court of Justice of 29 June 1993 in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraphs 22 and 34, and order in *HFB and Others* v *Commission*, cited at paragraph 158 above, paragraph 67).

161. It is appropriate, in the present case, to consider separately, first, whether the condition relating to urgency is satisfied in the case of the Set A documents and, second, whether it is satisfied in the case of the Set B documents.

- Set A documents

162. As the Commission has not yet had access to the Set A documents, which are in a sealed envelope, it is appropriate to determine whether it is necessary, in order to prevent serious and irreparable harm being caused, to order the Commission not to read those documents and, consequently, to suspend the operation of Article 2 of the decision of 8 May 2003.

163. In that regard, if the Commission were to read the Set A documents and if the Court of First Instance should subsequently consider, in its judgment in the main proceedings, that the Commission was wrong to refuse to regard those documents as covered by professional privilege, it would be impossible in practice for the Commission to draw all the inferences from that judgment of annulment, since its officials would already have become aware of the contents of the Set A

documents.

164. In that sense, the fact that the Commission was aware of the information in the Set A documents would as such constitute a substantial and irreversible breach of the applicants' right to respect for the confidentiality protecting those documents.

165. The Commission none the less states that, if the decision of 8 May 2003 were subsequently held to be unlawful, it would be required to remove from its file the documents affected by that unlawfulness and would therefore be unable to use them as evidence.

166. The President considers that the fact that the Commission would be unable to use the documents as evidence effectively prevents the aggravation of part of the harm which the applicants might sustain, namely the harm associated with the subsequent use as evidence of the documents in question.

167. On the other hand, the fact that the Commission would be unable to use the Set A documents as evidence would have no impact on the serious and irreparable harm which would result from their mere disclosure. The Commission's argument fails to take account of the particular nature of professional privilege. The purpose of professional privilege is not only to protect a person's private interest in not having his rights of defence irremediably affected but also to protect the requirement that every person must be able, without constraint, to consult a lawyer (see, to that effect, *AM & S* v *Commission*, cited at paragraph 66 above, paragraph 18). That requirement, which is formulated in the public interest of the proper administration of justice and respect for lawfulness, necessarily presupposes that a client has been free to consult his lawyer without fear that any confidences which he may impart may subsequently be disclosed to a third party. Consequently, the reduction of professional privilege to a mere guarantee that the information entrusted by a litigant will not be used against him dilutes the essence of that right, since it is the disclosure, albeit provisional, of such information that might be capable of causing irremediable harm to the confidence which that litigant placed, in confiding in his lawyer, in the fact that it would never be disclosed.

168. Consequently, the prohibition on the Commission's using the information in the Set A documents could at the most only prevent the aggravation of harm which would already be caused by the disclosure of those documents.

169. It must therefore be held that the condition relating to urgency is satisfied in the case of the Set A documents.

- Set B documents

170. As a preliminary point, it should be borne in mind that, unlike in the case of the Set A documents, the Commission has already read the three Set B documents, which were not placed in a sealed envelope. It is therefore no longer possible to ensure that the Commission does not read those documents. However, if the decision of 8 May 2003 is annulled in the main proceedings, the Commission will not be able to use that information as evidence.

171. The applicants none the less contend that interim measures must be adopted as a matter of urgency in order to avoid three types of irreversible harm.

172. The first of these types of harm relates, first of all, to the fact that the Commission must be prevented from taking irreversible procedural steps on the basis of the Set B documents and, in particular, from carrying out other investigative operations or adopting a statement of objections.

173. However, in the event that the Commission, as it claims in its observations, should be lawfully entitled to use the information concerned as mere indicia, the harm sustained by the applicants would be already occasioned and irreversible, since the Commission has already read the documents in question. It is not for the judge hearing an application for interim measures to adopt measures designed to make up for harm which is already irreversible (order in *Austria* v *Council*, cited at paragraph 36 above, paragraph 113).

174. Furthermore, if, on the other hand, the Commission should not be authorised to use the documents in question as indicia, it would be required, should the decision be annulled in the main action, to take the necessary measures to comply with the judgment of the Court of First Instance (see, in particular, judgment in Case T-548/93 *Ladbroke Racing* v *Commission* [1995] ECR II-2565,

paragraph 54) and, consequently, to cancel the measures previously adopted, which would be likely to prevent the occurrence of the harm on which the applicants rely. Consequently, in practice, harm could be established only if the Commission adopted measures based on the information in the Set B documents and the applicants were subsequently unable to demonstrate with sufficient certainty an actual link between the information and the measures adopted. The President considers that the applicants have not demonstrated that it was necessary and possible to order an interim measure to prevent a risk which, in the absence of proof to the contrary, remains hypothetical and, consequently, must not be taken into account under the head of urgency by the judge hearing the application for interim measures (order in *HFB and Others* v *Commission*, cited at paragraph 158 above, paragraph 67).

175. The applicants rely on a second type of harm relating, in essence, to the fact that, since the Set B documents have been placed in the Commission's file, third parties may demand access to them. There is, they allege, a risk that these third parties will themselves be obliged to communicate the documents in question to other third parties. The Commission must therefore return or destroy all the copies of the Set B documents in its possession.

176. It must be emphasised, however, that in its observations the Commission stated that it would not allow third parties to have access to the Set A and Set B documents until judgment is given in the main action. The judge hearing the application for interim measures, as he is entitled to do (see order of the president of the Court of Justice of 21 August 1981 in Case 232/81 R *Agricola Commerciale Olio and Others* v *Commission* [1981] ECR 2193), takes note, by the present order, of that declaration by the Commission. In those circumstances, the second type of harm relied on by the applicants must be rejected.

177. As regards, last, the third type of harm on which the applicants rely, it must be stated that they rely only on what they allege to be the great importance of the documents in question as regards investigations under way in Canada, the United States and Japan. In the light of the particularly vague nature of those arguments, it must be concluded that the applicants have not shown the need to prevent irreparable harm. At the hearing, the applicants did indeed state that the real importance of the Set B documents could not be evaluated at that stage. However, even on the assumption that that is actually so, the fact none the less remains that, as the Commission has noted, the applicants have once again relied solely on hypothetical risks.

178. In the light of the foregoing, the condition relating to urgency is not satisfied in the case of the Set B documents. Since it is satisfied in the case of the Set A documents, it is necessary to proceed, for those documents alone, to balance the interests involved.

The balance of interests

179. As regards the balance of interests, the Commission observes that the documents in question may be useful to it after the proceedings, notably in order to enable it to make requests for information. The delay in the investigation should the measures sought be ordered would affect the general interest of the Community and, more generally, of society as a whole in competition investigations being carried out as speedily and efficiently as possible. Speed is also important for the undertakings which are subject to the same investigation as the applicants and which, in the Commission's submission, may well be affected by the uncertainty resulting from suspension of the decision of 8 May 2003. Last, the procedure proposed by the applicants, namely the procedure according to which an investigation should be suspended in respect of a document as soon as an undertaking claims professional privilege, constitutes an unrealistic procedure which would give rise to much abuse. Only the option which allows the Commission to place a document in a sealed envelope where there is doubt as to whether it is protected by professional privilege would allow it to retain a minimum of control over the procedure.

180. Where, on an application for interim measures, the judge before whom the applicant claims that it will sustain serious and irreparable harm weighs up the various interests involved, he must consider whether the annulment of the contested decision by the court dealing with the main application would make it possible to reverse the situation that would have been brought about in the absence of interim measures and, conversely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed (see, to that effect, orders of the President of the Court of Justice of 26 June 2003 in Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum 187* v *Commission* [2003] ECR I-6887, paragraph 142, and in *Commission* v *Atlantic Container Line and Others*, cited at paragraph 37 above, paragraph 50).

181. In the present case, it is appropriate to take into account, first, the applicants' interest in the Set A documents not being disclosed and, second, the general interest and the Commission's interest in the Treaty competition rules being observed.

182. First of all, it must be emphasised that an undertaking's interest in the documents which it claims to be protected by professional privilege not being disclosed must be evaluated by reference to the circumstances of each case and, in particular, to the nature and content of the documents concerned. In the present case, after examining the Set A documents, the President considers that their disclosure would be susceptible of causing serious and irreparable harm to the applicants, by virtue not only of their mere disclosure but also of their contents.

183. However, that interest must be balanced against the Commission's interest and, more generally, that of the general public in competition investigations being carried out with the utmost speed, having regard to the importance of the competition rules for the attainment of the objectives of the EC Treaty.

184. If the main application is dismissed, the Commission will be able to have access to the Set A documents. Consequently, in principle, on that date, even in the event that the investigation has been delayed, the Commission will none the less be in a position to use the Set A documents for the purpose of completing the investigation.

185. At the hearing, however, the Commission stated that the uncertainty in which it was placed, as regards the content of the documents in question, caused major problems in allocating its resources and defining its priorities and, consequently, obliged it to suspend its investigation.

186. According to settled case-law, however, the rights of the defence, to which professional privilege is a necessary corollary (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 23), constitutes a fundamental right (see, in particular, judgment of the Court of Justice in *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited at paragraph 99 above, paragraph 85, and judgment in *Enso Española* v *Commission*, cited at paragraph 99 above, paragraph 80). That fundamental nature has the consequence that, in the context of the present balance of interests, given that it is established that the applicants' professional privilege and their rights of defence would be likely to sustain serious and irreparable harm should the Commission read the Set A documents, considerations of administrative efficiency and of resource allocation, in spite of their importance, can in principle prevail over the rights of the defence only if the Commission pleads very special circumstances justifying such harm. Otherwise, it would be possible in almost every case for the Commission to justify a serious interference with the rights of the defence by purely internal administrative considerations, which would be contrary to the fundamental nature of the rights of the defence.

187. The President considers that the Commission has not demonstrated in the present case the existence of such circumstances, since it has referred to disadvantages that might follow for it, by nature, from any suspension of the operation of a decision refusing to regard certain documents as covered by professional privilege.

188. Furthermore, in the context of the main application, the Commission has the possibility to lodge with the Court of First Instance, at the same time as its defence, an application pursuant to Article 76a of the Rules of Procedure for the main application to be dealt with under an expedited procedure. Admittedly, the judge dealing with the application for interim measures cannot guarantee that such an application will be granted in this case. None the less, account must be taken of the fact that if that application is granted, it will have the consequence of allowing judgment to be given speedily and, consequently, of rendering the Commission's present position less uncertain. In the particular circumstances of the present case, the President considers that the existence of that possibility does not give the Commission a greater interest in the application for interim measures being dismissed.

189. Nor has the Commission adduced precise and specific evidence capable of proving and evaluating the disadvantages which, in its submission, may affect the undertakings subject to the same investigation as the applicants should the operation of Article 2 of the decision of 8 May 2003 be suspended.

190. In the light of the foregoing, the balance of the interests in issue tilts in favour of suspending the operation of the provisions of the decision of 8 May 2003 whereby the Commission decides to open the sealed envelope containing the Set A documents, namely Article 2 of that decision.

191. Last, since the Set A documents will in all probability constitute an essential factor in the Court's assessment of the main application and since it has been established in the present order that the Commission must not read those documents before judgment is given in the main proceedings, it is appropriate to order that the Set A documents be kept at the Court Registry until the date of that judgment.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Cases T-125/03 R and T-253/03 R are joined for the purposes of this order.

2. The Council of the Bars and Law Societies of the European Union, the Algemene Raad van de Nederlandse Orde van Advocaten and the European Company Lawyers Association are granted leave to intervene in Cases T-125/03 R and T-253/03 R.

3. At the stage of the application for interim measures, the requests for confidential treatment submitted by the applicants in respect of certain matters in the procedural documents in Cases T-125/03 R and T-253/03 R and referred to as such in the letter of 16 September 2003 from the Registry to the applicants are granted.

4. The application for interim measures in Case T-125/03 R is dismissed.

5. The Commission's statement that it will not allow third parties to have access to the Set B documents pending judgment in the main proceedings in Case T-253/03 is noted.

6. In Case T-253/03 R, the operation of Article 2 of the Commission's decision of 8 May 2003 concerning a claim of legal privilege (Case COMP/E-1/38.589) is suspended pending the judgment of the Court in the main proceedings.

7. The sealed envelope containing the Set A documents will be kept by the Registry of the Court of First Instance pending the decision of the Court in the main action.

8. The remainder of the application for interim measures in Case T-253/03 R is dismissed.

9. The costs in Cases T-125/03 R and T-253/03 R are reserved.

Luxembourg, 30 October 2003.

H. Jung	B. Vesterdorf
Registrar	President

1: Language of the case: English. </HTML

Case T-474/04

Pergan Hilfsstoffe für industrielle Prozesse GmbH

v

Commission of the European Communities

(Competition – Agreements, decisions and concerted practices – Organic peroxides – Decision refusing a request for removal of certain passages from the definitive published version of a decision finding an infringement of Article 81 EC – Disclosure of information concerning the applicant by publishing a decision not addressed to it – Article 21 of Regulation No 17 – Professional secrecy – Article 287 EC – Presumption of innocence – Annulment)

Summary of the Judgment

1. *Actions for annulment – Interest in bringing proceedings – Undertaking which contests the hearing officer's decision rejecting its request for confidential treatment of information about it contained in the version of a Commission decision intended for publication, in which a finding of an infringement of Article 81 EC by other undertakings is made and a sanction imposed*

   (Arts 81 EC, 230, fourth para., EC and 233 EC)

2. *Competition – Administrative procedure – Establishing whether information is covered by professional secrecy – Criteria*

   (Arts 81 EC, 286 EC and 287 EC; European Parliament and Council Regulations Nos 1049/2001, Art. 4, and 45/2001; Council Regulation No 17, Art. 21(2); Commission Regulation No 2842/98, Art. 13 (1); Commission Decision 2001/462, Art. 9; Commission Notice 2005/C 325/07)

3. *Competition – Administrative procedure – Compliance with the obligation of professional secrecy – Undertaking's interest in information relating to its conduct not being disclosed*

   (Arts 81 EC and 82 EC; Council Regulations Nos 17, Art. 21(2), and 2988/74, Art. 1)

4. *Community law – Principles – Fundamental rights – Presumption of innocence*

   (Charter of Fundamental Rights of the European Union, Art. 48; Council Regulation No 17, Art. 21 (2))

5. *Competition – Administrative procedure – Compliance with the obligation of professional secrecy – Substantive scope*

   (Art. 287 EC; Council Regulation No 17, Art. 21(2))

1. A legal interest in bringing proceedings presupposes that annulment of the measure is of itself capable of having legal consequences, that the appeal must therefore be likely, if successful, to procure an advantage for the applicant, and is justified by a vested and present interest in the annulment of that measure.

   Such an interest exists where an undertaking seeks annulment of the hearing officer's decision, in the context of proceedings applying the Community competition rules, to refuse to grant the undertaking's request to have removed from the version of a decision intended for publication, in which a finding of an infringement of the competition rules is made and a sanction imposed, but which is not addressed to it, those paragraphs which, in the statement of reasons, describe its involvement in the infringement during a time covered by the limitation period.

Should the decision be annulled on the ground that it disregarded the undertaking's legitimate interest in the protection of its business interests, the Commission would, under Article 233 EC, have to give due effect to it for the publication of the decision in question.

The mere fact that the disputed information has already been published and that certain third parties may already have read it cannot make that interest disappear, since continued disclosure of that information continues to harm the interests and, in particular, the reputation of the applicant undertaking, and as such constitutes a vested and present interest.

(see paras 38-40)

2. Whilst neither Article 287 EC nor Regulation No 17 states explicitly what information, apart from business secrets, is covered by the obligation of professional secrecy, it is apparent from the open wording of Article 287 EC, from Article 13(1) of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] and from the case–law, that the concept of 'information covered by the obligation of professional secrecy' also includes confidential information other than business secrets. It follows from this wider understanding of the concept of 'information covered by the obligation of professional secrecy' that Article 21 of Regulation No 17 and Article 9 of Decision 2001/462 on the terms of reference of hearing officers in certain competition proceedings, must be interpreted as meaning that they apply, in the same way as Article 13(1) of Regulation No 2842/98, both to business secrets and to other confidential information. In addition, the confidentiality of information, for which professional secrecy requires that it be protected under Article 287 EC, may also stem from other provisions of primary or secondary Community law, such as Article 4 of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents or from Article 286 EC and Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

As regards, generally, the nature of business secrets or other information covered by the obligation of professional secrecy, it is necessary, first of all, that such business secrets or confidential information be known only to a limited number of persons. Next, it must be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must be worthy of protection. The assessment as to the confidentiality of a piece of information requires, in this regard, the individual legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible.

