JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 June 2011 *

In Joined Cases T-208/08 and T-209/08,

Gosselin Group NV, formerly Gosselin World Wide Moving NV, established in Deurne (Belgium), represented by F. Wijckmans and S. De Keer, lawyers,

applicant in Case T-208/08,

Stichting Administratiekantoor Portielje, established in Rotterdam (Netherlands), represented by D. Van hove, lawyer,

applicant in Case T-209/08,

* Language of the case: Dutch.

European Commission, represented by A. Bouquet and F. Ronkes Agerbeek, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International removal services), as amended by Commission Decision C(2009) 5810 final of 24 July 2009, and, in the alternative, annulment or reduction of the fine imposed on the applicants,

THE GENERAL COURT (Eighth Chamber),

composed of S. Papasavvas, acting President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2010,

gives the following

Judgment

Facts

1. *Subject-matter of the proceedings*

1 According to Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International removal services) (the 'Decision'), a summary of which is published in the *Official Journal of the European Union* of 11 August 2009 (OJ 2009 C 188, p. 16), Gosselin Group NV participated in a cartel on the international removal services market in Belgium, relating to the direct or indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders. The Commission of the European Communities states that the cartel operated for almost 19 years (from October 1984 to September 2003). Its members fixed prices, issued false quotes ('cover quotes') to customers and compensated each other for rejected offers by means of a financial compensation system ('commissions').

2. *Applicants*

2 The applicant in Case T-208/08, Gosselin Group ('Gosselin'), was founded in 1983 and has operated under that name since 20 December 2007. 92 % of Gosselin's shares are held by the applicant in Case T-209/08, Stichting Administratiekantoor Portielje ('Portielje'), and 8 % are held by Vivet en Gosselin NV. 99.87 % of this latter company belongs to Portielje, a foundation which does not carry on any commercial activity and brings together family shareholders in order to ensure unity of management.

3 During the financial year ending on 30 June 2006, Gosselin achieved a consolidated worldwide turnover of EUR 143 639 000 and Portielje achieved a consolidated worldwide turnover of EUR 0.

3. *Administrative procedure*

4 According to the Decision, the Commission opened the procedure on its own initiative because it had information that certain Belgian companies operating in the international removals sector were party to agreements that might be caught by the prohibition in Article 81 EC.

5 Accordingly, investigations were carried out at the premises of Allied Arthur Pierre NV, Interdean NV, Transworld International NV and Ziegler SA in September 2003, under Article 14(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). Following those investigations, Allied Arthur Pierre applied for immunity from fines or a reduction of the fine in accordance with the Commission notice on

immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3). Allied Arthur Pierre admitted that it had participated in agreements on commissions and cover quotes, listed the competitors involved, inter alia a competitor previously unknown to the Commission's services, and submitted documents corroborating its oral statements.

6 In accordance with Article 18 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), several written requests for information were sent to the undertakings involved in the anti-competitive agreements, to some competitors and to a professional organisation. On 18 October 2006, the statement of objections was adopted and notified to several companies. All the addressees replied to it. Their representatives, with the exception of Amertranseuro International Holdings Ltd, Portielje, Team Relocations Ltd and Trans Euro Ltd, exercised their right of access to the documents contained in the Commission's file, which were accessible only on the Commission's premises. They were granted access between 6 and 29 November 2006. The hearing was held on 22 March 2007.

7 On 11 March 2008, the Commission adopted the Decision.

4. *Decision*

8 The Commission states that the addressees of the Decision, including the applicants, participated in a cartel in the international removal services sector in Belgium or are deemed responsible therefor. The participants in the cartel fixed prices, shared customers and manipulated the submission of tenders at least from 1984 to 2003. As a result, they have committed a single, continuous infringement of Article 81 EC.

9 According to the Commission, the services concerned include the removal of goods of both natural persons — private individuals or employees of an undertaking or a public institution — and undertakings or public institutions. Such removals are characterised by the fact that Belgium is either the starting place or the destination. Having regard also to the fact that the international removal companies in question are all located in Belgium and that the cartel's activity took place in Belgium, the Commission therefore considered that the geographic centre of the cartel was Belgium.

10 The combined turnover of the participants in the cartel for international removal services in Belgium in 2002 was estimated by the Commission at EUR 41 million. As it estimated the size of the sector at approximately EUR 83 million, the combined market share of the undertakings involved was considered to be approximately 50 %.

11 The Commission states that the aim of the cartel was, inter alia, to establish and maintain high prices and to share the market contemporaneously or successively in various forms: agreements on prices, agreements on sharing the market by means of false quotes (cover quotes) and agreements on a system of financial compensation for rejected offers or for not quoting at all (commissions).

12 The Commission considers that, between 1984 and the early 1990s, the cartel operated inter alia on the basis of written price-fixing agreements. At the same time the commissions and cover quotes were introduced. A commission is a hidden element in the final price which the customer had to pay without receiving a corresponding service. It is a sum of money that the removal company winning the contract for an international removal owed to the competitors that did not secure the contract, whether they submitted an estimate or abstained from doing so. It is therefore a sort of financial compensation for the removal companies that did not win the contract.

The members of the cartel issued invoices to each other for commissions on the rejected offers or offers not made, referring to fictitious services, and the total for those commissions was invoiced to customers. The Commission states that that practice must be deemed to be indirect fixing of prices for international removal services in Belgium.

13 The members of this cartel also cooperated in submitting cover quotes, which led customers, that is to say, employers paying for the removal, into the mistaken belief that they could choose according to competition-based criteria. A cover quote is a fictitious quotation submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal. Through the submission of cover quotes, the removal company that wanted the contract ('the requesting firm') ensured that the institution or undertaking received several quotes, either directly or indirectly via the person who was moving. To that end, the requesting firm indicated to its competitors the price, the rate of insurance and the storage costs that they were to quote. That price, which was higher than the price quoted by the requesting firm, was then indicated in the cover quotes. According to the Commission, since the employer will usually choose the removal company that offers the lowest price, the companies involved in the same international removal as a rule knew in advance which of them would secure the contract for that removal.

14 The Commission also observes that the price quoted by the requesting firm could be higher than it might otherwise have been because the other companies involved in that removal would have submitted cover quotes indicating a price stated by the requesting firm. By way of example, the Commission refers, in recital 233 of the Decision, to an internal email of Allied Arthur Pierre dated 11 July 1997 which states: '[T]he customer has asked for two cover quotes, so we can ask for a high price.' Therefore, the Commission states that the submission of cover quotes to customers was a

manipulation of the tendering procedure so that the prices quoted in all the bids were deliberately higher than the price of the requesting firm, and at all events higher than they would have been in a competitive environment.

15 The Commission maintains that those arrangements were in place until 2003. Those complex activities had the same object of fixing prices, sharing the market, and thus of distorting competition.

16 In conclusion, the Commission adopted the operative part of the Decision, Article 1 of which is worded as follows:

'By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] … in the periods indicated:

…

(c) [Gosselin], from 31 January 1992 to 18 September 2002; with [Portielje], from 1 January 2002 to 18 September 2002;

...'

17 Consequently, in Article 2(e) of the Decision, the Commission imposed a fine of EUR 4.5 million on Gosselin, for EUR 370 000 of which Portielje is held jointly and severally liable.

18 For the purpose of calculating the amount of the fines, the Commission applied, in the Decision, the methodology set out in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

19 On 24 July 2009, the Commission adopted Decision C(2009) 5810 final amending the Decision in relation to the value of sales to be taken into account for the purpose of calculating the basic amount of the fine imposed on Gosselin and Portielje. Consequently, the fine imposed on Gosselin was reduced to EUR 3.28 million, for EUR 270 000 of which Portielje is held jointly and severally liable.