It follows, first, that when the hearing officer takes a decision under the third paragraph of Article 9 of Decision 2001/462, he must not merely examine whether the version of a decision taken under Regulation No 17 and intended for publication contains business secrets or other confidential information enjoying similar protection. He must also check whether that version contains other information which cannot be disclosed to the public either on the basis of rules of Community law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy. Secondly, in the context of its review of legality, the Court must ensure that the hearing officer observes the limits of his terms of reference, as just defined, and must therefore determine whether the hearing officer correctly applied the protection of professional secrecy in the particular case. However, the Court cannot complain that the hearing officer did not correct any procedural irregularities committed by the Commission when adopting the decision which is to be published, since the review of such procedural irregularities does not fall within his powers. Therefore, the Court cannot call in question either the procedural legality or the merits of the decision intended for publication, even if that decision were to contain serious errors.

(see paras 63-66)

3. The interest of an undertaking which the Commission has fined for breach of competition law in the non-disclosure to the public of details of the offending conduct of which it is accused does not merit any particular protection, given, first, the public interest in knowing as fully as possible the reasons for any Commission action, the interest of economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and, second, the fined undertaking's ability to seek judicial review of such a decision. This appraisal applies *mutatis mutandis* to a decision in which an undertaking is found to have committed an infringement, but proceedings against it are barred by limitation, the Commission being implicitly authorised to take that decision on the basis of the rules laid down by Regulation No 17, provided that it shows a legitimate interest for doing so. This applies, however, in so far as the infringement found at least appears in the operative part of the

decision and the decision is addressed to the undertaking concerned so that it may contest that infringement in court.

(see paras 72-73)

4. The scope of the Commission's power to adopt and publish decisions on the basis of Regulation No 17 and the scope of the protection of professional secrecy must be interpreted in the light of general principles and fundamental rights, which are an integral part of the Community legal order, and, in particular, of the principle of presumption of innocence – as reaffirmed in Article 48 of the Charter of Fundamental Rights of the European Union – which applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

In addition, the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case. Furthermore, the guilt of a person accused of an infringement is established definitively only where the decision finding that infringement has acquired the force of *res judicata*, which implies either the absence of an appeal against that decision by the person concerned within the time-limits provided for in the fifth paragraph of Article 230 EC, or, after such an appeal, the definitive closure of the contentious proceedings, in particular, by a judicial decision confirming the lawfulness of that decision.

As a consequence, findings which the person charged with an infringement, even though he contests their merits, has not had the opportunity to contest before the Community judicature cannot be regarded as established in law. The fact that such findings evade any review by the courts, and therefore, in the event that they are unlawful, any correction by the Community judicature, is manifestly contrary to the principle of the presumption of innocence. Any other interpretation would upset the system of division of functions and the institutional balance between the administration and the courts, on the ground that, where findings are contested, it is for the courts alone to make a definitive ruling on the existence of sufficient evidence that an undertaking is liable for an infringement of the rules on competition.

(see paras 75-77)

5. Since the Commission's findings relating to an infringement committed by an undertaking are capable of infringing the principle of the presumption of innocence, which stems, inter alia, from the need to respect the reputation and dignity of the person concerned as that person has not been finally found guilty of an infringement, those findings must, in principle, be regarded as confidential as regards the public, and therefore as being of the kind covered by the obligation of professional secrecy.

(see para. 78)

Judgment of the Court of First Instance (Third Chamber)
First Instance (Third Chamber)First Instance (Third Chamber)2007. Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission of the European Communities. Competition - Agreements, decisions and concerted practices - Organic peroxides - Decision refusing a request for removal of certain passages from the definitive published version of a decision finding an infringement of Article 81 EC - Disclosure of information concerning the applicant by publishing a decision not addressed to it - Article 21 of Regulation No 17 - Professional secrecy - Article 287 EC - Presumption of innocence - Annulment. Case T-474/04.

In Case T474/04,

Pergan Hilfsstoffe für industrielle Prozesse GmbH, established in Bocholt (Germany), represented by M. Klusmann and F. Wiemer, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet, acting as Agent, assisted by A. Böhlke, lawyer,

defendant,

APPLICATION for the annulment of Commission Decision (2004) D/204343 of 1 October 2004 in so far as it rejects the applicant's request for removal of all references to it in the definitive published version of Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E2/37.857 - Organic peroxides) (OJ 2005 L 110, p. 44),

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

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: K. Andova, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls Commission Decision (2004) D/204343 of 1 October 2004;

2. Orders the Commission to pay the costs.

Legal context

1. According to Article 287 EC [t]he members of the institutions of the Community... and the officials and other servants of the Community shall be required... not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'.

2. Article 20(2) of Council Regulation No 17: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 19591962, p. 87), applicable in this case and headed

Professional secrecy', provides that [w]ithout prejudice to the provisions of Articles 19 and 21, the Commission... [its] officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy.'

3. Article 21 of Regulation No 17, headed Publication of decisions', states as follows:

1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

4. Article 13(1) of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18), applicable to the present case, provides:

Information, including documents, shall not be communicated or made accessible in so far as it contains business secrets of any party, including the parties to which the Commission has addressed objections, applicants and complainants and other third parties, or other confidential information... The Commission shall make appropriate arrangements for allowing access to the file, taking due account of the need to protect business secrets... and other confidential information.'

5. Article 9 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21) provides:

Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time-limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.

The first and second paragraphs shall apply mutatis mutandis to the disclosure of information by publication in the Official Journal of the European Communities.'

6. Under Article 1(1)(b) of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, p. 1), the power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition is to be subject to a limitation period of five years in the case of infringements of provisions other than those concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations.

Facts, procedure and forms of order sought

7. In 2002, the Commission began an investigation, under Regulation No 17, of European producers of organic peroxides, including the AKZO group, Atofina SA, Atochem's successor (Atochem/Atofina'), and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc, now Degussa UK Holdings Ltd, Peroxidos Organicos SA, FMC Foret SA, AC Treuhand AG and the applicant, in respect of participation in cartels falling under Article 81 EC, including one main cartel and a number

of regional cartels, on certain markets for organic peroxides.

8. On 27 March 2003, the Commission began formal proceedings and adopted a statement of objections, which was subsequently notified, inter alia, to the applicant. In its comments of 13 June 2003, the applicant contested, in essence, both the scope and the duration of its participation in the main cartel, stating that it only had sporadic contact with Peroxid Chemie and Atochem/Atofina between 1994 and 1996. It stated, however, that it had not had contact with the other undertakings in question. Thus, the investigation of any infringement by the applicant would, in any event, be time barred.

9. By letter of 10 December 2003, the Commission informed the applicant of its decision to close the proceedings against it.

10. In addition, by Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E2/37.857 - Organic peroxides) (OJ 2005 L 110, p. 44; the peroxides decision'), the Commission imposed fines on Atochem/Atofina, Peroxid Chemie, AC Treuhand, Peroxidos Organicos and Degussa UK for breach of Article 81 EC. The decision was addressed to the abovementioned companies but not to the applicant.

11. In the operative part, the peroxides decision does not refer to the applicant's participation in the infringement found. However, it is stated, inter alia, in recital 78 of the decision, in relation to the applicant:

After having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, the Commission decided to close the proceedings against [the applicant] and [FMC Forest]. For [the applicant], the Commission considered it did not have enough evidence of [its] participation in the single and continuous infringement after 31 January 1997, the point in time when prescription applies...'

12. Subsequently, inter alia in recitals 156 to 177, the peroxides decision contains a detailed description of the applicant's participation in the main cartel between, in particular, the AKZO group, Atochem/Atofina and Peroxid Chemie which lasted for a period from 1971 to 1999. In essence, the Commission found that the applicant did not participate directly and formally in the main cartel, but that its involvement was limited to a period from 1993 to 1996, by way of meetings and other anticompetitive contacts with Atochem/Atofina and Peroxid Chemie, and the exchange of commercially sensitive data with them.

13. Finally, the peroxides decision states, in recital 319:

[The applicant] was an addressee of the statements of objections. [The applicant] is not an addressee of this Decision (see recital (78)), as there is no evidence that [the applicant]'s involvement lasted beyond 31 January 1997.'

14. By letter of 18 February 2004, notified on 19 February 2004, the Commission sent the applicant a copy of the peroxides decision and a summary of that decision. In the letter, the Commission informed the applicant that it intended to publish a nonconfidential version of both the peroxides decision and the summary, pursuant to Article 21 of Regulation No 17, and invited it to identify any passages which it considered to contain business secrets or other confidential information.

15. By letter of 4 March 2004, the applicant asked the Commission to remove from the version of the peroxides decision intended for publication all references to the applicant and its alleged offending conduct, in particular, those in recitals 15, 81, 106 (Table 4), and in recitals 120 to 123, 156 to 177, 184, 185, 188, 189, 202, and 270, on the ground that the applicant was not the addressee of the decision and that the proceedings which were initiated against it had been closed (recital 78 of the peroxides decision). It stated that certain passages in the peroxides decision,

relating to the applicant's involvement in the infringement established, in particular recitals 169 and 176, which had been disputed by the applicant in the course of the administrative procedure, were inaccurate. In any event, the business secrets in recital 45 (the applicant's market share), in recital 106 (Table 4), recitals 168 and 175 (name of Mr S.), and recitals 173 to 177 and 510 (detailed assessment of the applicant in the context of acquisition negotiations with a thirdparty) should be removed.

16. By letter of 6 April 2004, the Commission informed the applicant that it would omit every reference to it in the provisional version of the peroxides decision intended for publication, and attached the corresponding nonconfidential version. The Commission reserved its position, however, on the applicant's request for confidential treatment concerning the definitive version of the peroxides decision intended for publication.

17. By letter of 13 April 2004, the applicant requested that the reference to its name in recital 15 and Table 4 of the peroxides decision also be removed, and subject to those amendments, it accepted the provisional publication of this decision.

18. By letter of 22 June 2004, the Commission sent the applicant the provisional nonconfidential version of the peroxides decision, in the form intended to be published shortly afterwards on the Commission's Internet site, which did not contain any reference to the applicant.

19. By letter of 28 June 2004, the Commission informed the applicant of its intention to reject the request for confidential treatment concerning the reference to the applicant in the definitive version of the peroxides decision intended for publication. It stated that in that decision, the Commission had concluded that the applicant had committed an infringement of Article 81 EC, but was unable to impose a fine on it on account of the time bar. The Commission agreed, however, to remove from the nonconfidential definitive version of the peroxides decision, the name of the applicant's manager, Mr S., and the references to the detailed assessment of the applicant in the context of acquisition negotiations with a third party, and to replace the applicant's exact market share figures with bands of market share. Finally, the Commission informed the applicant that it could apply to the hearing officer under Article 9 of Decision 2001/462, in the event that it wished to maintain its request for confidential treatment.

20. By letter of 12 July 2004, the applicant asked the hearing officer to remove all references to the applicant from the definitive version of the peroxides decision intended for publication, in line with the provisional version published on the Commission's Internet site. In that letter, the applicant repeated the arguments it had advanced in its letter of 4 March 2004 and stated that the incorrect reference to its alleged participation in the infringement established, in recitals 15, 45, 61, 66, 71, 78, 81, 106 (Table 4), 108, 120 to 123, 156 to 177, 184, 185, 188, 189, 202, 270, 271, 319, 328, 366, 399, 423 and 510, and point 1.3.1 of the index, had to be removed. In support of its request, the applicant submitted that this information could provide third parties with evidence for the purpose of actions for damages against the applicant and could harm its reputation on the market. In addition, once it has closed the investigation procedure in respect of the applicant, the Commission no longer has the power to accuse it of infringing Article 81 EC or to adopt a decision to this end which adversely affects its interests. Furthermore, the fact that the peroxides decision is not addressed to the applicant wrongly deprives the applicant of the possibility of bringing a direct action against that decision. Finally, the Commission's approach is incompatible with the objective of the rules on limitation and the principles of legal certainty and the presumption of innocence.

21. By letter of 13 September 2004, the hearing officer adopted a first decision under the third paragraph of Article 9 of Decision 2001/462. In that decision, he refused to remove from the definitive version of the peroxides decision intended for publication the references made to the applicant

- save for the name of Mr S., information relating to the detailed assessment of the applicant and the reference to the applicant's market share, which were to be replaced by a band of market shares - on the ground that there were no business secrets, as the concept of a business secret presupposes that disclosure of the information in question will cause serious harm to the interests of the person concerned. First, as regards the risk of actions for damages under national law, the hearing officer concluded that the risk does not in itself cause serious and unjust harm to the applicant's interests such as to justify protection of the disputed information. In the event that they are wellfounded, actions for damages before national courts are in fact the acceptable consequence of committing an infringement of Community and national competition law. The hearing officer stated that the applicant was not the addressee of the peroxides decision and that this decision, in the absence of a finding that the applicant had infringed Article 81 EC, was therefore not legally binding on national courts. Secondly, the hearing officer observed that any harm to the applicant's reputation was the reasonable result of publishing the peroxides decision if the applicant had participated in the cartels established. Finally, the hearing officer stated that even if the findings in the peroxides decision were not established as a matter of fact, an issue which the hearing officer was not empowered to determine, this would not cause any serious and lasting harm to the applicant such as to render the disputed information a business secret.

22. In the same letter, the hearing officer also stated under a separate heading, entitled Respect for the rights of defence', that, for the purpose of safeguarding the applicant's rights of defence, the information relating to its alleged participation in a regional cartel in Spain, set out in recitals 176, 262 and 328 of the peroxides decision, had to be omitted, because, as that that information had not been referred to in the statement of objections, the applicant had not been given the opportunity to make submissions on it.

23. By letter of 27 September 2004, the applicant stated its intention to begin proceedings before the Court of First Instance against the decision rejecting its request for confidential treatment, as set out in the hearing officer's letter of 13 September 2004, and requested that publication of the definitive version of the peroxides decision containing references concerning the applicant be postponed until termination of those proceedings.

24. By letter of 1 October 2004, containing decision SGGreffe (2004) D/204343 (the contested decision'), the hearing officer repeated the reasons set out in his letter of 13 September 2004. The hearing officer also stated that the Commission would postpone publication of the peroxides decision, in the form described in the contested decision, until the applicant had been given the opportunity to apply to the Court for interim relief under Article 242 EC.

25. By letter of 15 October 2004, the applicant informed the hearing officer that it would not bring an application for interim relief, given the strict conditions laid down in the caselaw for such applications.

26. By letter of 18 October 2004, the hearing officer replied that, since the applicant had decided against bringing proceedings for interim relief, there was no longer anything to prevent the envisaged publication of the definitive version of the peroxides decision.

27. Subsequently, the Commission published, on the Internet site of its DirectorateGeneral (DG) for competition, the nonconfidential version of the peroxides decision, which contains references to the applicant and other information disputed by it.

28. By application lodged at the Registry of the Court of First Instance on 10 December 2004, the applicant brought the present action.

29. Upon hearing the report of the JudgeRapporteur, the Court (Third Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the Court's questions at

the hearing on 8 June 2006.

30. The applicant claims that the Court should:

- annul the contested decision in so far as it rejects the applicant's request for removal of all references to the applicant in the definitive published version of the peroxides decision;

- order the Commission to pay the costs.

31. The Commission contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

Law

A - Admissibility of the application for annulment

1. Arguments of the parties

32. The Commission contests the applicant's legal interest in bringing proceedings, and therefore, the admissibility of the present action.

33. It takes the view that, since the applicant decided not to apply to the Court of First Instance for interim relief and the peroxides decision has in the meantime been published with the disputed information, the applicant no longer has a legal interest in bringing proceedings against this decision. The applicant itself recognised its lack of legal interest in its letter of 27 September 2004, in stating that publication would render its application inoperative.

34. According to the Commission, the applicant does not in any way specify how the published information in question constitutes business secrets. In any event, annulment of the contested decision could not undo the fact that third parties had read the information and the probability that a similar situation would arise in the future is minimal. It is therefore doubtful that the annulment could give rise to legal effects (Joined Cases T480/93 and T483/93 Antillean Rice Mills and Others v Commission [1995] ECR II2305, paragraphs 59 and 60).

35. The Commission submits that the action is based on the false premise that the disputed information is of a binding nature. On the contrary, the findings relating to the infringements, such as those concerning the applicant - since they are only contained in the recitals of the peroxides decision and not formally expressed in the operative part - are not binding (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 315; Case T38/92 AWS Benelux v Commission [1994] ECR II211, paragraph 34; Case T145/89 Baustahlgewebe v Commission [1995] ECR II987, paragraphs 35, 55 et seq.; and Case T156/94 Aristrain v Commission [1999] ECR II645, publication by extracts, paragraph 699). The Commission considers that the applicant's argument that it has an interest in bringing proceedings because any annulment of the contested decision could form the basis of an action for damages against the Commission if it were ordered to pay damages in national proceedings, is purely hypothetical; it observes that the applicant is not the addressee of a decision finding an infringement of Article 81 EC which is binding on national courts.

36. The applicant submits, in essence, that its action against the contested decision is admissible.

2. Findings of the Court

37. As a preliminary point, the Court notes that the present action is directed against the contested decision, which was adopted on the basis of the third paragraph of Article 9 of Decision 2001/462, whereby the Commission rejected in part the applicant's request for confidential treatment, on

the ground that it related to certain passages of the nonconfidential peroxides decision intended for publication. The aim of the present action is not therefore to challenge the lawfulness of the peroxides decision as such. Furthermore, it is common ground that the timelimit for any action against the peroxides decision, a copy of which was sent to the applicant on 19 February 2004, has expired and that, therefore, that decision has become final as regards the applicant to the extent that it is capable of producing definitive binding legal effects in regard to it.

38. Even though the applicant had the opportunity to bring an action in due time against the peroxides decision, but did not, it does not follow that it has no legal interest in bringing proceedings against the contested decision. Such an interest presupposes that annulment of the measure is of itself capable of having legal consequences (see Antillean Rice Mills and Others v Commission , paragraph 34 above, paragraph 59, and the case law cited; see also, to that effect, Case 53/85 AKZO Chemie v Commission [1986] ECR 1965, paragraph 21), that the appeal must therefore be likely, if successful, to procure an advantage for that party (see, by analogy, C50/00 P Union de Pequeños Agricultores v Council [2002] ECR I6677, paragraph 21), and is justified by a vested and present interest in the annulment of that measure (order in Case T28/02 First Data and Others v Commission [2005] ECR II4119, paragraph 42).

39. In that regard, it must be borne in mind, first, that the question of whether annulment of the contested decision is capable of procuring an advantage for the applicant, and therefore giving rise to an interest in bringing proceedings, depends on an examination of an issue of substance, that is, the scope of business secret' within the meaning of the first paragraph of Article 9 of Decision 2001/462, read in conjunction with Article 21(2) of Regulation No 17. Assuming that the applicant's request for confidential treatment concerns, at least in part, business secrets covered by the abovementioned provisions - a question to be decided when appraising the substance of the present action - the contested decision rejecting that request would be unlawful since it is based on an incorrect application of that concept. Accordingly, annulment of the contested decision would be capable of procuring an advantage for the applicant in that the Commission, would, under Article 233 EC, have to give due effect to it for the publication of the peroxides decision, and, under Article 21(2) of Regulation No 17, have to have regard to the applicant's legitimate interest in the protection of its business secrets.

40. Secondly, contrary to the Commission's view, the mere fact that the disputed information has already been published and that certain third parties may already have read it cannot deprive the applicant of an interest in bringing proceedings against the contested decision. On the contrary, continued disclosure of that information continues to harm the interests and, in particular, the reputation of the applicant, and as such constitutes a vested and present interest within the meaning of the caselaw cited in paragraph 38 above. Furthermore, any other interpretation, which would make admissibility of the action dependent on whether or not the Commission had disclosed the disputed information - and therefore on whether the Commission had created a fait accompli - would allow the Commission to avoid scrutiny by the courts by making such disclosure even if it was unlawful.

41. More generally, the assessment made in paragraph 39 and 40 above is confirmed by caselaw to the effect that annulment of a decision may, per se, have legal consequences, in particular by obliging the Commission to take the measures needed to comply with the Court's judgment in accordance with Article 233 EC and by preventing the Commission from repeating such a practice (see, to that effect, Case T46/92 Scottish Football v Commission [1994] ECR II1039, paragraph 14, and the caselaw cited). However, in the present case, the precise effect of the contested decision is to post continuously on the Internet site of DG Competition the nonconfidential version of the peroxides decision, from which the passages relating to the applicant have not been removed. Therefore, annulment, at least in part, of the contested decision would require the Commission, under Article 233 EC, to cease to make public certain disputed passages.

42. In the light of the foregoing, the Court must reject the Commission's plea of inadmissibility and there is no need to examine the other arguments advanced by the parties in this context.

B - Substance

1. Preliminary observation

43. In support of its action, the applicant puts forward three pleas in law alleging, first, infringement of Article 21 of Regulation No 17, second, that the Commission lacks the power under Articles 3 and 15 of Regulation No 17 to adopt and publish a decision finding an infringement attributable to the applicant, and third, infringement of its right to effective judicial protection.

3 . The plea alleging infringement of Article 21 of Regulation No 17

(a) Arguments of the parties

44. The applicant maintains that the mere fact that it is not the addressee of the peroxides decision prevents the Commission from publishing the findings which relate to it.

45. According to the applicant, the publication provided for in Article 21(2) of Regulation No 17 relates only to the parties. However, the concept of parties' in that provision is only directed at the addressees of a decision imposing a fine and not the undertakings involved that are not the addressees of such a decision. In fact, publication of such a decision containing findings adversely affecting undertakings that are not addressees penalises them, owing to the negative repercussions on their reputation resulting from such publication and the increased risk that they would be exposed, on the basis of evidence that is apparent from the decision, to actions for damages brought by third parties before national courts. According to the applicant, unlike the addressees of a decision, such undertakings are also not in a position to contest the substance of those findings in court in order to avoid the negative effects and risks referred to above, which constitutes an unacceptable limitation on their right to effective judicial protection.

46. At the hearing, the applicant submitted, in essence, referring to the argument used in its second plea and to the judgment in Case T198/03 Bank Austria Creditanstalt v Commission [2006] ECR II1429, that the Commission's power to publish a decision under Article 21(2) of Regulation No 17 was limited, first, by the protection of professional secrecy within the meaning of Article 287 EC, which also covers the disclosure of matters such as those falling within Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), and secondly, by the principle of the presumption of innocence as provided for in Article 48 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and in the light of which the scope of the Commission's power of publication should be assessed. The principle of the presumption of innocence prevents the Commission from disclosing incriminating evidence which the undertaking in question has not had the opportunity to contest in court.

47. Consequently, the publication of the peroxides decision containing findings relating to alleged offending conduct of the applicant is a breach of Article 21(2) of Regulation No 17.

48. According to the Commission, the fact that the peroxides decision was not sent to the applicant as an addressee has no effect on its power to publish a version of the decision which contains references to the applicant. This is all the more so since the applicant was party to the administrative procedure concerning it until the moment it was closed.

49. The Commission takes the view that the only limitation on its power of publication, as provided for in the second part of Article 21(2) of Regulation No 17, is its obligation to have regard to the legitimate interest of undertakings in the protection of their business secrets. On the

other hand, the first part refers only to the minimum requirements which published information must satisfy, that is, to state the names of the parties and the main content of the decision.

50. The caselaw confirms this interpretation in recognising that published information which exceeds these minimum requirements is acceptable. Therefore, publication of the full text of a decision imposing fines is lawful, even if the decisions taken under Article 15 of Regulation No 17 are not included in those mentioned in Article 21(1) of the regulation (Case 41/69 Chemiefarma v Commission [1970] ECR 661, paragraphs 101 to 103, and Case 54/69 Francolor v Commission [1972] ECR 851, paragraphs 30 and 31). Consequently, the Commission was correct to find in the contested decision, on the basis of that caselaw, that it can also publish decisions, or parts of decisions, in respect of which secondary legislation has not provided for any publication obligation, provided that this does not lead to the disclosure of business secrets.

51. The Commission also argues that, even if the term parties' in the first part of Article 21(2) of Regulation No 17 specifies only the addressees of the decision, it nevertheless follows from the use of the wider concept of undertaking' - as opposed to party' - used in the second half of that sentence that persons other than the parties can be mentioned in the published decision.

52. The Commission also considers that the nonbinding information relating to the applicant in the peroxides decision, which is not formally expressed in the operative part of the decision, is not, for the purposes of the caselaw (Case C344/98 Masterfoods and HB [2000] ECR I11369, paragraph 52), the subject of a Commission decision which the national courts must take into account in any action for damages (Joined Cases T125/97 and T127/97 Coca Cola v Commission [2000] ECR II1733, paragraph 86). In the present case, the Commission's findings in the preamble to the peroxides decision are thus capable of being the subject of an action for annulment only to the extent to which, as grounds of an act adversely affecting a person's interests, they constitute the necessary support for its operative part (Case T138/89 NVB v Commission [1992] ECR II2181, paragraph 31, Joined Cases T24/93 to T26/93 and T28/93 Compagnie maritime belge transports and Others v Commission [1996] II1201, paragraph 150, and Case T228/97 Irish Sugar v Commission [1999] ECR II2969, paragraph 178). On the other hand, the information relating to infringements in the preamble, but which do not constitute such support, do not adversely affect the interests of either the parties or third parties. It follows that the Commission correctly stated, in the contested decision, that the peroxides decision is not a decision which finds that the applicant has infringed Article 81 EC and binds national courts in that respect.

53. In fact, the peroxides decision does not contain any binding finding concerning the applicant capable of prejudging the independent appraisal by a national court, but only a description of the applicant's conduct as an aid to understanding the origin and context of the infringement committed by the addressees of the decision. It is therefore not conceivable that the applicant would be exposed to any actions for damages before national courts without being able to defend itself. In particular, contrary to the applicant's claim, the published peroxides decision cannot be used as conclusive evidence against it, or to facilitate, in any significant way, the production of evidence by third parties in such a dispute.

54. In addition, the Commission takes the view that Article 30 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) - which has replaced Article 21 of Regulation No 17 and extended the publication requirements so that decisions imposing fines and periodic penalty payments are explicitly covered - confirms its approach and certainly does not contradict its past practice on publication. Publication serves, first, to ensure the transparency of administration, and secondly, as regards, in particular, decisions imposing fines, as a deterrent, in accordance with the objective of general deterrence recognised by the Court in Chemiefarma v Commission

, paragraph 50 above. According to the Commission, the applicant's alleged penalty constituted by the publication of the disputed information is capable neither of calling in question the objective of general deterrence nor of modifying the scope of the rules on limitation by extending their sphere so as to limit the Commission's power of publication. In that regard, the Commission submits that, with regard to the limitation periods for the imposition of penalties, Article 25 of Regulation No 1/2003 now expressly refers to the powers conferred on the Commission by Articles 23 and 24', and therefore, does not refer to publication of decisions under Article 30 of the regulation.

55. Finally, at the hearing, the Commission relied on the approach taken in Bank Austria Creditanstalt v Commission , paragraph 46 above (paragraph 89). According to that case, the inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement and it is legitimate for the Commission, in a decision finding an infringement and imposing a penalty, to describe the factual and historical context of the conduct in issue. The Commission also argued that, according to that judgment, the same is true for the publication of that description, given that publication may be of use in allowing interested persons to understand fully the reasoning behind such a decision and it is for the Commission to judge whether the inclusion of such matters is appropriate.

56. Cons equently, the plea alleging infringement of Article 21(2) of Regulation No 17 should be rejected.

(b) Findings of the Court

Preliminary observation

57. In its first plea, the applicant, in essence, contests the scope of the Commission's power under Article 21(2) of Regulation No 17 to publish a decision adopted on the basis of Regulation No 17 which was not addressed to it and in which the Commission found, in the grounds and not in the operative part, that the applicant had committed an infringement. In support of its plea, the applicant essentially argues, first, that it is not a party' within the meaning of the first part of Article 21(2) of Regulation No 17 in respect of which publication may be made in this way, and secondly, that publication of the peroxides decision adversely affects it since it discloses information covered by professional secrecy within the meaning of Article 287 EC.

58. The Court considers that it is appropriate to begin with an examination, in the light of Article 287 EC, of the merits of the second part of the first plea, relating to the scope of the Commission's power of publication.

The scope of the Commission's power of publication under Article 21 of Regulation No 17

59. First of all, it is appropriate to recall the content of Article 21 of Regulation No 17, which governs the scope of the Commission's power of publication.

60. Article 21(1) of Regulation No 17 lists the types of decisions which the Commission is authorised to publish, a list to which, according to caselaw, decisions imposing fines under Article 15 of the regulation must be added (see, to that effect, Chemiefarma v Commission , paragraph 50 above, paragraphs 101 to 104, and Francolor v Commission , paragraph 50 above, paragraphs 30 and 31). Article 21(2) of the regulation provides, in the first part of the sentence, that [t]he publication shall state the names of the parties and the main content of the decision', and in the second part, that the Commission must have regard to the legitimate interest of undertakings in the protection of their business secrets'.

61. More generally, the Court would point out that, even if publication of a measure is not explicitly prescribed by the Treaties or by another act of general application, it is apparent from the scheme

laid down by the Treaties, in particular Article 1 EU, Articles 254 EC and 255 EC, and the principle of openness and the requirement of transparency in acts of the Community institutions that are enshrined in those provisions, that, in the absence of provisions explicitly ordering or prohibiting publication, the rule is that the institutions have a power to publish acts which they adopt. However, there are exceptions to that rule in so far as Community law, in particular through provisions ensuring compliance with the obligation of professional secrecy, prevents disclosure of such acts or of certain information contained in them. Thus, the aim of Article 21(2) of Regulation No 17 is not to limit the Commission's freedom to publish, of its own volition, a version of its decision that is fuller than the minimum necessary and also to include information whose publication is not required, in so far as the disclosure of that information is not inconsistent with the protection of professional secrecy (Bank Austria Creditanstalt v Commission , paragraph 46 above, paragraphs 69 and 79).

62. In addition, the Court would point out that the second part of Article 21(2) of Regulation No 17, like Article 20 of the Regulation, is only the expression in secondary Community legislation of the protection of professional secrecy laid down in Article 287 EC and that the procedure provided for in Article 9 of Decision 2001/462 aims merely to implement the procedural requirements which the Court prescribed to that end in AKZO Chemie v Commission , paragraph 38 above (in particular paragraphs 29 and 30; see also, to that effect, Bank Austria Creditanstalt v Commission , paragraph 46 above, paragraph 28). Thus this procedure applies where the Commission, in the course of competition proceedings, intends to disclose information capable of undermining the protection of professional secrecy within the meaning of Article 287 EC (first and second paragraphs), and is applicable whatever form that disclosure may take, including publication of a decision in the Official Journal of the European Communities (third paragraph) or on the Internet.

63. The Court would point out, next, that neither Article 287 EC nor Regulation No 17 state explicitly what information, apart from business secrets, is covered by the obligation of professional secrecy. It is apparent, however, from the open wording of Article 287 EC (which prohibits disclosure of information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'), from Article 13(1) of Regulation No 2842/98 and from the caselaw, that the concept of information covered by the obligation of professional secrecy' also includes confidential information other than business secrets (Case 145/83 Adams v Commission [1985] ECR 3539, paragraph 34, and Case T353/94 Postbank v Commission [1996] ECR II921, paragraph 86).