Procedure and forms of order sought by the parties

20 By applications lodged at the Court Registry on 4 June 2008, the applicants brought the present actions.

21 By order of the President of the Eighth Chamber of the Court of 5 March 2010, Cases T-208/08 and T-209/08 were joined for the purposes of the oral procedure and of the judgment, in accordance with Article 50 of the Rules of Procedure of the Court.

22 Acting on a report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and to put a number of questions to the Commission. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 29 April 2010.

23 In Case T-208/08, Gosselin claims that the Court should:

— annul the Decision, in so far as it is addressed to the applicant;

— in the alternative, annul Article 1 of the Decision, in so far as it is addressed to the applicant, inasmuch as it finds a continuous infringement by the applicant from 31 January 1992 to 18 September 2002, and reduce the fine imposed on it in Article 2, in a manner corresponding to that adjusted period;

— in the alternative, annul Article 2(e) of the Decision, in so far as it is addressed to the applicant, and reduce correspondingly the fine imposed in Article 2;

— order the Commission to pay the costs.

24 In Case T-209/08, Portielje claims that the Court should:

— annul the Decision in so far as it concerns the applicant;

— in the alternative, annul Article 2(e) of the Decision, in so far as it concerns the applicant, and reduce correspondingly the fine imposed in Article 2;

— order the Commission to pay the costs.

25 In Cases T-208/08 and T-209/08, the Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay their own costs, and possibly also a fair share of the Commission's costs.

Law

26 Gosselin puts forward three pleas for the annulment of the Decision and the cancellation or reduction of the fine. Portielje, which was designated by the Commission as Gosselin's parent company, puts forward two additional pleas, relating to the concept of an undertaking and to the imputability of the infringements committed by Gosselin. As for the rest, the pleas put forward by Portielje are the same as those put forward by Gosselin.

27 Portielje makes the preliminary point, with regard to the third, fourth and fifth pleas, that the acts which may constitute an infringement of competition law were carried out only by Gosselin and that Portielje itself can incur liability only if Gosselin may be held liable under competition law.

1. *Portielje's first and second pleas, alleging infringement of Article 81 EC*

28 By its first plea, Portielje maintains that it is not an undertaking within the meaning of Community competition law. In its second plea, it claims that it cannot be held jointly liable for the acts committed by Gosselin.

Arguments of the parties

Portielje's arguments

29 Portielje maintains that it is not an undertaking within the meaning of Community competition law, since it does not carry on any economic activity. It states in that regard that it does not operate on any goods or services market and that it holds, only in trust, shares which were previously held by the family shareholders themselves. Those shares cannot be presented for negotiation on any market, and Portielje does not propose to manage the shares of third parties in any way whatsoever. Consequently, the Portielje 'stichting' (foundation) is not subject to corporation tax or turnover tax in the Netherlands. It follows, according to Portielje, that there is no parent company/subsidiary relationship between itself and Gosselin.

30 In the reply, Portielje contends that this plea is very different from its second plea, alleging that the infringements committed by Gosselin cannot be attributed to Portielje.

31 As regards that second matter, Portielje maintains that whether the behaviour of a subsidiary may be attributed to its parent company always depends on whether it is established that management control is actually exercised. However, it did not exercise any decisive influence on Gosselin's commercial or strategic policy. First, it points out that its Board (bestuur) met for the first time on 5 November 2004, therefore a long time after the end of the infringement. Since its Board did not meet during the period in question, it is physically impossible for it to have exerted any influence over Gosselin. Second, Portielje's sole activity is to exercise the voting rights linked to the shares in question at the general meeting of Gosselin's shareholders. The only way Portielje could (indirectly) influence Gosselin's policy was therefore to use those voting rights at that company's general meeting. However, it has been established that, during the relevant period (from 1 January to 18 September 2002), no meeting of Gosselin's shareholders was held. Third, Portielje had no influence on the composition of Gosselin's Board of Directors during the period in question. The members of Gosselin's Board of Directors were already directors before Portielje acquired Gosselin's shares in trust.

32 Consequently, Portielje considers that, even if the Commission may invoke the presumption stemming from the case-law concerning 100 % holdings (Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 79), that presumption is rebutted by the established facts.

33 In the reply, it adds that the Boards of Directors of Portielje and Gosselin are only partly composed of the same members. Of the six persons constituting Portielje's Board of Directors, only half also sat on Gosselin's Board of Directors. Furthermore, Portielje acted in accordance with its articles of association, because the 2002 annual report was drawn up in writing.

The Commission's arguments

34 The Commission explains that the reason why it hold Portielje jointly responsible for the acts carried out by Gosselin lies in the existence of significant organic and functional links between those two entities. However, it did not regard Portielje as an undertaking per se, but rather as a component of the undertaking which committed the infringement. The formal separation of those two entities, the result of their separate legal personalities, cannot preclude the unity of their conduct on the market for the purposes of applying the competition rules.

35 The Commission states that it based the joint responsibility of Portielje on an evidentiary presumption, drawn from the fact that that entity holds almost the whole of Gosselin's capital. Portielje's affirmation that its Board of Directors met for the first time only on 5 November 2004, after the infringement had ceased, is contrary to the wording of its own articles of association. Moreover, that fact does not mean that Portielje did not exert a decisive influence over Gosselin's commercial or strategic policy. Even if its Board of Directors did not meet, it was able to influence that policy directly, because the three principal members of its Board were at the same time members of Gosselin's Board.

Findings of the Court

36 Although the Commission dealt with Portielje's two pleas together, it is necessary to consider them separately.

The first plea

37 By its first plea, Portielje maintains that it is not an undertaking within the meaning of Community competition law. In that regard, it must be pointed out that both Article 81 EC and Article 23 of Regulation No 1/2003 apply only to the conduct 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).

38 The Commission itself concedes, in the defence, that Portielje is not 'an undertaking per se'.

39 It is true that the Commission also claims that Portielje is a 'component of the undertaking which committed the infringement' and that the formal separation of those two entities, the result of their separate legal personalities, cannot preclude the unity of their conduct on the market for the purposes of applying the competition rules. However, that reasoning confuses two different concepts, that of undertaking and that of imputation of the conduct of a subsidiary to its parent company.

40 Admittedly, according to the case-law of the Court of Justice, the term 'undertaking', in a competition law context, must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11). Similarly, according to settled case-law, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 132 and 133,

and Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 26).

41 However, in the aforementioned cases, it was established that the parent company was an undertaking, even though it had not actually participated in the behaviour which was penalised. The concept of economic unity, which may include several separate legal personalities, was therefore introduced in order to make it possible to attribute the behaviour of one legal entity (the subsidiary) to another (the parent company), and not to provide grounds for classifying the parent company as an undertaking. The concept of economic unity cannot therefore compensate for the fact that the parent company is not an undertaking.

42 It follows that the parent company of an undertaking which has infringed Article 81 EC cannot be penalised by a decision implementing Article 81 EC, if it is not an undertaking itself.

43 It is therefore necessary to examine whether Portielje is an undertaking.

44 In the context of competition law, the concept of an undertaking encompasses, according to the case-law, every entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21).

45 In the present case, only the question of whether Portielje is engaged in an economic activity is disputed.

46 It is established that Portielje is not engaged in any direct economic activity. In that regard, it has stated that it does not operate on any goods or services market, that it holds, only in trust, shares which were previously held by the family shareholders themselves, that those shares cannot be presented for negotiation on any market, and that Portielje does not propose to manage the shares of third parties in any way whatsoever. The Commission has not contested those statements.