64. It follows from this wider understanding of the concept of information covered by the obligation of professional secrecy' that Article 21 of Regulation No 17 and Article 9 of Decision 2001/462 must be interpreted as meaning that they apply, in the same way as Article 13(1) of Regulation No 2842/98, both to business secrets and to other confidential information. In addition, the confidentiality of information, for which professional secrecy requires that it be protected under Article 287 EC, may also stem from other provisions of primary or secondary Community law, such as Article 4 of Regulation No 1049/2001 (cited in paragraph 46 above) or from Article 286 EC and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) (see also, to that effect, Bank Austria Creditanstalt v Commission , paragraph 46 above, paragraphs 34 and 35).

65. As regards, generally, the nature of business secrets or other information covered by the obligation of professional secrecy, it is necessary, first of all, that such business secrets or confidential information be known only to a limited number of persons. Next, it must be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties (Postbank v Commission , paragraph 63 above, paragraph 87, and see also Commission Notice 2005/C 325/07

on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC] (OJ 2005 C 325, p. 7), paragraphs 3.2.1 and 3.2.2). Finally, the interests liable to be harmed by disclosure must be worthy of protection. The assessment as to the confidentiality of a piece of information requires, in this regard, the individual legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible (Bank Austria Creditanstalt v Commission , paragraph 46 above, paragraph 71).

66. It follows, first, that when the hearing officer takes a decision under the third paragraph of Article 9 of Decision 2001/462, he must not merely examine whether the version of a decision taken under Regulation No 17 and intended for publication contains business secrets or other confidential information enjoying similar protection. He must also check whether that version contains other information which cannot be disclosed to the public either on the basis of rules of Community law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy (Bank Austria Creditanstalt v Commission , paragraph 46 above, paragraph 34). Secondly, in the context of this review of legality, the Court must ensure that the hearing officer observes the limits of his terms of reference, as just defined, and must therefore determine whether the hearing officer correctly applied the protection of professional secrecy in the particular case. However, the Court cannot complain that the hearing officer did not correct any procedural irregularities committed by the Commission when adopting the decision which is to be published, since the review of such procedural irregularities does not fall within his powers. Therefore, the Court cannot call in question either the procedural legality or the merits of the decision intended for publication, even if that decision were to contain serious errors.

67. It is in the light of the principles set out in paragraphs 59 to 66 above that the Court must ascertain whether and to what extent the information disputed by the applicant is protected by the obligation of professional secrecy under Article 287 EC.

The protection of the disputed information through the obligation of professional secrecy

- General observation

68. In the light of the foregoing, the Court must examine whether the disputed information constitutes information covered by the obligation of professional secrecy under Article 287 EC, as that concept is interpreted in paragraphs 63 and 65 above, and, in particular, ascertain whether publication of that information is likely to cause serious harm to the applicant.

- The aspects of the protection of professional secrecy taken into account by the hearing officer

69. The Court would point out, first of all, that, after the applicant had disputed the publication of certain passages relating to it in the peroxides decision and had made its request for confidential treatment of those passages, the hearing officer, in the contested decision, merely ascertained whether the information contested by the applicant constituted business secrets, disclosure of which would be likely to harm its legitimate interests.

70. It must be borne in mind that, even if the hearing officer thereby formally restricted the subjectmatter of his examination, in the course of his assessment he nevertheless adopted a position on whether disclosure of the disputed information would be harmful, and therefore, whether it was confidential. Thus the hearing officer examined, first, whether publication of the disputed information was capable of providing to third parties evidence enabling them to bring actions for damages against the applicant before national courts and, secondly, whether such publication might cause serious harm to the applicant's reputation on the market.

71. It is apparent from the foregoing, as from paragraph 21 above, that, in essence, in reply to

the applicant's request for confidential treatment, the hearing officer also examined whether the disputed information constituted confidential information other than business secrets. In that regard, the hearing officer concluded that the applicant's interest in the removal of the disputed information from the definitive version of the peroxides decision intended for publication was not sufficient.

- The substance of the contested decision in relation to observance of the obligation of professional secrecy

72. The Court would point out that the interest of an undertaking which the Commission has fined for breach of competition law in the non-disclosure to the public of details of the offending conduct of which it is accused does not merit any particular protection, given, first, the public interest in knowing as fully as possible the reasons for any Commission action, the interest of economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and, second, the fined undertaking's ability to seek judicial review of such a decision (Bank Austria Creditanstalt v Commission , paragraph 46 above, paragraph 78). The Court considers that this appraisal applies mutatis mutandis to a decision in which an undertaking is found to have committed an infringement, but proceedings against it are barred by limitation pursuant to Article 1 of Regulation No 2988/74, the Commission being implicitly authorised to take that decision on the basis of the rules laid down by Regulation No 17, provided that it shows a legitimate interest for doing so (Joined Cases T22/02 and T23/02 Sumitomo Chemical and Sumika Fine Chemical v Commission [2005] ECR II4065, paragraphs 60 to 63).

73. However, the application of the caselaw cited in paragraph 72 above presupposes that the infringement found at least appears in the operative part of the decision and that the decision is addressed to the undertaking concerned so that it may contest that infringement in court. As the Commission itself argues, regardless of the grounds on which such a decision is based, only the operative part thereof is capable of producing legal effects and, as a consequence, of adversely affecting an undertaking's interests. By contrast, the assessments made in the grounds of a decision are not in themselves capable of forming the subject of an application for annulment. They can be subject to judicial review by the Community judicature only to the extent that, as grounds of a measure adversely affecting a person's interests, they constitute the essential basis for the operative part of that measure (order in Case C164/02 Netherlands v Commission [2004] ECR I1177, paragraph 21; Case T213/00 CMA CGM and Others v Commission [2003] ECR II913, paragraph 186), and if, in particular, those grounds are likely to alter the substance of what was decided in the operative part of the measure in question (see, to that effect, Case T251/00 Lagardère and Canal+ v Commission [2002] ECR II4825, paragraphs 67 and 68).

74. In the present case, it follows from the foregoing that, regardless of whether or not the Commission was justified in finding, in the grounds of the peroxides decision, an infringement attributable to the applicant, in the absence of such a finding in the operative part, the applicant did not have standing to bring an action against that decision. Accordingly, an action brought by the applicant against the peroxides decision seeking review by the Court of First Instance of the substance of the disputed information would, in any event, have been inadmissible, even if brought within the timelimit provided for in the fifth paragraph of Article 230 EC (see, to that effect, Compagnie maritime belge transports and Others v Commission , paragraph 52 supra, paragraph 150).

75. In addition, as the applicant admits, the scope of the Commission's power to adopt and publish decisions on the basis of Regulation No 17 and the scope of the protection of professional secrecy must be interpreted in the light of general principles and fundamental rights, which are an integral

part of the Community legal order, and, in particular, of the principle of presumption of innocence - as reaffirmed in Article 48 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) - which applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C199/92 P Hüls v Commission [1999] ECR I4287, paragraph 150; Joined Cases T67/00, T68/00, T71/00 and T78/00 JFE Engineering and Others v Commission [2004] ECR II2501, paragraph 178; Sumitomo Chemical and Sumika Fine Chemicals v Commission , paragraph 72 above, paragraphs 104 and 105).

76. The Court also observes that the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case (Sumitomo Chemical and Sumika Fine Chemicals v Commission , paragraph 72 above, paragraph 106). Furthermore, the guilt of a person accused of an infringement is established definitively only where the decision finding that infringement has acquired the force of res judicata , which implies either the absence of an appeal against that decision by the person concerned within the timelimits provided for in the fifth paragraph of Article 230 EC, or, after such an appeal, the definitive closure of the contentious proceedings, in particular, by a judicial decision confirming the lawfulness of that decision.

77. As a consequence, findings which the person charged with an infringement, even though he contests their merits, has not had the opportunity to contest before the Community judicature cannot be regarded as established in law. The fact that such findings evade any review by the courts, and therefore, in the event that they are unlawful, any correction by the Community judicature, is manifestly contrary to the principle of the presumption of innocence. Any other interpretation would upset the system of division of functions and the institutional balance between the administration and the courts, on the ground that, where findings are contested, it is for the courts alone to make a definitive ruling on the existence of sufficient evidence that an undertaking is liable for an infringement of the rules on competition.

78. The Court considers, further, that, since the Commission's findings relating to an infringement committed by an undertaking are capable of infringing the principle of the presumption of innocence, those findings must, in principle, be regarded as confidential as regards the public, and therefore as being of the kind covered by the obligation of professional secrecy. This principle stems, inter alia, from the need to respect the reputation and dignity of the person concerned as that person has not been finally found guilty of an infringement (see, by analogy, Case T15/02 BASF v Commission [2006] ECR II497, paragraph 604). The confidentiality of such information is confirmed by Article 4(1)(b) of Regulation No 1049/2001, which provides that information, whose disclosure would harm the protection of privacy and the integrity of the individual, is to be protected. Finally, the confidentiality of that information cannot depend on whether, and to what extent, it is of probative value for the purpose of proceedings at national level.

79. In that regard, the defendant cannot rely on paragraph 89 of the ruling in Bank Austria Creditanstalt v Commission , paragraph 46 above, given that the Court's appraisal in that part of the ruling does not concern a similar situation to that in the present case, in which the applicant has no possibility of contesting the merits of the assertions relating to it in the peroxides decision (Bank Austria Creditanstalt v Commission , paragraph 46 above, last line of paragraph 78). It is clear from the caselaw cited in paragraphs 72 and 73 above that the Commission cannot adopt a decision finding an infringement after expiry of the limitation period, where such a finding is not justified by the existence of a legitimate interest and where the undertaking concerned has

no possibility of seeking review of that finding by the Community judicature (see also, to that effect, CocaCola v Commission , para graph 52 above, paragraph 86).

80. In the present case, as the Court has pointed out in paragraph 74 above, the applicant did not have standing to bring an action against the peroxides decision, given, in particular, that its participation in the infringement was not referred to in the operative part even though it contested the merits of the grounds of that decision in which its participation in the infringement was mentioned. Such a situation is contrary to the principle of the presumption of innocence and infringes the protection of professional secrecy, as interpreted in paragraphs 75 to 78 above, which require that respect for the reputation and dignity of the applicant be ensured. The disputed information must therefore be held to be covered by the obligation of professional secrecy within the meaning of Article 287 EC. In that regard, the Court would point out, finally, that the Commission itself accepted, during the hearing, that it could have published the peroxides decision by limiting itself to finding that the applicant had participated in the administrative procedure and to closing the investigation in its regard by reason of the limitation period. It must be held that, in those circumstances, there is therefore no public interest in publishing the disputed information that is capable of prevailing over the applicant's legitimate interest in having such information protected.

81. It follows from the foregoing that the hearing officer, in finding that the disputed information was not worthy of protection and that its publication would not cause serious and unjust harm to the applicant's interests, misapplied the protection of professional secrecy in the present case. As a consequence, the contested decision must be annulled in so far as it rejects the applicant's request for confidential treatment, and it is not necessary to rule on the applicant's other pleas in law and complaints.

Costs

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

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FORM	Judgment
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11997M001 : N 61
31962R0017 : N 57 63 66 72 75
31962R0017-A03 : N 43
31962R0017-A15 : N 43 60
31962R0017-A20 : N 2 62
31962R0017-A20P2 : N 2
31962R0017-A21 : N 3 43 57 - 81
31962R0017-A21P1 : N 60
31962R0017-A21P2 : N 39 57 60 - 62
31974R2988-A01 : N 72
31974R2988-A01P1LC : N 6
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32000X1218(01)-A48 : N 75
32001D0462-A09 : N 5 62 64
32001D0462-A09L1 : N 39
32001D0462-A09L3 : N 37 66
32001R0045 : N 64
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61969J0041 : N 60
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61985J0053 : N 38 40 62
61992A0046 : N 41
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61993A0024 : N 74
61993A0480 : N 38 40
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62000A0213 : N 73 79
62000A0251 : N 73 79
62000J0050 : N 38 40
62002A0015 : N 78
62002A0022 : N 72 73 75 76 79
62002B0028 : N 38 40
62002O0164 : N 73 79
62003A0198 : N 61 62 64 - 66 72 73 79

SUB Competition

AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
NOTES	Idot, Laurence: Publication d'une décision de condamnation et secret professionnel, Europe 2007 Décembre Comm. no 348 p.29-30 ; Barbier de La Serre, Eric: Secret professionnel, présomption d'innocence et protection juridictionnelle effective, Revue Lamy de la Concurrence : droit, économie, régulation 2008 no 14 p.93-95 ; Arhel, Pierre: Activité des juridictions communautaires en droit de la concurrence (3e trimestre 2007), Petites affiches. La Loi / Le Quotidien juridique 2008 no 30 p.5-6 ; Walter, Bernd A.: Was ist ein "Berufsgeheimnis"? , oder: Der "gute Ruf" als Begrenzung von gemeinschaftsrechtlicher Transparenz, European Law Reporter 2008 p.9-13
PROCEDU	Action for annulment
DATES	of document: 12/10/2007 of application: 10/12/2004

Case T-411/07 R

Aer Lingus Group plc

v

Commission of the European Communities

(Interim measures – Control of concentrations – Decision declaring a concentration to be incompatible with the common market – Article 8(4) and (5) of Regulation (EC) No 139/2004 – Application for suspension of operation and for interim relief – Measure incompatible with the distribution of powers between institutions – Powers of the Commission – Interim measures addressed to an intervener – Application for suspension of operation – Admissibility – No prima facie case – Lack of urgency – Absence of serious and irreparable damage – Damage dependent on future, uncertain events – Insufficient reasons – Weighing of all the interests involved)

Summary of the Order

1. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Provisional nature of the measure*

   (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Interest of the applicant in obtaining the suspension sought*

   (Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

3. *Applications for interim measures – Interim measures – Measures incompatible with the distribution of powers between institutions*

   (Arts 233 EC and 243 EC; Council Regulation No 139/2004, Art. 8(4) and (5))

4. *Applications for interim measure – Conditions governing admissibility – Application – Formal requirements*

   (Art. 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

5. *Applications for interim measures – Jurisdiction of the judge hearing the application for interim relief – Imposition of orders addressed to third parties – Limits*

   (Art. 243 EC)

6. *Competition – Concentrations – Powers of the Commission – Adoption of measures against the parties to an unlawful concentration – Conditions – Implementation of the concentration*

   (Arts 81 EC and 82 EC; Council Regulations No 1/2003, Art. 7(1), and No 139/2004, Arts 3, 7 and 8 (4) and (5))

7. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Urgency – Serious and irreparable damage*

   (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. According to Article 107(4) of the Rules of Procedure of the Court of First Instance, an order prescribing interim measures may have only an interim effect and is without prejudice to the decision on the substance of the case by the Court of First Instance. It follows that, in principle, the duration of the effects of such an order cannot extend beyond that of the main proceedings.

(see para. 45)

2. An application for suspension of operation of a negative administrative decision cannot be envisaged, since the grant of such suspension could not have the effect of changing the applicant's position. As it cannot be of any interest to the applicant, such an application must be rejected, except to the extent to which suspension might be necessary for the purposes of adopting other interim measures requested by the applicant, should the judge dealing with the application for interim measures consider them to be admissible and well founded.

(see paras 46-48)

3. In principle, the judge dealing with an application for interim measures cannot adopt an interim measure which, were it to be ordered, would constitute an interference with the exercise of the powers of another institution which would be incompatible with the distribution of powers between the various Community institutions as intended by the authors of the Treaty.

   Such is the case, with the consequent need for it to be rejected as being inadmissible, with an application for interim measures seeking to require the Commission to apply in a particular manner Article 8(4) and (5) of Regulation No 139/2004 on the control of concentrations between undertakings by adopting certain measures against the other party to a prohibited concentration. Were it to be decided in the judgment in the main application that the Commission has a power to order the measures set out in Article 8(4) and (5) of Regulation No 139/2004, it would be for the Commission, should it consider it necessary in the context of the powers of control accorded to it in the field of concentrations, to take the necessary measures to comply with the judgment, in accordance with Article 233 EC. Accordingly, should the judge dealing with the application for interim measures grant this request, this would amount to an injunction addressed to the Commission to draw precise inferences from the annulment decision, and consequently to ordering a measure which would exceed the Court's powers in the main action. Under the system for the division of powers established under the Treaty and by Regulation No 139/2004, however, it is for the Commission, if it considers it necessary in the context of the powers of control accorded to it in the field of concentrations, and in particular by Article 8(4) and (5) of Regulation No 139/2004, to adopt the restorative measures which it deems appropriate.

(see paras 49-51)

4. An application for interim measures pursuant to Article 243 EC cannot be vague and imprecise. However, in cases in which the content of the measures sought by the applicant is sufficiently clear from the rest of the application, the judge hearing the application may conclude that the request is not vague and imprecise in nature and may thus consider it admissible.

(see paras 52 and 53)

5. With regard to applications for interim measures, Article 243 EC states clearly that 'the Court of Justice may in any cases before it prescribe any necessary interim measures'. Such broad wording is obviously intended to grant sufficient powers to the judge hearing an application to prescribe any measure which he deems necessary to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice.

   In order to ensure the full effectiveness of Article 243 EC, therefore, it cannot be ruled out that the judge hearing the application may impose orders directly on third parties, if necessary, as the wide powers of the judge hearing such an application are limited only, in so far as an impact on the rights and interests of third parties is concerned, in cases where such rights and interests may be seriously affected. Such broad discretion should, in this respect, be exercised with due regard to the procedural rights, and in particular the right to be heard, of the addressees of the interim measures and of parties directly affected by those measures. When deciding whether to grant the interim measures applied for in this type of case, the judge hearing the application will also have due regard to both the strength of the *prima facie* case and the imminence of serious and irreparable harm in the specific case. Even where a third party has not had an opportunity to be heard in the context of proceedings for interim measures, it cannot be excluded that interim measures might be imposed on that party, in exceptional circumstances and bearing in mind the temporary nature of such measures, if it appears that, without such measures, the applicant would be exposed to a situation liable to endanger its very existence. The judge hearing the application carries out such assessments when balancing the various interests at stake.

(see paras 56, 59)

6. The Commission does not err in applying the provisions of Article 8(4) and(5) of Regulation No 139/2004 on the control of concentrations between undertakings, which authorise it to take measures against the parties to a prohibited concentration which has already been carried out where, after having declared incompatible with the common market a projected concentration providing for the acquisition of the entire capital of an undertaking, it considers that it lacks the power to prevent the acquiring undertaking from exercising voting rights arising from a minority shareholding which it has finally acquired in so far as it is not in a position to exercise *de jure* or *de facto* control over the undertaking concerned by means of that shareholding.

While it is true that the term ‘implemented’ in the English version may, in principle, leave room for confusion as to the precise scope of those provisions in view of the fact that the definition of the term ‘implementation’ may encompass both ‘the fact of having accomplished some aim’ and ‘the carrying into effect’, the manner in which that expression is rendered in the French, German and Italian versions, the comparison of the French version with other Community texts in which the term ‘implementation’ is clearly meant to indicate ‘carrying into effect’ rather than ‘the act of accomplishing some aim’, and the fact that the Commission may, under Article 8(4) of Regulation No 139/2004, require the undertakings concerned to ‘dissolve the concentration’, indicate, however, that, *prima facie*, the definition of ‘implementation’ envisaged by those provisions involves the full implementation of the concentration, as defined in Article 3 of Regulation No 139/2004, and thus the acquisition of control.

That conclusion cannot be brought into question by any alleged practice on the Commission’s part by which the latter treats partial implementation, even as regards steps falling short of transfer of control, as being precluded by Article 7(1) of Regulation No 139/2004, under which a concentration with a Community dimension may not be implemented until it has been declared compatible with the common market, and indicates to parties that they should refrain from taking such steps. First, as the interpretation of Community law is a prerogative of the Court of Justice and not of the Commission, the Commission’s practice, albeit influential and important in determining whether any legitimate expectations may be justified, is not conclusive in that regard. Second, even if Article 7 (1) of Regulation No 139/2004 were to be interpreted as prohibiting only a change of control pending the Commission’s review, and not steps falling short of change of control, such as the exercise of voting rights arising from minority shareholdings, taking into account the time-limit within which the Commission must review a notified concentration and the combinations of factors which might confer control in any given case, it would remain legitimate for the Commission to request the parties not to take any action which might lead to a change of control.

Finally, this interpretation of Article 8(4) and (5) of Regulation No 139/2004, in conjunction with the prohibition under Article 21(3) thereof of Member States applying their national competition legislation to any concentration having a Community dimension, does not *prima facie* give rise to a lacuna which is incompatible with the aim of Regulation No 139/2004. In so far as the remaining minority shareholding is no longer linked to an acquisition of control, ceases to be part of a ‘concentration’ and lies outside the scope of Regulation No 139/2004, Article 21 thereof does not *prima facie* in principle, under those circumstances, prevent the application by national competition authorities and national courts of their national legislation on competition. Furthermore, whilst a minority shareholding of the type in question cannot, *prima facie*, be regulated under Regulation No 139/2004, it might be envisaged that the Treaty provisions on competition, and in particular Articles 81 EC and 82 EC, may be applied by the Commission to the conduct of the undertakings involved.

(see paras 89-92, 94, 98, 100-101, 103)

7. The urgency of an application for interim relief must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the relief. It is for that party to prove that it cannot await the outcome of the main proceedings without suffering damage of that kind.

Where damage depends on the occurrence of a number of factors, it is enough for that damage to be foreseeable with a sufficient degree of probability. However, the party seeking the interim relief is still required to prove the facts which are deemed to show the probability of serious and irreparable damage. In order to be able to determine whether the damage feared is serious and irreparable and therefore provides grounds for ordering interim measures, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail for each of the parties concerned.

The claim by the party seeking interim relief that the judge hearing the application should apply the ‘precautionary principle’ and is entitled to apply ‘protective measures’ without having to await proof of the reality of the risk alleged cannot therefore be entertained.

(see paras 116-119)

Order of the President of the Court of First Instance
First InstanceFirst Instance2008. Aer Lingus Group plc v Commission of the European Communities. Interim measures - Control of concentrations - Prohibition of a notified operation - Article 8(4) and (5) of Regulation (EC) No 139/2004 - Application for an order requiring the Commission to take measures against the other party to the prohibited concentration - Measure incompatible with the distribution of powers between institutions - Powers of the Commission - Order addressed to an intervener - Application for suspension of operation - Admissibility - Prima facie case - Urgency - Serious and irreparable damage - Occurrence of damage dependent on future, uncertain events - Insufficient reasons - Weighing of all the interests involved. Case T-411/07 R.

In Case T-411/07 R,

Aer Lingus Group plc, established in Dublin (Ireland), represented by A. Burnside, Solicitor, and B. van de Walle de Ghelcke and T. Snels, lawyers,

applicant,

v

Commission of the European Communities, represented by X. Lewis, E. Gippini Fournier and S. Noe, acting as Agents,

defendant,

supported by

Ryanair Holdings plc, established in Dublin (Ireland), represented by J. Swift, QC, V. Power, A. McCarthy and D. W. Hull, Solicitors, and G. M. Berrisch, lawyer,

intervener,

APPLICATION for, first, an order requiring the Commission to adopt certain measures concerning Ryanair Holdings plc's shareholding in the applicant, second, alternatively, any order to similar effect against the Commission or Ryanair Holdings plc, and, third, suspension of the operation of the Commission Decision of 11 October 2007 C(2007)4600 final rejecting the applicant's request that proceedings be opened under Article 8(4) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) and that interim measures be adopted under Article 8(5) of that regulation,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES,

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1) The application for interim measures is dismissed.

2) Costs are reserved.

Luxembourg, 18 March 2008.

Legal context

1. Under Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control

of concentrations between undertakings (OJ 2004 L 24, p. 1) :

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

...'

2. Article 8 of Regulation No 139/2004 provides:

...

4. Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market, or

(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.'

Facts

3. The applicant, Aer Lingus Group plc (hereinafter the applicant' or Aer Lingus'), is a public limited company and the non-trading holding company of Aer Lingus Limited, a low-cost, low-fares international airline based in Ireland, providing scheduled air transportation services to and from Dublin, Cork and Shannon airports. Following its privatisation in 2006 by the Irish Government, which retained a shareholding of 25.35 %, Aer Lingus shares were admitted to trading on 2 October 2006.

4. On 23 October 2006, Ryanair Holdings plc (hereinafter Ryanair'), which had previously acquired, between 27 September and 5 October 2006, through its wholly-owned subsidiary Coinside Limited, a 19.21% stake in Aer Lingus, launched a public bid for the entire share capital of Aer Lingus.

5. On 30 October 2006, Ryanair lodged with the Commission a notification of a proposed concentration pursuant to Article 4 of Regulation No 139/2004 relating to its projected acquisition of Aer Lingus.

6. During the bid period, Ryanair acquired further shares in Aer Lingus and, by 28 November 2006, held 25.17 % of the share capital in Aer Lingus.

7. On 20 December 2006 the Commission adopted a decision under Article 6(1)(c) of Regulation No 139/2004 (hereinafter the Regulation') initiating phase II proceedings. In this decision the Commission considered that the separate acquisitions of shares referred to above and the public bid launched by Ryanair constituted a single concentration for the purposes of Article 3 of the Regulation.

8. On 27 June 2007, the Commission adopted Decision C(2007) 3104 declaring the notified concentration to be incompatible with the common market (hereinafter the Prohibition Decision'), pursuant to Article 8(3) of the Regulation. The Commission concluded that the notified concentration would significantly impede effective competition in the common market or a substantial part thereof within the meaning of Article 2(3) of the Regulation, in particular as a result of the creation of a dominant position of Ryanair and Aer Lingus on 35 routes from and to Dublin, Shannon and Cork, and the creation or strengthening of a dominant position on 15 other routes from and to Dublin and Cork.

9. By application lodged with the Registry of the Court of First Instance on 10 September 2007, registered under number T-342/07, Ryanair brought an action for annulment of the Prohibition Decision.

10. Following the Prohibition Decision, Ryanair acquired a further 4.3 % of the share capital of Aer Lingus, bringing its total shareholding to 29.4 %.

11. During the proceedings before the Commission prior to the Prohibition Decision, Aer Lingus submitted that the Commission should take a decision under Article 8(4) of the Regulation requiring Ryanair to divest itself of its minority stake in Aer Lingus should the Commission prohibit the concentration.

12. On 27 June 2007, the Deputy Director General of the Directorate-General for Competition addressed a letter to the applicant indicating that, in the opinion of the services in charge of Merger Control, the Commission did not have the power under Article 8(4) of the Regulation to order Ryanair to divest itself of its minority shareholding, insofar as there was no indication that, with 25.22 % of Aer Lingus shares, Ryanair would be in a position to exercise de jure or

de facto control over Aer Lingus within the terms of Article 3(2) of the Regulation. For the same reasons, the letter stated that the Commission would lack the power to adopt interim measures under Article 8(5) of the Regulation.

13. On 17 August 2007, Aer Lingus addressed to the Commission a request that it open proceedings against Ryanair under Article 8(4) of the Regulation and that it adopt interim measures under Article 8(5) thereof to prevent Ryanair from exercising its voting rights in Aer Lingus, or, alternatively, to state formally that the Commission does not have the power to adopt such measures. In addition, Aer Lingus requested that the Commission explicitly take a position on the interpretation of Article 21 of the Regulation.

14. On 11 October 2007, the Commission adopted Decision C(2007) 4600 final rejecting Aer Lingus' request (hereinafter the Contested Decision').

The Contested Decision

15. In the Contested Decision, the Commission took the view that, pursuant to Article 3 of the Regulation, a concentration arises only where an undertaking acquires control, control being defined as the possibility of exercising decisive influence. As to Article 8(4) of the Regulation, the Commission recalled that this provision allows it, where a concentration has already been implemented, to require the undertakings concerned to dissolve the concentration, in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration.

16. However, the Commission found that the concentration assessed in the present case had not been implemented, insofar as Ryanair had not acquired control of Aer Lingus. The transactions that were carried out during the Commission's proceedings could therefore not be considered to constitute implementation of the notified concentration.

17. In particular, the Commission underlined that the minority stake held by Ryanair did not grant it, de jure or de facto , control of Aer Lingus within the meaning of Article 3(2) of the Regulation. The Commission added that, even though minority shareholdings may in certain circumstances lead to a finding of control, there were no indications that such circumstances were present in this case. In fact, according to the information available to the Commission, Ryanair's rights as a minority shareholder (in particular the right to block so-called special resolutions' under Irish company law) are associated exclusively with rights related to the protection of minority shareholders and do not confer control upon Aer Lingus. Furthermore, the Commission pointed out that Aer Lingus itself did not claim that the minority stake acquired would lead to control by Ryanair over Aer Lingus.

18. Finally, the Commission stated that the present case differed from the situation in past cases where Article 8(4) had been applied, such as in the Commission Decision of 30 January 2002 setting out measures to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M.2416 - Tetra Laval/Sidel , OJ 2004 L 38, p. 1, hereinafter the Tetra Laval/Sidel Case') and in the Commission Decision of 30 January 2002 requiring undertakings to be separated pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M.2283 - Schneider/Legrand , OJ 2004 L 101, p. 134, hereinafter the Schneider/Legrand Case'). In fact, in those cases, by contrast to the present situation, an acquisition had already been successfully completed and the acquirer had acquired control of the target.

19. As concerns Aer Lingus' request that the Commission adopt interim measures pursuant to Article 8(5) of the Regulation, the Commission noted that the wording of this provision referred similarly to a situation where a concentration has already been implemented and is declared incompatible with the common market' and concluded therefore that it did not have the power to take interim measures

in that case.

20. In relation to Aer Lingus' request that the Commission adopt a position on the interpretation of Article 21 of the Regulation, the Commission noted that such a request amounted, in effect, to a request for a legally binding interpretation of a provision of Community law to be addressed to Member States, and that the Commission manifestly lacks the power to adopt such acts.

Procedure

21. By application lodged at the Court Registry on 19 November 2007, registered under number T-411/07, the applicant brought an action for annulment of the Contested Decision on the basis of the fourth paragraph of Article 230 EC.

22. By separate document lodged at the Registry on the same day, registered under number T-411/07 R, the applicant applied for the adoption of interim measures and for the suspension of the operation of the Contested Decision on the basis of Articles 242 EC and 243 EC, and of Article 104 of the Rules of Procedure of the Court of First Instance.

23. On 12 December 2007 the Commission submitted its written observations on this application for interim measures.

24. By a document lodged at the Registry on 27 November 2007, Ryanair applied for leave to intervene in support of the form of order sought by the Commission.

25. By a document lodged at the Registry on 4 December 2007, Aer Lingus raised no objections to Ryanair's application for leave to intervene and stated that it made no confidentiality claims in relation to any of the documents which it had lodged with the Court in Case T-411/07 R.

26. By a document lodged at the Registry on 5 December 2007, the Commission raised no objections to Ryanair's application for leave to intervene.

27. By order of the President of the Court of First Instance of 7 December 2007, Ryanair was granted leave to intervene in support of the form of order sought by the Commission and to submit a statement in intervention, which it did on 19 December 2007.

28. A hearing was held on 24 January 2008.

Forms of order sought

29. The applicant claims that the President of the Court of First Instance should:

- order the Commission to require Ryanair, until judgment in the main application or in Case T-342/07, whichever is the later:

- not to exercise the voting rights or any other rights attached or deriving from the shareholding held by Ryanair in Aer Lingus (including, without limitation, attendance or voting at meetings, or the requisition of general meetings) except in accordance with a derogation granted by the Commission;

- to vest the shares in question in a Trustee and not to dispose of any of them except to a buyer, and in accordance with a procedure, approved by the Commission;

- not to increase further its shareholding in Aer Lingus;

- alternatively, adopt any order to similar effect against the Commission and/or Ryanair as the President may think fit;

- suspend the Commission's decision of 11 October 2007 C(2007)4600 final rejecting the applicant's request that proceedings be opened under Article 8(4) of the Regulation, in so far as necessary;

- order the Commission to pay the costs.