47 However, the Commission claims, on the basis of a judgment of the Court of Justice, that Portielje takes part indirectly in the economic activity carried on by Gosselin. The Court considered that an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking and must therefore itself, in that respect, be regarded as an undertaking within the meaning of competition law. On the other hand, the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset (see, to that effect, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 111 to 113).

48 It is therefore necessary to examine whether Portielje 'involved itself directly or indirectly' in the management of Gosselin. That question is very similar to the question concerning the decisive criterion in the second plea, relating to the imputation to Portielje of Gosselin's conduct. Even if Portielje were an undertaking, in order for Gosselin's conduct to be imputed to it, it is still necessary to examine whether it exercised a decisive influence over Gosselin. However, contrary to its approach in respect of this latter issue (see paragraph 52 below), the Court has not established a rebuttable presumption of 'involvement' within the meaning of the judgment in *Cassa di Risparmio di Firenze and Others*, cited in paragraph 47 above. In that judgment, it merely gave guidance to the national court in order that it might assess, in the light

of the national legislation applicable to the case, whether banking foundations were involved in the management of their banking companies. Therefore, in the present case, the burden of proving 'involvement' lies with the Commission.

49 In that regard, it should be pointed out that the Commission merely observed that Portielje holds almost all Gosselin's shares and that the three principal members of its Board were at the same time members of Gosselin's Board of Directors. In other words, it raised only structural arguments, which come under the (separate) concept of the exercise of a decisive influence. However, it adduced no hard evidence to show that Portielje actually involved itself in the management of Gosselin.

50 It follows that the Commission has not established that Portielje was an undertaking within the meaning of Article 81 EC and therefore this applicant's plea must be upheld.

The second plea

51 For the sake of completeness, it is necessary to examine whether, even if Portielje were an undertaking, Gosselin's conduct could be imputed to it on the ground that it exerted a 'decisive influence' over Gosselin.

52 In that regard, the Commission relies on the case-law according to which, in the specific case in which a parent company wholly owns its subsidiary which has committed an infringement, there is a rebuttable presumption that that parent company

exercises a decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50). It is thus for a parent company which disputes before the Community judicature a Commission decision holding it jointly and severally liable for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 60 and the case-law cited).

53 In the present case, Portielje holds almost all of Gosselin's capital. However, it has in fact managed to rebut the presumption that it exerts a decisive influence over Gosselin.

54 First, Portielje points out that its Board of Directors met for the first time on 5 November 2004, consequently more than two years after the infringement ceased on 18 September 2002. The Commission contends that, since Portielje was founded in June 2001 and its articles of association provide for at least one Board meeting each year, such conduct is contrary to the wording of its own articles of association. However, the issue of Gosselin's certificates in the foundation was only recorded on 11 December 2002. Moreover, Article 5.2 of Portielje's articles of association also permit decisions to be taken in writing. According to Portielje, which is not contradicted in that regard by the Commission, before the meeting of 5 November 2004 that case had arisen only once, namely on 10 March 2003 in order to prepare the 2002 annual report. Consequently, it must be held that Portielje acted in accordance with its articles of association and that both the written procedure of 10 March 2003 and the first formal meeting of 5 November 2004 were held after the end of the infringement. That Portielje exerted a decisive influence over the conduct of its subsidiary is therefore ruled out on that ground alone.

55 Second, Portielje's sole activity consists in exercising the voting rights linked to the shares in question at the general meeting of Gosselin's shareholders. The only way

Portielje could influence Gosselin's policy was therefore to use those voting rights at that company's general meeting. However, it has been established that, during the relevant period (from 1 January to 18 September 2002), no meeting of Gosselin's shareholders was held.

56 Third, Portielje states that it had no influence on the composition of Gosselin's Board of Directors during the period in question. The Commission claims that Portielje, even though it held no Board meetings, was able to exert a direct influence on Gosselin's commercial and strategic policy, because the three principal members of its Board were at the same time members of Gosselin's Board of Directors. However, Portielje rightly points out that its Board of Directors and that of Gosselin are only partly composed of the same members. Of the six persons constituting Portielje's Board of Directors, only half also sat on Gosselin's Board of Directors. During the period in question, Portielje did not alter the composition of Gosselin's Board of Directors. The members of Gosselin's Board of Directors were already directors of that company before Portielje acquired Gosselin's shares in trust. That time sequence shows that their presence on the Board of Directors does not indicate influence on the part of Portielje.

57 Moreover, the argument that the three persons who constitute Gosselin's Board of Directors, but who represent only half of Portielje's Board of Directors, control Gosselin not in their capacity as directors of the company but through the influence exerted by Portielje over Gosselin's general meeting must be rejected. Indeed, the Commission concedes that it would be 'very contrived' for Portielje's principal directors to exert, through Gosselin's general meeting, an influence over its Board of Directors — a body on which they themselves sat. In any event, the fact that the Board members are partly the same cannot mean that all the undertakings in which the three members of

Gosselin's Board of Directors are also represented in that capacity are therefore to be regarded as parent companies of Gosselin. In the present case, Gosselin's three directors were among the owners of Portielje, which was only an instrument for exercising ownership rights. Accordingly, even if those three persons did not act only as directors of Gosselin, it is more likely that they acted in their own interests.

58 It is apparent from the foregoing that Portielje has adduced evidence to show that it did not exert a decisive influence over Gosselin, or even that it was unable to exert such an influence. Accordingly, it has managed to rebut the presumption in *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 32 above, and *Akzo Nobel and Others* v *Commission*, cited in paragraph 52 above.

59 It follows that it is necessary to uphold Portielje's first and second pleas and to annul the Decision in so far as it concerns this applicant.

2. *Portielje's third plea and Gosselin's first plea, alleging infringement of Article 81 EC*

60 This plea is expressed in two parts. By the first part, Portielje and Gosselin put in question the argument that their practices resulted in an appreciable restriction of competition. In the second part, they dispute that there was an appreciable effect on trade between Member States.

The alleged absence of an appreciable restriction of competition

Arguments of the parties

61 The applicants state that Gosselin took no part at all in the pricing agreement and therefore is not referred to at all in the recitals of the Decision relating thereto. Gosselin does not deny that, in a number of cases, it received or paid commissions and that those were a sort of financial compensation for the removal company which had not obtained the contract. However, it submits that it only received a commission for removals for which it had actually submitted a competitive quote. Therefore, so far as concerns Gosselin, the commissions system did not go hand in hand with a customer-sharing system. Similarly, Gosselin did not apply ceiling prices.

62 Gosselin does not deny having requested and provided cover quotes, but states that cover quotes were requested or produced only when it was of the opinion that it could not win the contract in question. Gosselin maintains that it does not know of any cover quotes which were requested or issued without the customer who wished to move — who had already made his choice of company — asking for them. It never used commissions and cover quotes for the same removal job.

63 The applicants claim that the Decision does not therefore establish that the commissions and the cover quotes had a significant restrictive effect on competition. They also maintain that Gosselin cannot be held responsible for conduct it has not practised. In that regard, they point out that Gosselin did not participate in any cartel meeting and that it had no knowledge of any pricing agreements.

64 The Commission maintains that it is under no obligation to establish the actual existence of anti-competitive effects. In addition, it disputes the applicants' assertions.

Findings of the Court

65 It should be noted at the outset that — contrary to what its heading suggests — the first part of the plea does not refer either to the *de minimis* principle, namely the fact that agreements of minor importance escape the prohibition laid down in Article 81(1) EC, where they restrict competition only insignificantly (see, to that effect, Case 56/65 *LTM* [1966] ECR 235, 250, and Case 5/69 *Völk* [1969] ECR 295, paragraph 7), or to the corresponding Commission notice, namely the Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (*de minimis*) (OJ 2001 C 368, p. 13).