30. The Commission contends that the President of the Court should:

- dismiss the application for suspension;

- dismiss the application for interim measures;

- order the applicant to pay the costs.

31. Ryanair contends that the President of the Court should:

- dismiss the application;

- order the applicant to pay the costs associated with the intervention.

Law

32. Under Articles 242 EC and 243 EC, in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the act contested before it be suspended or prescribe any necessary interim measures.

33. Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency, and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Thus, the judge hearing the application may order suspension of operation of an act and/or interim measures if it is established that such an order is justified, prima facie , in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, with the result that an application for interim measures must be dismissed if any one of them is not satisfied (order in Case C268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing the application must also weigh up the interests involved (see the order in Case C445/00 R Austria v Council [2001] ECR I1461, paragraph 73 and the case cited).

34. In addition, in the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order in Case C-149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I2165, paragraph 23, and order of 3 April 2007 in Case C-459/06 P(R) Vischim v Commission , not published in the ECR, paragraph 25).

Admissibility

Arguments of the parties

35. The Commission submits that the application for interim measures should be dismissed on the ground that none of the relief sought is of the type that can be granted in the framework of interim proceedings.

36. First, the Commission argues that the interim measures requested go beyond the scope of what the applicant could obtain in the main proceedings, which cannot result in the automatic divestiture of Ryanair's minority shareholding. Should Aer Lingus prevail in the main proceedings, it would be for the Commission to take the necessary measures to comply with the Court's judgment, in accordance with Article 233 EC.

37. In addition, the Commission points out that the applicant requests the adoption of measures having effect until the judgment in the main application or in Case T342/07, whichever is the later. According to the Commission, extending the duration of the measures sought beyond the end of the

main proceedings would be to deny the provisional nature of the interim measures procedure. It also argues that the present application for interim measures cannot relate to different and separate proceedings to which the applicant is not a party.

38. Second, so far as concerns the request for suspension of the Contested Decision, the Commission submits that, according to consistent case-law, an application for suspension of operation cannot, in principle, be envisaged against a negative administrative decision.

39. Third, so far as concerns the request that the President of the Court enjoin the Commission to order Ryanair to abstain from exercising its minority voting rights or to take certain positive steps, the Commission points out that, by this means, the applicant is seeking to escape the application of the case-law according to which the judge hearing the application for interim measures cannot issue directions to individuals who are not parties to the dispute.

40. In the Commission's opinion, the fact that Ryanair has been granted leave to intervene does not confer upon it the status of a party.

41. Fourth, so far as concerns the request that the President of the Court adopt any order to similar effect against the Commission and/or Ryanair as the President may think fit, the Commission considers that such a claim is vague and imprecise and does not, therefore, meet the criteria laid down in the Rules of Procedure. Consequently, it should be rejected as inadmissible.

42. In its statement in intervention, Ryanair supports the Commission's submissions and considers that the application should be dismissed as inadmissible. It stresses, in particular, that the order sought goes beyond what could be obtained in the main proceedings and is inviting the judge hearing the application to disregard the constitutional balance between the Community institutions and to assume the role of the Commission. In addition, Ryanair submits that the interim measures are, in substance, requested not against the Commission, but against Ryanair itself, which is not a party to the proceedings. As such, Ryanair, as well as other affected parties, would be deprived of the procedural guarantees which they enjoy under the Regulation and under general principles of Community law, and would in particular be deprived of their rights of defence.

Findings of the President

43. Without contending clearly that the present application should be rejected as being inadmissible in its entirety, the Commission states that none of the forms of order which the applicant seeks can be granted in the context of proceedings for interim measures.

44. Each of these forms of order must be examined separately.

45. First, as regards the duration of the measures requested, it must be pointed out that, according to Article 107(4) of the Rules of Procedure, an order of the type requested by the applicant may have only an interim effect, and is to be without prejudice to the decision on the substance of the case by the Court of First Instance. It follows that, in principle, the duration of such an order cannot extend beyond that of the main proceedings to which it relates. Accordingly, in so far as the applicant's request for measures until the judgment in the main application or in Case T-342/07, whichever is the later' involves the application of interim measures beyond the date of the judgment in the main application, such request must be rejected. Should any interim measures be granted in the present proceedings, such measures may apply only until the judgment in the main application.

46. Second, as regards the request for suspension of operation of the Contested Decision, it should be noted that an application for suspension of operation cannot, in principle, be envisaged against a negative administrative decision, since the grant of suspension could not have the effect of changing the applicant's position (order of the President of the Second Chamber of the Court of Justice

in Case C-206/89 R S. v Commission [1989] ECR 2841, paragraph 14, orders of the President of the Court of Justice in Case C-89/97 P(R) Moccia Irme v Commission [1997] ECR I-2327, paragraph 45, and in Joined Cases C-486/01 P(R) and C488/01 P(R) Front national and Martinez v Parliament [2002] ECR I-1843, paragraph 73).

47. By the Contested Decision, the Commission has rejected the applicant's request that it open proceedings under Article 8(4) of the Regulation and adopt interim measures under Article 8(5) of that regulation to prevent Ryanair from exercising its voting rights in Aer Lingus, or to formally state that the Commission does not enjoy the power to do so. The suspension of operation of this negative administrative decision would not, in itself, have any effect on the conditions governing the exercise of Ryanair's minority shareholding in Aer Lingus and thus would not have any consequence of use to the applicant.

48. Since an order suspending the Contested Decision would be of no interest to the applicant, this request must be rejected, except to the extent to which suspension of the Contested Decision might be necessary for the purposes of adopting any other of the requests for interim measures applied for by Aer Lingus, should the President consider them to be admissible and well founded.

49. Third, as regards the applicant's request for an order that the Commission require Ryanair not to exercise any rights attached to or deriving from the shareholding held by Ryanair in Aer Lingus, to vest the shares in question in a Trustee and not to dispose of any of them except to a buyer, and not to increase further its shareholding in Aer Lingus, it should be noted that, in principle, the adoption of interim measures which would constitute an interference with the exercise of the Commission's powers, incompatible with the distribution of powers between the various Community institutions, as intended by the authors of the EC Treaty, cannot be entertained (see, to that effect, the orders of the President of the Court in Case T-213/97 R Eurocoton and Others v Council [1997] ECR II-1609, paragraph 40, and in Case T-107/01 R Sacilor Lormines v Commission [2002] ECR II-3193, paragraphs 52 and 53).

50. In the present case, if it were to be decided in the judgment in the main application that, as contended by the applicant, the Commission has a power to order the measures set out in Article 8(4) and (5) of the Regulation, it would be for the Commission, should it consider it necessary in the context of the powers of control accorded to it in the field of concentrations, to adopt the restorative measures it deems appropriate, and to take the necessary measures to comply with the Court's judgment, in accordance with Article 233 EC. Accordingly, should the judge hearing the application for interim measures grant this request, it would amount to an injunction to draw precise inferences from the annulment decision, and such an order would exceed the Court's powers in the main action (order of the President of the Court in Case T-369/03 R Arizona Chemical v Commission [2004] ECR II-205, paragraph 67).

51. Under the system for the division of powers established under the EC Treaty and by the Regulation, however, it is for the Commission, if it considers it necessary in the context of the powers of control accorded to it in the field of concentrations, and in particular by Article 8(4) and (5) of the Regulation, to adopt the restorative measures which it deems appropriate. It follows that, to the extent to which the applicant's first request seeks to obtain an order from the President requiring the Commission to apply Article 8(4) and (5) of the Regulation in a particular manner, such a request must be rejected as inadmissible.

52. In relation to the applicant's request that the President of the Court make any such order or orders to similar effect against the Commission and/or Ryanair as the President may think fit, the Commission submits that this type of request is too vague, and, accordingly, inadmissible. The Commission bases this argument on established case-law of the Court to the effect that requests for interim measures pursuant to Article 243 EC cannot be vague and imprecise (see, to that effect,

the orders of the President of the Court in Case T-228/95 R Lehrfreund v Council and Commission [1996] ECR II-111, paragraph 58, and in Case T-78/04 R Sumitomo Chemical v Commission [2004] ECR II-2049, upheld on this point on appeal in Case C-381/04 P, not published in the ECR).

53. However, in cases where the content of the measures sought by the applicant is sufficiently clear from the rest of the application, the judge hearing the application may conclude that the request is not vague and imprecise in nature and thus consider it admissible. In the present case, it is clear from the first request that the applicant is seeking to obtain interim measures to ensure, inter alia , that Ryanair's rights as shareholder are not exercised pending a final decision on the case. As the Commission points out at paragraph 25 of its observations, what the applicant really wants is to prevent Ryanair from exercising its minority voting rights'. The scope of the measures requested for these purposes is made clear in the applicant's first request. Accordingly, the request for any such order or orders to similar effect against the Commission and/or Ryanair as the President may think fit' is, in this case, sufficiently clear to meet the conditions laid down in the Rules of Procedure.

54. To the extent to which such a request, in practice, seeks to obtain an order from the President of the Court that the Commission exercise its discretion under Article 8(4) and (5) in a particular manner, however, based on the foregoing, this request is inadmissible.

55. To the extent to which, on the other hand, the request seeks to obtain an order from the President addressed to the intervener, the Commission states that the judge hearing the application for interim measures cannot issue directions to individuals who are not parties to the dispute, that Ryanair should not be considered a party to the dispute, and that, accordingly, no interim measures can be addressed to it. In addition, even if Ryanair were to be considered a party to the proceedings, by virtue of its status as intervener', the Commission states, relying on settled case-law of the Court, that where the interim measures applied for may seriously affect the rights and interests of third parties, which in this case includes other Aer Lingus' shareholders, which, not being parties to the proceedings, have not been able to make their views known, such measures can be justified only if it appears that, without them, the applicant would be exposed to a situation liable to endanger their very existence (order of the President of the Court in Case T12/93 R Comité Central d'Entreprise de la SA Vittel and Comité d'Etablissement de Pierval v Commission [1993] ECR II-785, paragraph 20).

56. It should be pointed out that Article 243 EC states clearly that The Court of Justice may in any cases before it prescribe any necessary interim measures'. Such broad wording is obviously intended to grant sufficient powers to the judge hearing an application for interim measures to prescribe any measure which he deems necessary to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Community Courts (see order of the President of the Court of Justice in Case C-180/01 P(R) Commission v NALOO [2001] ECR I-5737, paragraph 52 and the case-law cited). In order to ensure the full effectiveness of Article 243 EC, therefore, it cannot be excluded that the judge hearing the application may impose orders directly on third parties, if necessary. Such broad discretion should, in this respect, be exer cised with due regard to the procedural rights, and in particular the right to be heard, of the addressees of interim measures and of parties directly affected by the interim measures. Of course, when deciding whether to grant the interim measures applied for in this type of cases, the judge hearing the application will, in addition, have due regard to both the strength of the prima facie case and the imminence of serious and irreparable harm in the specific case at stake. Even where a third party has not had an opportunity to be heard in the context of proceedings for interim measures, it cannot be excluded that interim measures might be imposed on it, in exceptional circumstances and bearing in mind the temporary nature of interim measures, if it appears that, without such measures, the applicant would be exposed to a situation liable to

endanger its very existence.

57. Ryanair has been admitted to intervene in the present proceedings by order of the President of 7 December 2007, and it submitted its observations on 19 December 2007. In addition, Ryanair, like all of the other parties to the present proceedings, has had the opportunity to put forward its views at length in the course of the oral hearing. Ryanair's views are, therefore, taken into account in the present proceedings.

58. It follows that the request for any such order or orders to similar effect against Ryanair as the President may think fit is admissible.

59. Such a conclusion cannot be reversed by the Commission's argument that interim measures having the effect of suspending Ryanair's rights attaching to its shareholding in Aer Lingus would have an impact on third parties, and in particular on the other shareholders of Aer Lingus, and that because such other parties have not been heard in the present proceedings, no order having an impact on them can be granted. In this respect, it should be pointed out that, based on the foregoing, the wide powers of the judge hearing an application for interim measures are limited only, in so far as an impact on the rights and interests of third parties is concerned, in cases where such rights and interests may be seriously affected (order of the President of the Court in Case T-12/93 R Comité Central d'Entreprise de la SA Vittel and Comité d'Etablissement de Pierval v Commission, cited in paragraph 54 above, paragraph 20). In addition, even where the rights and interests of third parties may be seriously affected by the interim measures requested, such interim measures may nonetheless be granted if it appears that, without them, the applicants would be exposed to a situation liable to endanger their very existence' (order of the President of the Court in Case T-12/93 R Comité Central d'Entreprise de la SA Vittel and Comité d'Etablissement de Pierval v Commission, cited in paragraph 54 above, paragraph 20, and case-law cited therein). The judge hearing an application for interim measures carries out such assessments when balancing the different interests at stake. Accordingly, it cannot be excluded that, if all the applicable conditions are satisfied, interim measures may be granted in the present proceedings, notwithstanding a possible impact on the rights and interests of other shareholders in Aer Lingus.

The Merits

Prima facie case

- Arguments of the parties

60. The applicant submits that the factual and legal elements set out below demonstrate that there is a serious dispute regarding the correctness of the Commission's interpretation of Article 8(4) and (5) in the Contested Decision.

61. First of all, the applicant contests the assertion in paragraph 12 of the Contested Decision, according to which negative effects cannot occur since Ryanair has not acquired, and may not acquire, control of Aer Lingus'. In the applicant's opinion this assertion is contrary to the facts, to sound economic theory and to previous Commission decisions.

62. With regard to the first argument, the applicant stresses that Ryanair has used its shareholding to seek access to Aer Lingus' confidential strategic plans, has blocked special resolutions that would have assisted Aer Lingus in raising capital and/or making acquisitions, has requisitioned two Extraordinary General Meetings with the object of reversing Aer Lingus' strategic decisions, and has threatened its directors with litigation for breach of statutory duty towards it as a shareholder.

63. These facts, according to the applicant, have had the result of distracting the management of Aer Lingus, embroiling the company in confrontation and legal disputes with Ryanair, and, inevitably, weakening Aer Lingus as an effective competitor of Ryanair.

64. With regard to the second argument, the applicant submits that sound economic principles indicate that minority shareholdings such as Ryanair's shareholding in Aer Lingus distort competition between the companies concerned. In particular, as a shareholder of Aer Lingus having the right to receive a proportion of Aer Lingus' profits, Ryanair does not have incentives to compete with Aer Lingus, because it has a conflicting interest in maximising the value of its shareholding and ensuring that Aer Lingus is profitable. Shareholdings such as that of Ryanair, according to Aer Lingus, contribute significantly to anti-competitive outcomes.

65. With regard to the third argument, in support of its claim, the applicant relies on the Commission's decisions in Tetra Laval/Sidel and Schneider/Legrand.

66. In those two decisions, the Commission established that in particular circumstances the retention of a minority shareholding would impede the restoration of conditions of effective competition and would have disproportionate effects on the target company.

67. Secondly, according to the applicant, the Commission's interpretation of Article 8 (4) and (5) is incorrect. The Commission, according to the applicant, has followed a purely textual approach, whereas a wider interpretation is more consistent with the purpose of the Regulation.

68. In the applicant's submissions, in the Kali und Salz case (joined Cases C-68/94 and C-30/95 France and others v Commission [1998] ECR I-1375) the Court of Justice, and in the Gencor case (Case T-102/96 Gencor v Commission [1999] ECR II-753) the Court of First Instance, faced with two possible interpretations of different provisions of the Regulation to those currently in issue, noted that the narrower interpretation would partially deprive the Regulation of its effectiveness, whereas the wider view was consistent with its text, even if not explicitly set out therein.