66 The applicants claim rather that there is a lack of evidence of anti-competitive effects, or of any restriction of competition. Moreover, they dispute Gosselin's liability for conduct which it states it did not practise.

— The alleged absence of restrictions of competition

67 Since the applicants challenge the classification of commissions and cover quotes as restrictions of competition, it should be pointed out that the purpose of those two practices was to share customers and to rig bids, that is to say, two obvious restrictions of competition. In order to prepare cover quotes, the removal undertakings

concerned exchanged information, such as the exact date and details of the removal to be carried out, and the prices of that service, so that the undertaking which submitted a cover quote deliberately waived any real competition with the undertaking which had requested that cover quote. The result was a sophisticated system resulting in an artificial price rise.

68 As the Commission established in the Decision, for the person who is moving, the interest in receiving cover quotes lies in the fact that he does not have to ask for several bids to be prepared. When the removal is paid for by the employer, it is therefore unlikely that that person will then approach other removal undertakings in order to obtain genuine quotes. Accordingly, the undertaking which is approached does not have to expect any competition from the other removal undertakings involved in the cartel, so it may be expected to apply higher prices. The institution or undertaking which pays for the removal cannot therefore benefit from competition, although that is precisely the reason why it asks for quotes. That is also made expressly clear by an internal email of Allied Arthur Pierre, cited in recital 233 of the Decision, which states that 'the customer has asked for two cover quotes, so we can ask for a high price'.

69 Similarly, the commissions inevitably raised the level of prices, since the costs generated by them were passed on to customers. Contrary to what the applicants claim, the object of those practices was indeed to distort competition within the meaning of Article 81 EC.

70 Finally, it must be pointed out that the person who intends moving and is in contact with the supplier is not the true customer of the removal companies. In recital 264 of the Decision, the Commission observes that it is for the undertaking or public institution paying for the removal to select a removal company. It is precisely with the aim of securing a choice that many undertakings and public institutions require the submission of several quotes. Consequently, the Court must reject the arguments

that the cover quotes were issued because they were a response to market demand, or that they were only submitted after the 'customer' had made his selection.

71 Accordingly, the claim that there was no restriction of competition cannot succeed.

— Evidence of anti-competitive effects

72 As regards evidence of anti-competitive effects, it should be pointed out that, as a general rule, in assessing an agreement under Article 81(1) EC, account should be taken of the actual conditions in which it functions, in particular the economic and legal context in which the undertakings concerned operate, the products or services covered by the agreement and the actual functioning and structure of the market concerned (see 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 136 and the case-law cited).

73 However, as the Commission has rightly pointed out, it is apparent from settled case-law that, for the purpose of the application of Article 81(1) EC there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 30). Consequently, in assessing an agreement under Article 81(1) EC, account does not have to be taken of the actual conditions in which it functions, if it is an agreement containing obvious restrictions of competition such as price fixing, market sharing or the control

of outlets (see, to that effect, *European Night Services and Others* v *Commission*, cited in paragraph 72 above, paragraph 136).

74 In the present case, Gosselin's practices contained obvious restrictions of competition (see paragraph 67 above). In those circumstances, the Commission was not required to prove anti-competitive effects.

— Responsibility for the written agreements

75 The applicants maintain that Gosselin cannot be held responsible for acts in which it has not participated.

76 In that regard, it is not disputed that Gosselin participated in two of the three practices described in the Decision, namely the agreement on commissions and the agreement on cover quotes. By contrast, it never participated in the written agreement on prices. Although an undertaking that has taken part in an infringement through conduct of its own may also be held responsible for conduct of other undertakings in the context of the same infringement, that applies only to the period of its participation in that infringement (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 83). Consequently, Gosselin cannot be held responsible for conduct which had ceased more than five years before its accession to the cartel.

77 However, in the Decision, the Commission found that Gosselin infringed Article 81(1) EC only during the period from 31 January 1992 to 18 September 2002. Therefore, as regards the duration of participation in the cartel, the Commission duly took account of the fact that it participated in the cartel only from 1992. As regards gravity, the issue will be examined in paragraph 134 et seq. below.

78 For that same reason, Gosselin's claim that it had no knowledge of written agreements is irrelevant, since the Commission, in the Decision, holds it liable for the infringement only from that date.

79 As regards cover quotes and commissions, Gosselin must have been aware of the infringements committed by the other participants, since those two practices were based on mutual cooperation between alternating partners on each occasion. That system was based on the concept of quid pro quo, in so far as each undertaking which paid a commission or issued a cover quote expected to be able, in the future, to benefit itself from that system and obtain commissions or cover quotes. Therefore, those operations were not ad hoc, but constituted a link of complementarity.

80 Consequently, this part of the plea must be rejected.

The alleged absence of an appreciable effect on trade between Member States

Arguments of the parties

81 First of all, the applicants claim that the supply of services, which involves the customer's property crossing the border, cannot be compared with the import or export of goods.

82 The applicants then dispute the Commission's assertion that the turnover of the parties exceeded, with the services in question, the EUR 40 million threshold laid down in point 53 of the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] (OJ 2004 C 101, p. 81; 'the 2004 Guidelines). They note, in particular, that the total sales mentioned in recital 540 of the Decision is EUR 21 323 734, that is, almost half that threshold. As regards the 5 % threshold of the market shares, the applicants point out that, when the Commission wishes to invoke market shares, it must define the market in question. However, the Decision gives a 'description of the market', but no analysis or argument to define the market in question in a legally correct manner. The applicants claim, moreover, that they were unable to see the slightest difference as regards the influence, whether appreciable or not, on trade between Member States, between the period before the infringement and the period after it.

83 Finally, the applicants claim that the Decision does not correspond to the method of work set out in points 78 to 82 of the 2004 Guidelines, which deal expressly with the situation of cartels covering a single Member State.

84 As regards the thresholds laid down in the 2004 Guidelines, the Commission points out that the Guidelines establish a rebuttable positive presumption that trade is appreciably affected where the overall turnover exceeds EUR 40 million or where the overall market share is higher than 5 %. According to the Commission, in 2002 the cartel participants achieved an overall turnover of approximately EUR 41 million on the international removal services market. Moreover, on the basis of estimates relating to the extent of that market, the Commission was able to establish that the total market share of the cartel participants was about 50 %. In contrast, recital 540 of the Decision concerns the determination of the amount of the fine, taking account of the situation of each of the undertakings.

85 Finally, the Commission notes that, although the applicants cast doubt on the accuracy of the estimate of the overall market share at approximately 50 %, they do not deny that that market share was higher than 5 %. In any event, the Commission is not required to define the market since it found that the object of the agreement was to restrict competition within the common market and that it was therefore liable, by its very nature, to affect trade between Member States.

Findings of the Court

86 As regards, first, the complaints relating to possible differences between international removal services and the import and export of goods, it must be stated that those differences are not relevant for determining the scope of European Union competition law. The concept of 'trade between Member States' is a wide concept which includes any economic activity. Even agreements which cover only the territory of a single Member State may fall within the scope of competition law (see, to that effect, Case 172/80 *Züchner* [1981] ECR 2021, paragraph 18, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 95 and the case-law cited). This latter situation is, moreover, expressly provided for by points 78 to 82 of the 2004 Guidelines. Although the applicants maintain that the Commission did not comply with its own guidelines in that regard, they do not however specify the nature of the alleged infringement of those rules.

87 As regards the other complaints, the Commission claims that the issue of the definition of the market and, accordingly, its assertion that the thresholds laid down in point 53 of the 2004 Guidelines were reached, is irrelevant.