69. In the same vein, the applicant claims that the natural meaning of Article 8(4) and (5) is consistent with the use of the powers set out therein to address a minority shareholding such as that of Ryanair, whereas that adopted by the Commission leaves the Community helpless in the face of the distortion of competition created by Ryanair's minority stake, which was acquired as part of a prohibited concentration and is therefore inconsistent with the purpose of the Regulation.

70. In particular, the applicant submits that the Commission's interpretation fails to take account of the follow recitals in the preamble to the Regulation: 2, 5, 7, 8, 14, 20 and 23.

71. As far as Article 8(4) is concerned, instead of being guided by the recitals in the preamble to the Regulation, the Commission adopts a purely textual approach in paragraph 10 of the Contested Decision and takes the view that the concentration assessed in the present case has not been implemented' and that the transactions that have been carried out during the Commission's proceedings can therefore not be considered as part of an implemented concentration'.

72. The first error committed by the Commission, according to the applicant, was to regard the transactions' which it must consider as somehow distinct from the concentration assessed in the Prohibition Decision. According to the applicant, it is apparent from paragraph 12 of the Prohibition Decision that the various transactions' referred to therein form an integral part of the prohibited concentration. Therefore, according to the applicant, the Commission, having acknowledged already in its decision of 20 December 2006 that such transactions and the public bid formed part of a single concentration for the purposes of Article 3 of the Regulation, misidentified the concentration to which Article 8(4) is applicable. Two requirements must be satisfied for Article 8(4) to apply: there must be a concentration and it must be found to be incompatible with the common market.

73. The second condition being satisfied, according to the applicant, the main question is to establish whether the concentration so defined has been implemented. In this regard, the applicant claims

that the Commission wrongly equates the meaning of implemented' in Article 8(4)(a) with acquire control' in the sense of Article 3(2) of the Regulation. In the applicant's view, Article 8(4)(a) does not refer to the acquisition of control', and only adopts the word implemented'. In the opinion of the applicant, the fact that the concentration was never fully consummated, because the Commission prevented it, does not mean that the concentration has not been implemented, albeit partially, through the transactions referred to in paragraph 12 of the Prohibition Decision.

74. In support of this claim, at the oral hearing, the applicant sought to introduce as new evidence Commission press releases, which, according to the applicant, demonstrate that it is common practice for the Commission to consider steps short of control as implementation'. The applicant claims that the above documents, demonstrate that the Commission has in the past carried out surprise inspections to check whether the parties to a concentration had implemented an acquisition under review by the Commission, in breach of Article 7(1) of the Regulation.

75. Thirdly, the applicant advances a legal ground based on Article 7 of the Regulation. Under Article 7(1), a concentration with a Community dimension may not be implemented until it has been declared compatible with the common market. Article 7(2) establishes that Article 7(1) does not prevent the implementation of a public bid or a series of transactions in securities, provided that the concentration is notified to the Commission and that the acquirer does not exercise the voting rights attaching to the securities acquired, except on the basis of a derogation granted by the Commission under Article 7(3).

76. The applicant argues that paragraphs 1 and 2 of Article 7, read together, must prevent Ryanair from exercising its voting rights except in accordance with a derogation granted by the Commission under paragraph 3.

77. The Commission argues that the applicant has failed to establish a prima facie case that would justify granting the interim measures sought. Firstly, as a starting point, the Commission observes that the Regulation applies only to concentrations in the sense of Article 3, and not to the acquisition of a minority shareholding that does not confer control within the meaning of Article 3(2), that is to say, decisive influence, and that it is not disputed that Ryanair's shareholding in Aer Lingus does not give it control of that company.

78. Secondly, the Commission argues that defining several transactions as part of a single concentration ensures that all transactions are notified together to the Commission, and safeguards the one stop shop principle'. According to the Commission, however, this does not give the Commission jurisdiction to control minority shareholdings as such.

79. Thirdly, the Commission submits that once the single concentration defined during the administrative procedure is broken up, Article 21(3) of the Regulation no longer precludes the Member States from applying their national legislation on competition to such a minority shareholding.

80. Fourthly, as far as the teleological interpretation of the provisions in question is concerned, the Commission points out that Aer Lingus' interpretation of such provisions is contrary to the general purpose of the Regulation, which is to control concentrations in the sense of Article 3.

81. Finally, the Commission argues that its previous decisions under Article 8(4) of the Regulation do not support Aer Lingus' contention that a concentration can be said to have been implemented in the absence of acquisition of control, since, in all previous cases, control had been acquired.

- Findings of the President

82. The applicant submits, in essence, that the Commission wrongly refused to take action under Article 8(4) and (5) of the Regulation against Ryanair's minority shareholding in Aer Lingus. In that respect, Aer Lingus contends that the minority shareholding in question has substantial

negative effects on competition and submits that the Commission was wrong to conclude that it does not have the power in this case to take action under Article 8 (4) and (5).

83. With regard to the applicant's first claim, relating to the assertion in paragraph 12 of the Contested Decision that negative effects cannot occur since Ryanair has not acquired, and may not acquire, control of Aer Lingus', it is clear from a closer reading of the Contested Decision that such a statement is taken out of context, it did not form the basis for the Commission's decision not to adopt the measures requested by the applicant under Article 8(4) and (5), and is therefore irrelevant for the purposes of the present proceedings. Indeed, the rationale behind the Contested Decision is clearly that, according to the Commission, no concentration has been implemented in the circumstances at hand and that therefore the Commission has no powers to adopt measures under Article 8(4) and (5) in relation to the minority shareholding in question, irrespective of whether such minority shareholding might be deemed to give rise to competition concerns or not.

84. It follows that the arguments brought by the applicant in support of this claim, namely those aimed at demonstrating that this claim is consistent with the facts of the case, sound economic theory', and previous Commission decisions, do not require further consideration.

85. Based on the parties' arguments, as set out above and discussed during the oral hearing, the main question to be addressed by the President in the current proceedings for interim measures, as far as the requirement of a prima facie case is concerned, is whether the applicant has adequately demonstrated that, prima facie , the Commission wrongly interpreted the expression implemented' in Article 8 to imply an acquisition of control and that, on the other hand, the implementation' requirement should be construed to be satisfied by any actions or steps taken by the notifying party with a view to consummating the concentration. In other words, the issue is whether partial implementation' or implementation of any of the elements which together constitute the single concentration notified can constitute implementation' of that concentration and trigger the Commission's powers under Article 8(4) and (5).

86. In support of its interpretation of Article 8(4) and (5), Aer Lingus cites the case-law of the Community Courts (par. 68 supra) in which the Court of Justice and the Court of First Instance concluded that, faced with two possible interpretations of the Regulation, the interpretation that better reflects the purpose of that Regulation should be adopted.

87. In relation to the case-law relied upon by the applicant, it must be pointed out that in Kali und Salz the Court of Justice, and in Gencor the Court of First Instance, held that the provisions of the Regulation in question were to be interpreted by reference to the purpose of the Regulation because the precise scope of the provisions in question could not be conclusively assessed on the basis of their wording alone (Kali und Salz, at paragraph 168, and Gencor, at paragraph 148).

88. Accordingly, before carrying out an analysis of Article 8(4) and (5) by reference to the purpose of the Regulation, it is first necessary to determine whether the wording of the provisions in question is not sufficiently clear and allows for the two different interpretations put forward by the applicant.

89. In this regard it should first of all be noted that the definition of the English term implementation' may encompass both the having accomplished some aim' and the carrying into effect' and could therefore, in principle, leave room for confusion as to the precise scope of the provisions set out in Article 8(4) and (5). Whilst the use of the present perfect simple tense in the expression has already been implemented' in Article 8(4)(a) and (5)(c) of the Regulation might suggest that this expression refers to the having accomplished some aim', this consideration alone cannot be deemed to be sufficient to establish, even prima facie , the scope of the Commission's powers under Article 8 of the Regulation.

90. However, it is settled case-law that the need for a uniform interpretation of Community regulations

makes it impossible for a given piece of legislation to be considered in isolation and requires that, in case of doubt, it should be interpreted and applied in the light of the versions existing in the other official languages (see Case C-64/95 Lubella [1996] ECR I-5105, paragraph 17 and the case-law cited therein). Accordingly, it is necessary to ensure that the English version of Article 8(4) and (5) of the Regulation does not give the expression in question a different meaning from that of the other language versions, and such an expression must be interpreted and applied in the light of the versions which exist in the other official languages (see, to that effect, Case C-177/95 Ebony Maritime and Loten Navigation [1997] ECR I-1111, paragraphs 29 to 31). In this respect, it should be noted that in the French version of Article 8(4) the expression has already been implemented' is a déjà été réalisée', in the Italian version è già stata realizzata', and in the German version vollzogen wurde'. The way in which the expression implemented' is set out in the sample of other official languages analysed above indicates that, prima facie , the definition of implementation' envisaged under Articles 8(4) and 8(5) encompasses full consummation of the concentration.

91. Secondly, this conclusion can, prima facie , be confirmed through a comparison of the French version of Article 8(4) and (5) with the French version of other Community legislation in which the term implementation' is clearly meant to indicate carrying into effect' rather than the act of accomplishing some aim'. An example of such use of the term implementation' can be found in recital 3 of the preamble to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, which states that ... Such simplified arrangements should only be accepted if the Commission has been regularly informed on the implementation of the existing aid concerned'. The term implementation' in this case appears in the French version of recital 3 as mise en oeuvre', and not as réalisation'.

92. Thirdly, it must be borne in mind that once the Commission's powers under Article 8(4) are triggered, the Commission may require the undertakings concerned to dissolve the concentration', an expression which, prima facie , implies the existence of a concentration as defined in Article 3 of the Regulation, and therefore an acquisition of control. In this context, it must be noted that, in the present case, it is not disputed that, through its minority shareholding in Aer Lingus, Ryanair is not in a position to exercise de jure or de facto control over the applicant.

93. It follows that, without its being necessary to discuss the applicant's arguments relating to the purpose of the Regulation in any detail, it may be concluded that the applicant has failed to demonstrate the existence of a prima facie case.

94. This conclusion cannot be brought into question by the applicant's claim that the Commission treats partial implementation as precluded by Article 7(1), even as regards steps falling short of transfer of control, and indicates to parties that they should refrain from such steps. At the hearing the Commission confirmed that, although it has never adopted a formal position in relation to the question whether Article 7 prevents the acquisition of minority shareholdings, in the context of discussions with the notifying parties the Commission has adopted the policy of asking the acquirer to refrain from exercising any voting rights, whether arising from a controlling shareholding or a minority shareholding, until the end of the proceedings. In this regard, it should first be pointed out that, based on the distributions of competence discussed at paragraph 42 above, the interpretation of Community law is a prerogative of the Court of Justice and not of the Commission, and that, accordingly, the Commission's practice, albeit generally influential and important in determining whether any legitimate expectations may be justified, is not conclusive for present purposes. Secondly, as was pointed out by the Commission in the course of the hearing, even if Article 7(1) of the Regulation were to be interpreted as prohibiting only a change of control pending the Commission's review, and not steps short of change of control such as the exercise of voting rights arising from

minority shareholdings, taking into account the strict time-limits within which the Commission must review a notified concentration and the combinations of factors which might give rise to control in any given case, it would remain legitimate for the Commission to ask the parties not to take any action which might lead to a change of control. In addition, although it is not, prima facie , a requirement arising from the Regulation, the notifying parties might consider it advantageous to facilitate the Commission's administrative process by complying with such a request and, thereby, to avoid the risk that the Commission might consider it necessary to carry out inspections at the parties' premises to verify whether any steps taken by the notifying parties do not in fact produce a change of control.

95. In relation to the press releases, which, according to the applicant, demonstrate that it is common practice for the Commission to consider steps short of control as implementation', it should be noted at the outset that no explanation has been provided by the applicant as to why the press releases in question, one of which dates back to 1997, were not available to it at the time at which it filed its application and why they had to be introduced in the proceedings at such a late stage. However, irrespective of whether this late evidence is admissible or not, suffice it to state that such evidence is inconclusive as to the meaning of the expression implementation'. In particular, the information contained in the press releases discussed does not appear to have an impact on the considerations set out above.

96. During the hearing, counsel for the intervener referred to the use of this Court's time by the applicant in submitting late evidence of this type as bordering on contempt of court. Without needing to rule on this serious allegation, the President finds that such evidence is in any event inconclusive, and that, also in this respect, it can be concluded that the applicant has failed to demonstrate the existence of a prima facie case.

97. Under the applicant's first claim, namely that Ryanair's shareholding in Aer Lingus gives rise to serious competition concerns, the applicant argued that the refusal of the Commission to adopt measures under Article 8(4) to request disposal of Ryanair's minority shareholding is contrary to previous Commission decisions, and referred in particular to the Commission's decisions in Tetra Laval/Sidel and Schneider/Legrand. In this respect, for the sake of completeness, it should be pointed out that this evidence also cannot reverse the conclusions reached above. In particular, the fact that in Tetra Laval/Sidel and Schneider/Legrand the Commission found that the retention of a minority shareholding in the target in the notified transaction which had been prohibited under the Regulation would impede the restoration of effective competition, and therefore ordered the disposal of all the shares acquired, is irrelevant for the purposes of the present proceedings. Indeed, it is consistent with the above conclusions that the Commission's powers in those cases had been triggered by the implementation' of the transaction, in other words, by a change of control. Once the powers of the Commission had been triggered, the Commission was entitled, as specifically provided for under Article 8(4), to require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration'.

98. As far as the applicant's submission based on Article 7 is concerned, namely that, since the proposed acquisition has not yet been declared compatible with the common market, Ryanair may acquire securities or implement a public bid in the context of the notified transaction only in so far as it does not exercise the voting rights attaching to the securities acquired, except under derogation from the Commission, suffice it to state that the same interpretation of the term implementation' set out above must apply mutatis mutandis to the applicant's arguments relating to Article 7.

99. Accordingly, in relation to this legal ground also, Aer Lingus has failed to demonstrate the existence of a prima facie case.

100. Finally, the applicant argues that the interpretation of Article 8(4) and (5) adopted by the Commission, in conjunction with the Article 21(3) prohibition of Member States applying their national legislation on competition to any concentration having a Community dimension, gives rise to a lacuna which is incompatible with the aim of the Regulation. In this respect it should first be noted that the same factual scenario, whereby an undertaking enjoys a minority shareholding in a competitor, not giving rise to control, and that such competitor might consider that the minority shareholding in question is harmful to competition, could very well occur in cases where such minority shareholding is not acquired in the context of a concentration. In this scenario, the Regulation would clearly not apply, and the impossibility for the Commission to scrutinise the minority shareholding in question under Article 8(4) and (5) of the Regulation would clearly not be deemed to constitute a lacuna in the ability of the Community to secure undistorted competition.

101. As far as the operation of Article 21 is concerned, it should be pointed out, first, that Article 21(3) must be read in conjunction with Article 21(1). Article 21(1) provides that the Regulation alone is to apply to concentrations having a Community dimension as defined in Article 3 of the Regulation. In this light, in circumstances such as those in the present case, where a concentration has been notified, declared incompatible with the common market by the Commission and on this basis the public bid was abandoned, no concentration with a Community dimension as defined in Article 3 is in existence. Nor can a concentration with a Community dimension be contemplated by the parties in these circumstances, since any such concentration would be in violation of an existing Commission decision. On this basis, as the Commission sets out in its written observations, Article 21(3) cannot be said, prima facie , to apply since there is no concentration in existence, or contemplated, to which the Regulation alone must apply. The remaining minority shareholding is, prima facie , no longer linked to an acquisition of control, ceases to be part of a concentration' and lies outside the scope of the Regulation. Accordingly, Article 21, which under recital 8 to the Regulation is aimed at ensuring that concentrations generating significant structural changes are reviewed exclusively by the Commission in application of the one-stop shop principle', does not in principle, under these circumstances, prevent the application by national competition authorities and national courts of national legislation on competition.