88 That argument cannot be accepted.

89 Admittedly, for the purpose of the application of Article 81(1) EC, the Commission is not required to show the actual anti-competitive effects of agreements or practices which have as their object the prevention, restriction or distortion of competition (*Consten and Grundig* v *Commission*, cited in paragraph 73 above, 342, and *Ferriere Nord* v *Commission*, cited in paragraph 73 above, paragraph 30, upheld by the Court of Justice in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 12 to 15).

90 Nevertheless, in accordance with settled case-law, Article 81(1) EC is not applicable if the effect of a restrictive practice on intra-Community trade or on competition is not 'appreciable'. An agreement escapes the prohibition laid down in Article 81(1) EC if it restricts competition or affects trade between Member States only insignificantly (*LTM*, cited in paragraph 65 above; *Völk*, cited in paragraph 65 above, paragraph 7; Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 and 17; and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 207).

91 Consequently, there is an obligation on the Commission to define the market in a decision applying Article 81 EC where it is impossible, without such a definition, to determine whether the agreement or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230).

92 Thus, it is the Commission's assessment in relation to those conditions for the application of Article 81 EC which is called into question by the applicants in this plea, since the definition and size of the market and the market shares held are in fact merely preliminaries (see, to that effect, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 75).

93 In the Decision, in order to establish that there was an appreciable effect on trade between Member States, the Commission bases its assessment on the 2004 Guidelines which state minimum thresholds for market shares and consolidated turnovers for the companies concerned. Under point 55 of those guidelines, in order to apply the 5 % market share threshold provided for in points 52 and 53 thereof, it is first necessary to determine the relevant market.

94 Consequently, in so far as they refer to the assessment of the appreciable effect on trade between Member States, and in particular to the 5 % threshold, the complaints alleging an incorrect definition of the relevant market and an incorrect estimation of the size of that market and of the market shares of the companies concerned are not ineffective.

95 The Commission also submits that, although the applicants call into question the accuracy of the estimate of the overall market share at approximately 50 %, they do not expressly deny that that market share was higher than 5 %. Since the positive presumption of point 53 of the 2004 Guidelines provides that it is sufficient if only one of the two alternative conditions is met, the Commission considers that the applicants' arguments cannot affect its finding that the infringements were likely to have an appreciable effect on trade between Member States. However, the applicants submit that, if the Commission wishes to base its arguments on market shares, it must define the relevant market in a manner which is substantiated economically. Therefore, they are indirectly denying that the 5 % threshold was exceeded.

96 It should therefore be examined whether the Commission has established, in the Decision, that there was an appreciable effect on trade between Member States.

— Cross-border nature

97 At the hearing, the Commission claimed that the cross-border nature of the relevant removals was sufficient to establish that trade was affected. However, it must be stated that that nature, which is not disputed, is not in itself capable of establishing that trade between Member States was 'appreciably' affected.

98 If every cross-border transaction were automatically capable of appreciably affecting trade between Member States, the concept of appreciability, which is, however, a condition for the application of Article 81(1) EC established by case-law, would be devoid of meaning. In that connection, it should be pointed out that even in the case of an infringement by object, the infringement must be capable of affecting intra-Community trade appreciably. That is, moreover, also apparent from the 2004 Guidelines, since the positive presumption, laid down in point 53 thereof, applies only to agreements or practices that by their very nature are capable of affecting trade between Member States.

99 At the hearing, the Commission relied, however, on the judgment in Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801 in order to substantiate its claim that the cross-border nature of the removals was by itself sufficient to establish its competence. It is clear that that judgment, and in particular paragraph 18 thereof, does not address the issue of the appreciable effect on trade. Indeed, that term is not even referred to in the judgment.

100 In any event, the Decision does not contain any reasoning based solely on the cross-border nature of the relevant removals. In particular, it is apparent from both the wording and the context of recital 372 of the Decision that that recital, which does not mention the judgment in *Vereniging van Vlaamse Reisbureaus*, cited in paragraph 99 above, does not seek to demonstrate an appreciable effect on trade.

— EUR 40 million threshold

101 As regards the EUR 40 million threshold laid down in point 53 of the 2004 Guidelines, the applicants rightly claim that a distinction must be drawn between the turnover generated as a subcontractor and that generated as a company which controls an international removal. Indeed, in order not to include the same figure twice in the estimate of the sales concerned, the turnover achieved as a subcontractor has to be deducted from the turnover achieved through the services in question. Otherwise, for a single removal, the figure for the turnover achieved as a subcontractor would be included first in the turnover of the company which controls the service and then again in that of the subcontractor. Furthermore, the subcontractor turnovers were not generated on the removal services market intended for the final consumer.

102 The explanation provided by the Commission in recital 530 of the Decision in order to justify its decision to exclude those sales in calculating the fine is, indeed, convincing. However, that cannot explain why it would be appropriate to include the same figure twice in estimating the size of the market for the purposes of ascertaining whether there was an appreciable effect on trade. That estimate and the estimate of the combined turnover of the participants in the cartel are therefore vitiated by a manifest error of assessment.

103 That conclusion is supported by the Commission's replies to the Court's written and oral questions.

104 The Commission attempted, first, to derive an argument from point 54 of the 2004 Guidelines. However, that provision simply excludes sales between entities that form part of the same undertaking and is in no way concerned with the issue of subcontracting. It cannot, in particular, act as a basis for the argument *a contrario* which the Commission seems to advance.

105 Second, the Commission contended in its written reply that its approach does not 'necessarily' result in the double counting of the same removal, because, first, a number of Belgian movers did not form part of the cartel, and, second, the subcontracting was in some cases carried out on behalf of foreign movers. The Commission therefore concedes implicitly that in the other cases that approach amounted to including twice the turnovers achieved as a subcontractor. In addition, at the hearing, the Commission acknowledged that there was double counting when the subcontracting was between two participants in the cartel. Moreover, it admitted that if its methodology were corrected on that point, the EUR 40 million threshold would no longer be reached.

106 It is clear from the foregoing that the Commission has failed to prove that the EUR 40 million threshold has been reached in the present case.

— 5 % threshold

107 With regard to the 5 % threshold, the applicants claim that the Commission should have determined the market in order to ascertain whether it had been exceeded.

108 In that regard, it must be stated that, in order to calculate a market share, it is necessary first to determine that market. As the Court has already observed in paragraph 93 above, point 55 of the 2004 Guidelines expressly recognises that '[i]n order to apply the market share threshold, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market'. That obligation is also clear from other language versions of that point (for example in German 'muss').

109 In addition, as regards the binding nature of the guidelines adopted by the Commission, the Court of Justice has already held that, in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (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 211).

110 It is common ground that the Commission has failed to comply with the obligation laid down in point 55 of the 2004 Guidelines. In its written pleadings and at the hearing, it stressed not only that it was not required to define the market concerned but also that it had not done so. Consequently, the Commission's finding that the 5% threshold was reached should, theoretically, be rejected.

111 However, in the circumstances of the case, the Court considers that the Commission has, nevertheless, established to the requisite legal standard that the second alternative condition provided for in the presumption laid down in point 53 of the 2004 Guidelines was met.

112 In recitals 88 to 94 of the Decision, the Commission provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope. Therefore, the Commission identified the relevant services and market precisely. The Court considers that such a description of the sector can be sufficient, in so far as it is sufficiently detailed, to enable the Court to verify the Commission's basic assertions and in so far as, on that basis, it is clear that the combined market share far exceeds the 5% threshold.

113 In that connection, it should be observed, first, that the Commission was justified in finding that international removal services in Belgium were the relevant services. The Commission was fully entitled to find that the cartel had as its object the restriction of competition in the sector of international removals to and from Belgium. The removals in question were characterised by the fact that Belgium was either the starting place or the destination, that the removal companies in question were all situated in Belgium and that the cartel's activity took place in Belgium. In addition, in estimating the size of the market, the Commission took into account the turnovers of the foreign companies on that market.