102. In this respect, the fact that the Commission's decision finding the concentration incompatible with the common market is being challenged before the Court of First Instance makes no material difference, since, on the basis of Article 242 EC, actions before the Court of Justice do not have suspensory effect. In addition, if the relevant national competition authorities were deterred from taking definitive measures by considerations relating to procedural economy, it would be open to such authorities to adopt interim measures to address any concern which they might identify pending judgment by this Court.

103. Furthermore, as far as the existence of a regulatory lacuna is concerned, it should be pointed out that, whilst a minority shareholding of the type in question cannot, prima facie , be regulated under the Regulation, it might be envisaged that the EC Treaty provisions on competition, and in particular Article 81 EC and Article 82 EC, can be applied by the Commission to the conduct of the undertakings involved following the acquisition of the minority shareholding. In this regard it should be recalled that under Article 7(1) of Council Regulation (EC) No 1/2003 of 16 December 2002, where it finds that an infringement of Article 81 EC or of Article 82 EC has taken place, the Commission has the power to impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'.

104. Whilst Article 81 EC might, prima facie , be difficult to apply in cases, such as the present, in which the infringement in question arises from the acquisition of shares on the market and, therefore, the necessary meeting of minds might be difficult to establish, the applicant may ask the Commission to initiate a procedure under Article 82 EC if it believes that Ryanair enjoys a dominant position

on one or more markets and is abusing that dominant position by interfering with a direct competitor's business strategy and/or by exploiting its minority shareholding in a direct competitor to weaken its position.

105. It is also appropriate to point out that this scenario applies in cases, such as the present, in which all parties agree that no change of control has occurred for the purposes of the Regulation. However, should Ryanair, at a later stage, be found to enjoy or to have acquired control over Aer Lingus by virtue of its minority shareholding, then Article 8(4) and (5) might apply.

106. Accordingly, in relation also to this legal ground, relating to the existence of a lacuna which is incompatible with the aim of the Regulation, it can be concluded that the applicant has failed to demonstrate the existence of a prima facie case.

107. It follows that the applicant has failed to demonstrate the existence of a prima facie case.

Urgency

- Arguments of the parties

108. The applicant takes the view that the condition relating to urgency is satisfied in this case, in particular in so far as there is a risk that Ryanair could impose its wishes on Aer Lingus at any time.

109. The applicant submits, first, that under the current shareholding structure of Aer Lingus Ryanair already enjoys the power to block special resolutions requiring a 75% majority. The applicant, furthermore, submits that Ryanair has already used its minority shareholding in Aer Lingus to block a proposal for a special resolution under which Aer Lingus would have been authorised to issue additional shares equivalent to up to 5% of its issued share capital without having first to offer those shares to existing shareholders.

110. Secondly, Ryanair's weight when voting on ordinary resolutions is in practice more significant than the weight conferred on it by its shareholding for a number of reasons. In particular, on the assumption that only some 80% of Aer Lingus shares are going to be voted at a general meeting, which according to the applicant is the likely turnout based on the turnout at the first, and so far only, general meeting of Aer Lingus, Ryanair's actual voting weight tends towards 40%. Such weight is further increased by the fact that Ryanair is the largest shareholder in Aer Lingus and one with very significant aviation expertise and may, according to the applicant, have a potentially very significant influence on other shareholders.

111. Thirdly, the applicant claims that there is a possibility that the Irish Government, Aer Lingus' second largest shareholder, may abstain from shareholder resolutions affecting the strategic direction of the company. In addition, there may be circumstances in which the Irish Government may be required to abstain from voting, for example where it is a related party to a transaction. According to the applicant, this might be the case where Aer Lingus intends to enter into agreements with the state-owned Dublin Airport Authority, for example, to redevelop the Aer Lingus head office site. In such circumstances, Ryanair's shareholding might in fact represent more than 50% of the votes likely to be cast.

112. In addition, Aer Lingus puts forward a number of examples of circumstances in which Ryanair may interfere with Aer Lingus' business by taking advantage of the scenarios set out above. In particular, Ryanair may employ its shareholding in Aer Lingus to further its campaign against Dublin Airport's Terminal 2, which according to the applicant is crucial to Aer Lingus' expansion plans. Equally, Ryanair, based on its preference for Boeing aircraft, may interfere with Aer Lingus' plans to purchase Airbus aircraft. In its written pleadings, Aer Lingus reported Ryanair's intention to interfere with the decision of the Board of Aer Lingus to abandon a number of routes and to

open new ones. At the hearing, however, it was confirmed that such attempts had been unsuccessful. According to the applicant the damage which would arise from Ryanair's exercise of its voting rights as a minority shareholder, should this result in the Board being defeated on an issue of commercial policy, would be both serious and irreparable, and the resulting disruption to Aer Lingus' business could not be remedied by the Court's judgment in the main application, or at all.

113. At the oral hearing the applicant sought to introduce as new evidence information relating to, inter alia , a contract with Airbus for the delivery of Airbus wide-body aircraft which, according to the applicant, would need to be approved by the shareholders shortly after the hearing, and which constitutes a pivotal aspect of Aer Lingus' business strategy to exploit the opportunities arising from the Open Skies regime. Should the Board's initiatives relating to such opportunities not be approved by the shareholders of Aer Lingus in the short term, Aer Lingus would suffer serious and irreparable harm since such opportunities would not be available to Aer Lingus following a judgment in the main proceedings.

114. Finally, the applicant claims that the Court should, in the present case, apply the precautionary principle', because, according to the applicant, once it has been shown that there is a non-negligible risk that Ryanair might cause or contribute to Aer Lingus suffering serious and irreparable damage, the Court is entitled to take protective measures without having to await further proof of the reality of that risk.

115. The Commission, for its part, submits essentially that the urgency requirement is not satisfied.

- Findings of the President

116. According to settled case-law, the urgency of an application for interim relief must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the relief. It is for that party to prove that it cannot await the outcome of the main proceedings without suffering damage of that kind (see order of the President of the Court in Case T151/01 R Duales System Deutschland v Commission [2001] ECR II-3295, paragraph 187 and the case-law cited).

117. Where damage depends on the occurrence of a number of factors, it is enough for that damage to be foreseeable with a sufficient degree of probability (order of the President of the Court in Case T-369/03 R Arizona Chemical and Others v Commission, cited in paragraph 49 above, paragraph 71; see also, to that effect, the orders of the Court of Justice in Case C-280/93 R Germany v Council [1993] ECR I-3667, paragraphs 32 to 34, and of the President of the Court of Justice in Case C335/99 P(R) HFB and Others v Commission [1999] ECR I-8705, paragraph 67). However, the applicant is still required to prove the facts which are deemed to show the probability of serious and irreparable damage (Arizona Chemical and Others v Commission , cited above, paragraph 72; see also, to that effect, HFB and Others v Commission , cited above, paragraph 67).

118. In that regard, it must be pointed out that, in order to be able to determine whether the damage which applicants fear is serious and irreparable and therefore provides grounds for ordering interim measures, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail for each of the undertakings concerned.

119. As a preliminary point, therefore, it should be underlined that the applicant's claim that the President should apply the precautionary principle', and that the Court is entitled to apply protective measures' without having to await proof of the reality of the risk alleged by the applicant is manifestly inconsistent with the principles and the case-law applicable to interim measures applications, and cannot be entertained.

120. In the present case, the applicant submits that the interference in its business affairs by its shareholder and principal competitor Ryanair would place it in an extremely difficult position and that, as a consequence, it would suffer damage which would be serious and irreparable. The applicant, in particular, has put forward a number of scenarios in which Ryanair might be able to influence the outcome of voting in relation to a number of matters which are, according to the applicant, crucial to the growth plans that the Board of Aer Lingus has set for that company.

121. In this regard, as a preliminary point, it should be emphasised that it is not being claimed by the applicant that Ryanair is in a position to exercise control over Aer Lingus. On the basis of the definition of control under Article 3(2), it follows that Ryanair cannot be understood to be in a position to exercise decisive influence' over Aer Lingus.

122. Both in its written pleadings and in the course of the oral hearing, when it was given ample opportunity to present its case, moreover, the applicant has failed to provide sufficiently concrete evidence in relation to the type of harm that is at stake for Aer Lingus, the likelihood of such harm occurring, and whether such harm is indee d serious and irreparable. For example, the applicant has failed to provide sufficiently concrete evidence to establish, in relation to each example put forward, inter alia , whether and when a vote must be held, why a vote has to be held before a decision is issued in the main proceedings, why Ryanair alone would be able, in the specific circumstances, to oppose a proposal of the Board or to pass its own resolution. In addition, Aer Lingus has failed to provide sufficient evidence to support its claim that the resulting harm would be both serious and irreparable.

123. It follows that the assertions put forward by the applicant remain hypothetical and unsubstantiated statements which do not satisfy the condition of foreseeability of harm with the requisite degree of probability.

124. More specifically, in relation, first, to the claim that under the current shareholding structure of Aer Lingus, Ryanair already enjoys the power to block special resolutions requiring a 75% majority, and has on one occasion already done so, Aer Lingus has failed to provide concrete evidence demonstrating that the passing of any such special resolution is anticipated to be required before the decision in the main proceedings is issued by this Court. In addition, Aer Lingus has failed to provide concrete evidence indicating with the requisite degree of probability that Ryanair will oppose such a hypothetical special resolution, and has failed to provide any concrete evidence to support the statement that any such opposition is likely to cause both serious and irreparable harm to Aer Lingus. With reference to the example of the only special resolution which Ryanair has so far successfully opposed, no concrete evidence was provided by Aer Lingus to support its statement that the failure of the Board to obtain the abolition of shareholders' pre-emption rights is likely to cause serious and irreparable harm to Aer Lingus.

125. Secondly, in relation to Aer Lingus' claim that Ryanair's weight when voting on ordinary resolutions is in practice more significant than the weight conferred on it by its shareholding, it should be noted, again, that, by this argument, the applicant is not claiming that Ryanair is in a position of de jure or de facto control. Furthermore, Aer Lingus has failed to provide concrete evidence to demonstrate that the passing of any such ordinary resolution is anticipated to be required before the decision in the main proceedings is issued by this Court. In addition, Aer Lingus has failed to provide any concrete evidence to support the statement that any such opposition is likely to cause both serious and irreparable harm to Aer Lingus.

126. In this context Aer Lingus claimed that Ryanair's shareholding might give rise to serious harm to competition primarily in the context of two issues, namely the Aer Lingus Board's proposal to acquire Airbus aircraft, and the Board's plans regarding Dublin Airport's Terminal 2.

127. As far as the Board's proposal to acquire Airbus aircraft is concerned, it should first of all be pointed that Aer Lingus' conclusion that Ryanair would object to such acquisition is based on the general assumption that, since Ryanair owns a Boeing-only fleet, Ryanair would seek to impose the purchase of Boeing aircraft on Aer Lingus, and on a press statement in which Ryanair is reported to have declared that it would ensure that Aer Lingus' fleet be converted to a Boeing-only fleet. In that regard, it was pointed out by Ryanair at the hearing, and no objection was raised by Aer Lingus, that such intention was expressed at a time when the acquisition was being contemplated, and that the purpose of the idea of converting Aer Lingus' fleet to a Boeing-only fleet was to facilitate the integration of Aer Lingus into Ryanair. Whilst Ryanair has appealed the Commission decision declaring its acquisition of Aer Lingus incompatible with the common market, and on this basis, it might be said to be still contemplating, ultimately, the possibility of integrating Aer Lingus into Ryanair, it cannot be concluded on the basis of the evidence provided that there is a sufficient probability that Ryanair would object to the proposal of the Aer Lingus Board to acquire Airbus aircraft.

128. In addition, while at the hearing Aer Lingus submitted that a purchase of Airbus wide-body aircraft is anticipated, and would need to be approved by the shareholders shortly after the hearing, Aer Lingus failed to demonstrate to the requisite degree of probability that, if such approval is required, the turnout at the shareholder meeting would be so low as to provide Ryanair with enough voting weight to prevent the approval of such acquisition, and even less to impose the acquisition of Boeing aircraft. Finally, even supposing that Ryanair would be in a position to object to the purchase of Airbus aircraft, Aer Lingus has not alleged that should the contract not be ratified by a certain date, its option would necessarily expire.

129. Equally, in relation to Aer Lingus' claim that the Irish Government may decide, or may be required by Irish legislation, to abstain on some shareholder resolutions, no concrete evidence was provided to demonstrate that a specific issue in relation to which the Irish Government would not exercise its voting rights is anticipated to require shareholder approval before the decision in the main proceedings is issued by this Court. In addition, Aer Lingus has failed to provide any concrete evidence indicating to the requisite degree of probability that such abstention is likely to result in the rejection of the Board's proposal, and that this is in turn likely to cause both serious and irreparable harm to Aer Lingus. With reference to the specific example of Terminal 2, Aer Lingus provided no concrete evidence to support its statement that a shareholder resolution is required in order to approve the Board's plans in this context, and no concrete evidence was adduced to demonstrate that the Irish Government will be required by Irish legislation not to exercise its voting rights. Finally, no evidence was provided to support the statement that a failure of the Board to obtain shareholder approval in relation to its approach to the use of Terminal 2 is likely to cause harm to Aer Lingus which will be both serious and irreparable.

130. In addition, in its submissions relating to the issues above, the applicant has failed to demonstrate that the harm which Aer Lingus would allegedly suffer is of a type other than pecuniary.

131. In relation to pecuniary damage, it is appropriate at this stage to state that it is established case-law that damage of this nature cannot, save in exceptional circumstances, be regarded as irreparable, if it can ultimately be the subject of financial compensation. Pecuniary damage can justify the award of interim measures only if it appears that, without the measures sought, the applicant would be in a position that could jeopardise its existence before final decision in the main action or irremediably alter its position in the market (orders of the President of the Court in Case T-181/02 R Neue Erba Lautex v Commission [2002] ECR II-5081, paragraph 84, in Case T-169/00 R Esedra v Commission [2000] ECR II-2951, paragraph 45, in Case T-148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II-3027, paragraph 46, and in Case T-316/04 R Wam v Commission [2004] ECR II-3917, paragraph 29). In this regard, suffice it to state that at no point has the applicant

claimed that, without the interim measures sought, its very existence would be jeopardised or its market position irremediably altered before a final decision is issued in the main action.

132. At the oral hearing, the applicant did offer to provide, in camera , and in the absence of the intervener, new and more specific information relating to the examples of harm set out above. As an example of the type of information which it could provide in an in camera session, the applicant explained that a vote would soon be required at shareholder level to approve a contract for the purchase of Airbus aircraft, detailed information in relation to which is highly confidential. The applicant did not, however, explain how the additional information could fulfil the urgency requirement for the granting of interim measures. Moreover, the applicant failed to explain why such additional information could not be provided with its written application, under the claim of confidentiality, and had to be introduced at such a late stage in the proceedings. Finally, it follows from the considerations set out above in relation to the admissibility of a request for interim measures to be addressed to Ryanair or having an impact on Ryanair, that evidence provided in the absence of Ryanair cannot be used as the basis for interim measures, since that would give rise to a breach of Ryanair's rights of defence. The only exception to this principle, which is based on the temporary nature of interim measures, applies in cases where, in the absence of the interim measures sought, the very existence of the applicant would be jeopardised. As noted above, at no point in the proceedings has Aer Lingus claimed that its existence would be jeopardised in the absence of interim measures.

133. In any event, irrespective of whether such new evidence is admissible or not, there is no evidence that such additional information would have been of a nature capable of changing the outcome of the President's assessment set out above.

134. In the light of the foregoing, it must be held that the applicant has not established that without the interim measures sought it will suffer serious and irreparable harm.

135. It follows from all of the foregoing that the applicant has not demonstrated the requisite prima facie case and the need for interim measures to prevent an imminent risk of serious and irreparable harm. The application for interim measures must therefore be rejected. This is particularly so in light of the fact that, as results from the reasoning in paragraph 56 above, a particularly strong prima facie case and the existence of very serious and irreparable harm will have to be demonstrated before the required measures could be imposed on Ryanair, in view of the fact that those measures would have a serious impact on the rights and interests of Ryanair as a shareholder of Aer Lingus.

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