114 Second, on that basis, the Commission estimated the size of the market at EUR 83 million and the combined market share of the participants in the cartel at approximately 50 %. Those figures must be adjusted in order to take into account the corrections resulting from Decision C(2009) 5810 (paragraph 19 above) and from the exclusion of the sales achieved as a subcontractor (paragraph 102 above), which, according to the Commission, results in a combined turnover of over EUR 20 million and a combined market share of approximately 30 %. That market share is still, however, well above the 5 % threshold.

115 Third, in answer to the Court's questions, the Gosselin itself stated, at the hearing, that, for the 5 % threshold not to be reached, the size of the market would have to be much larger. In fact, the size of the market would then have to be over EUR 400 million. The only way the market could attain such a size would be to start from a much larger market than that of international removal services in Belgium, which was, however, correctly identified by the Commission as the relevant market.

116 Accordingly, the Court considers that, exceptionally, the Commission was entitled to base its decision on the second alternative condition of point 53 of the 2004 Guidelines without expressly determining the market within the meaning of point 55 of those guidelines.

117 Lastly, as the Commission correctly observed, in the context of the positive presumption laid down in point 53 of the 2004 Guidelines, it is sufficient if only one of the two alternative conditions is met in order to prove that the effect on trade between Member States is appreciable.

118 It follows from all the foregoing that the part of the plea alleging that trade between Member States is not appreciably affected must be rejected.

119 This plea in law must therefore be dismissed in its entirety.

3. *Portielje's fourth plea and Gosselin's second plea, concerning a reduction of the fine*

120 This plea is expressed in four parts. By the first part, the applicants allege an infringement of Article 23(2)(a) and (3) of Regulation No 1/2003, of Article 15(2) of Regulation No 17 and of the 2006 Guidelines in the determination of the gravity of the infringement. The other parts relate to an infringement of those same provisions in the determination of the duration of the infringement (second part, only invoked by Gosselin), in the determination of the value of sales for the purpose of calculating the basic amount of the fine (the second and third parts respectively) and in the rejection of mitigating circumstances (the third and fourth parts respectively).

The gravity of the infringement

Arguments of the parties

121 The applicants claim that there is an important qualitative distinction between the removal companies which took part in the 'classic' cartel on prices, which went hand in hand with meetings and written agreements, and the other companies (like Gosselin) which were only involved in the commissions and the cover quotes. The 'classic' cartel provided a framework for the conduct on the market of the cartel participants whereas the commissions and the cover quotes were applied on a case-by-case basis.

122 Nevertheless, the Commission applied to all the companies concerned the same rate of 17 %, without carrying out a case-by-case assessment and without taking account of all the relevant circumstances, as required under point 20 of the 2006 Guidelines. Consequently, the applicants ask the General Court to set, at the very least, the relevant percentage for calculating the fine at a rate lower than 17 %.

123 According to the Commission, the applicants' arguments are based on the incorrect notion that the agreements relating to commissions and cover quotes are less serious than agreements relating to ceiling prices.

Findings of the Court

124 The applicants claim, in essence, that the Commission should have taken into account all the relevant circumstances of the present case and that there is a significant qualitative distinction between the prices cartel and the other practices.

— The obligation to take account of all the relevant circumstances of the case

125 As regards the first plea, it should be noted that, in recital 542 of the Decision, the Commission states that agreements or concerted practices involving the type of restriction identified in this case may be classified as 'very serious' solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographic area or have a particular impact. In support of that assertion, the Commission refers, both in the Decision and in the defence, to Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917.

126 In that judgment, the General Court held that gravity was to be assessed by taking into account such matters as the nature of the restrictions on competition, that the gravity of the infringement could be established by reference to the nature and the object of the abusive conduct, and that it was clear from settled case-law that factors relating to the object of a course of conduct may be more significant for the purpose of setting the amount of the fine than those relating to its effects (see paragraph 83 of the judgment and the case-law cited).

127 In the present case, the infringement consisted in price fixing and market sharing. Such a clear breach of competition law is, by its nature, particularly serious.

128 In addition, unlike 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 1998 Guidelines'), the 2006 Guidelines no longer mention the need to take account of 'the effective economic capacity of offenders to cause significant damage to other operators' in order to assess gravity, nor the 'actual impact [of the infringement] on the market, where this can be measured'.

129 However, the 2006 Guidelines expressly state, in point 20, that '[t]he assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case'. The 2006 Guidelines have also brought about a fundamental change in the methodology for calculating fines. In particular, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') has been abolished, and a scale from 0 % to 30 % introduced in order to enable finer distinctions to be made. Under point 19 of the 2006 Guidelines, the basic amount of the fine must be 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement'. As a general rule, 'the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales' (point 21 of the Guidelines).

130 Therefore, the Commission cannot use its margin of assessment in the imposition of fines, and thereby determine the precise level from 0 % to 30 %, without also taking into account the particular circumstances of the case. Thus, point 22 of the 2006 Guidelines provides that, '[i]n order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'.

131 That difficulty in determining an exact percentage is reduced to a certain extent in the case of secret horizontal price-fixing and market-sharing agreements in which, under point 23 of the 2006 Guidelines, the proportion of the value of sales taken into account will generally be set 'at the higher end of the scale'. It is clear from that point that, for the most harmful restrictions, the rate should, at the very least, be above 15 %.

132 In the present case, the Decision should not be annulled in that regard on the ground that the rate of 17 % was set solely on the basis of the inherently serious nature of the infringement. Where the Commission simply applies a rate equal or almost equal to the minimum rate laid down for the most serious restrictions, it is not necessary to take into account additional factors or circumstances. That would be required only if a higher rate had to be established. In that connection, Gosselin certainly does not argue that the Commission ought to have adopted a higher rate and the Commission has not claimed that the Court should increase the amount of the fine.

133 Consequently, the complaint alleging that the gravity of the infringement was calculated in an abstract manner must be rejected.

— The alleged significant qualitative distinction

134 As regards the complaint relating to an alleged significant qualitative distinction between the prices cartel and the other practices, a complaint which ties in with Portielje's fifth plea alleging infringement of the principle of equal treatment, it is necessary to note the settled case-law according to which the principle of equal treatment, which is one of the fundamental principles of Community law, prohibits not only comparable situations from being treated differently but also different situations from being treated in the same way, unless such treatment is objectively justified (see, to that effect, Case 91/85 *Christ-Clemen and Others* v *Commission* [1986] ECR 2853, paragraph 10, and Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25 and the case-law cited).

135 The Commission, when assessing the gravity of the infringement, clearly did not in fact treat the participants differently in the percentage applied to the individual value of sales, but applied a uniform rate of 17 % to all the undertakings concerned. The Commission justifies that approach by the fact that the infringement was a single and continuous one.

136 The question therefore arises whether, in the light of the case-law, it was open to the Commission to abandon any distinction between the participants in the infringement and any consideration of the specific circumstances of the case in assessing the gravity of the infringement committed by Gosselin.

137 In that connection, it is apparent from the case-law that, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623, and *Commissi*on v *Anic Partecipazioni*, cited in paragraph 76 above, paragraph 150). That conclusion follows logically from the principle that penalties must be specific to the offender and to the offence, so that an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law (Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 119).

138 In addition, it is clear from a large number of judgments of the Court of Justice and of the General Court that the gravity of the infringement is to be assessed on an individual basis by taking into account numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines (see Case C-219/95 P *Ferriere Nord* v *Commission*, cited in paragraph 89 above, paragraph 33 and the case-law cited; Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 106; and *Scandinavian Airlines System* v *Commission*, cited in paragraph 125 above, paragraph 83 et seq.) Thus, the Court of Justice has held 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 the aspects in which it had participated must be taken into consideration when the gravity of the infringement is assessed and, as appropriate, when the fine is determined (see *Commission* v *Anic Partecipazioni*, cited in paragraph 76 above, paragraph 90, and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 429 and the case-law cited).

139 However, the General Court's practice is usually to assess individual circumstances not in the context of the assessment of the gravity of the infringement, that is, when the basic amount of the fine is set, but in the context of the adjustment to the basic amount to reflect mitigating or aggravating circumstances (Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 100 et seq., upheld on appeal in the judgment of 12 November 2009 in Case C-554/08 P *Carbone-Lorraine* v *Commission*, not published in the ECR).

140 That case-law is, however, consistent with the case-law referred to in paragraphs 137 and 138 above. In those judgments, the word 'gravity' was used in a general manner to describe the intensity of the infringement, and not in the technical meaning of the guidelines on the method of setting fines. Consequently, the Commission was at liberty to take into account certain aspects of 'gravity' within the meaning of Article 23 of Regulation No 1/2003 in the context of mitigating and aggravating circumstances and not in the context of 'gravity' within the meaning of its guidelines on the method of setting fines.

141 This applies, in particular, to the assessment of the relative gravity of participation in a single and continuous infringement committed by several undertakings. In that connection, the Court of Justice has confirmed, as regards the 1998 Guidelines, that the

relative gravity of the participation in the infringement of each of the undertakings concerned has to be examined in the context of a possible application of aggravating or mitigating circumstances (Case C-554/08 P *Carbone-Lorraine* v *Commission*, cited in paragraph 139 above, paragraph 27). In the case of a single and continuous infringement, the concept of 'infringement', as used in the 1998 Guidelines, refers therefore to the overall infringement involving several undertakings and the 'gravity' of that single infringement is the same for all the participants.

142 Case C-554/08 P *Carbone-Lorraine* v *Commission*, cited in paragraph 139 above, is, however, concerned with the 1998 Guidelines. As has already been pointed out in paragraph 129 above, the 2006 Guidelines have brought about a fundamental change in the methodology for calculating fines. First, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') has been abolished. The current system, comprising a scale from 0 % to 30 %, enables finer distinctions to be made according to the gravity of the infringements.

143 Second, flat-rate amounts have been abolished. Now, the basic amount is calculated on the basis of each individual undertaking's value of sales to which the infringement directly or indirectly relates. That new methodology therefore makes it easier to take into account the extent of the individual participation of each undertaking in the infringement when the gravity of that infringement is assessed. It also makes it possible to take into account any reduction in the gravity of a single infringement over time.

144 Third, at the hearing, the Commission confirmed that its practice was no longer necessarily to apply a single rate to all the participants in an infringement. In Decision C(2008) 5476 of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C.39.181 — Candle waxes), a summary of which is published in the Official Journal of 4 December 2009 (OJ 2009 C 295,

p. 17), and Decision C(2009) 8682 of 11 November 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.589 — Heat stabilisers), a summary of which is published in the Official Journal of 12 November 2010 (OJ 2010 C 307, p. 9), the Commission applied different rates to different categories of participant in the cartels at issue according to the relative gravity of their participation in the infringement. In particular, in the latter case, a higher rate was set for the undertakings which had participated not only in price fixing but also in customer sharing and/or market sharing.

145 However, the new methodology does not impose such an approach. Although the case-law referred to in paragraphs 137 and 138 above states that the relative gravity of the participation in the infringement and the particular circumstances of the case must be taken into account, it remains open to the Commission, pursuant to the 2006 Guidelines, to take such factors into account when assessing the gravity of the infringement or adjusting the basic amount according to the mitigating and/or aggravating circumstances. Where the Commission follows the latter approach, the assessment of mitigating and aggravating circumstances must, however, enable sufficient account to be taken of the relative gravity of the participation in a single infringement, and any variation in that gravity over time.

146 In the present case, the Commission set a single rate of 17 % for all the undertakings concerned. In so far as Gosselin submits that the relative gravity of its participation is less significant than that of other undertakings involved and that a number of specific or unusual circumstances should have been considered, its arguments will be examined in the context of the complaints alleging that the Commission incorrectly assessed the mitigating circumstances.

147 Therefore, the first part of the present plea must be rejected and Gosselin's arguments considered when the fourth part is examined (paragraph 180 et seq. below).

The duration of the infringement

148 This part of the plea is put forward only by Gosselin.

Arguments of the parties

149 Gosselin states that the Commission expressly concedes, in recital 379 of the Decision, that the file contains no documents showing that Gosselin implemented anti-competitive agreements for a period covering more than three full years, that is, from 30 October 1993 to 14 November 1996.

150 That lack of evidence cannot, according to Gosselin, be compensated for by the assertion that it was a single and continuous infringement, or that at no time did Gosselin dissociate itself from that infringement. As regards the first assertion, it submits that that fact does not relieve the Commission of the burden of adducing hard evidence of the duration of Gosselin's participation. As regards the second assertion, Gosselin maintains that the case-law cited in the Decision, according to which the undertaking concerned must openly and unambiguously dissociate itself from the cartel, always relates to 'classic' cartels in which multilateral meetings have taken place and during

which objectives of restricting competition have been mentioned *expressis verbis*. Consequently, that case-law is not applicable to Gosselin, which did not participate in any cartel meeting. Finally, Gosselin submits that a period of three years is particularly long and that, therefore, continuity cannot be demonstrated in its case.

151 The Commission acknowledges that, as regards Gosselin, the file contains no document relating to specific cases of commissions and cover quotes during the period from 30 October 1993 to 14 November 1996, but it considers that it may be inferred from objective and consistent circumstantial factors that Gosselin participated in the cartel during that period. It states that it was an intermediary period and that Gosselin did not finally terminate its participation in the cartel in 1993. It is also apparent from available evidence that the activity of the cartel, as such, remained unchanged during the period concerned and that it was not suspended. Finally, the Commission states that Gosselin did not distance itself publicly and unambiguously from the cartel at the beginning of the period concerned.

Findings of the Court

152 In essence, Gosselin claims that, during the period from 30 October 1993 to 14 November 1996 ('the period at issue'), it did not participate in the cartel and that, therefore, the multiplier which takes into account the number of years of participation should be lowered.

153 In that regard, it is apparent from settled case-law that the burden of proof concerning infringements of Article 81(1) EC lies with the Commission and that it must adduce precise and coherent evidence to justify the firm belief that the alleged infringement has been committed (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20, 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, paragraph 62).

154 This is especially so for evidence concerning the duration of the infringement, a criterion the weight of which was considerably increased in the 2006 Guidelines. If there is no evidence directly establishing the duration of an infringement, the Commission is required to adduce evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 125 and the case-law cited).

155 In the present case, it is not disputed that there is no documentary evidence for the period at issue.

156 However, the Commission cited, in the Decision and in its pleadings, case-law according to which an undertaking, in order to put an end to its liability, must dissociate itself openly and unambiguously from the cartel, so that the other participants are aware of the fact that it no longer supports the general aims of the cartel.

157 In that regard, it is true that, where participation in multilateral meetings has been established, it is for the undertaking concerned to put forward indicia 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 and Others* v *Commission*, cited in paragraph 37 above, paragraph 81, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155).

158 However, that case-law concerns cartels in which multilateral meetings took place, and during which anti-competitive objectives were mentioned. As the Court of Justice explained in paragraph 82 of the judgment in *Aalborg Portland and Others* v *Commission*, cited in paragraph 37 above, the reason underlying that principle of law is that, having participated in such meetings 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. In the present case, it is established that Gosselin did not participate in such meetings.

159 Therefore, it was for the Commission to adduce evidence of the duration of Gosselin's participation, without being able to benefit from the easing of the burden of proof resulting from the aforementioned case-law.

160 However, clearly, with regard to the period at issue, the indicia put forward by the Commission cannot prove to the required legal standard Gosselin's participation in the cartel.

161 First, inasmuch as the Commission points out that the period at issue is an intermediary period and that Gosselin did not finally terminate its participation in the cartel in October 1993, it must be stated that that is inherent in the fact of being an interruption. The mere fact that Gosselin participated in the cartel both before and after the period concerned in therefore irrelevant. Moreover, the fact that Gosselin is held liable for having participated in the cartel only until 18 September 2002, the date of the last documentary evidence, although the cartel existed until September 2003, shows that it is possible to terminate participation in a cartel even without an express declaration.

162 Second, the Commission claims that Gosselin participated in the same anti-competitive practices both after November 1996 and before October 1993 and that there was no change, between those two dates, in its conduct within the cartel. However, since the modus operandi of the cartel did not change during the period at issue, Gosselin's participation could only take the same forms as before.

163 Third, the Commission observed, in recital 274 of the Decision, that the mere fact that a cover quote does not appear in its file does not mean that that cover quote was never drawn up. The evidence in the file indicates that some cover quotes were sometimes sent directly to the person who was moving. According to that recital, an internal file of Allied Arthur Pierre concerning a removal from Brussels (Belgium) to Lisbon (Portugal) shows that cover quotes were requested from Gosselin and Ziegler. It is also stated that Gosselin 'is sending the cover quote today by post [and that the] customer has been informed'. However, that removal dates from 1998 and therefore took place after the period at issue.

164 Fourth, the Commission conceded at the hearing that there was no further evidence of Gosselin's participation during the period at issue.

165 Fifth, as regards the period at issue, it should be pointed out that the question whether or not that period is long enough to constitute an interruption of the infringement cannot be examined in the abstract. On the contrary, it needs to be assessed in the context of the functioning of the cartel in question (Case T-18/05 *IMI and Others* v *Commission* [2010] ECR II-1769, paragraph 89 et seq.).

166 In the present case, it is apparent from Table 3 in recital 280 of the Decision that the undertakings concerned were usually in contact several times a year in order to draw up cover quotes or pay commissions. The fact that those practices were based on the concept of quid pro quo (see paragraph 79 above) required a certain continuity of cooperation within the cartel. However, the duration of the period during which Gosselin did not participate in those practices is more than three years. Since that duration far exceeds the intervals in which the undertakings in question usually demonstrated, by drawing up cover quotes or paying commissions, their respective intentions to restrict competition, it must be concluded that the Commission has not adduced evidence of facts sufficiently proximate in time for it to be reasonable

to accept that the infringement continued uninterruptedly between 30 October 1993 and 14 November 1996.

167 Sixth, in the Decision, the Commission relied on the single and continuous nature of the infringement. It must be considered, as Gosselin considers, that the lack of documentary evidence for the period at issue cannot be compensated for by the assertion, made in recital 380 of the Decision, that the cartel in question is a single and continuous infringement. Such a finding cannot be a ground for Gosselin's liability for the whole duration of the cartel. Thus, point 24 of the 2006 Guidelines does not refer to the duration of the infringement, but to the duration of the participation of each undertaking in the infringement. Consequently, it is necessary to determine the duration of individual participation in the cartel, as the Commission did in the Decision.

168 It is apparent from all the foregoing considerations that the second part of the plea, alleging that the duration of the infringement was incorrectly determined, must be upheld and that it is therefore necessary to annul the Decision in so far as it holds Gosselin liable for its participation in the cartel during the period at issue. Consequently, the duration of the period at issue must be deducted from the duration of 10 years and 7 months given in recital 548 of the Decision. The duration of Gosselin's participation was therefore 7 years and 6 months.

169 In the light of the fact that, after the period at issue, Gosselin resumed and repeated its participation in an infringement which it does not deny was the same cartel in which it had participated before the interruption, the limitation period as provided for in Article 25(2) of Regulation No 1/2003 does not apply in the present case. Nevertheless, the Decision must be adjusted to reduce the amount of the fine imposed on Gosselin in order to take account of the actual duration of its participation in the cartel. The specific consequences of that adjustment are detailed in paragraph 174 below.

The value of sales to be taken into account for the purpose of calculating the basic amount of the fine

Arguments of the parties

170 The applicants claim that, in the Decision, the Commission starts from an incorrect amount as regards the value of sales. That error is due to the fact that Gosselin's financial year does not coincide with the calendar year. Therefore, the Commission should have taken as the 'last full business year of its participation in the infringement' (within the meaning of point 13 of the 2006 Guidelines) the last financial year preceding the end of the infringement. As it is apparent from the Decision that 18 September 2002 is the date of the end of the infringement, that last financial year would be the year from 1 July 2001 to 30 June 2002 (corresponding to a turnover of EUR 1 607 946,90) and not the financial year from 1 July 2000 to 30 June 2001, the year which was nevertheless used in the Decision.

171 In the defence, the Commission concedes that the 2006 Guidelines do not provide a complete response to the question of which data it should, as a general rule, take as a starting point. In the rejoinder, the Commission also recognises that the period from 1 July 2001 to 30 June 2002 is a more appropriate reference year than the one used in the Decision.

Findings of the Court

172 On 24 July 2009, the Commission adopted Decision C(2009) 5810 final amending the Decision in relation to the value of sales to be taken into account for the purpose of calculating the basic amount of the fine imposed on Gosselin and Portielje

(see paragraph 19 above). In that decision, the Commission used the period from 1 July 2001 to 30 June 2002 as the reference year, and therefore a relevant turnover of EUR 1 607 946. Consequently, the fine imposed on Gosselin was reduced to EUR 3.28 million, for EUR 270 000 of which Portielje is held jointly and severally liable.

173 Since the Commission has recognised that the third part of this plea is well founded and has consequently amended the Decision, it is no longer necessary to rule on this part of the plea.

174 As the duration of the infringement has been reduced to 7 years and 6 months (see paragraph 168 above), the amount of the fine imposed on Gosselin must be reduced to EUR 2.32 million (corrected turnover, multiplied by 0.17 and by 7.5, plus the additional amount by way of deterrent).

Mitigating circumstances

Arguments of the parties

175 The applicants consider that, in the Decision, the Commission wrongly refuses to apply the mitigating circumstance relating to Gosselin's limited participation and minor role. In that regard, they point out, first, that Gosselin was not involved in the creation of the cartel and did not participate in the agreements on prices. Its alleged involvement in agreements on commissions was also very limited and sporadic.

176 Second, they consider that the Decision has in no way established that Gosselin knew, or was bound to have known, that its actions were part of an overall plan and that that overall plan covered all the constituent elements of the cartel. Moreover, they disagree that liability for the whole of a cartel is adequate grounds for rejecting a mitigating circumstance which is based specifically on the very limited role of a particular undertaking.

177 Third, the applicants claim that the removal departments of undertakings and institutions were fully aware of the cover quotes principle and saw it as a means of completing the administrative files easily. As it was a practice which the removal companies concerned did not keep secret, the removal departments must have been aware of the existence of cover quotes. As regards Gosselin, the file contains an example concerning a Community official with authority to sign for an international removal who asked for cover quotes.

178 The Commission disputes those arguments.

Findings of the Court

179 It is apparent from the Decision that the Commission did not find any mitigating circumstances. However, the applicants claim that the Commission should have taken account of the fact that Gosselin was not involved in the creation of the cartel and did not participate in the agreements on prices (first complaint), that Gosselin did not know that its actions were part of an overall plan (second complaint) and that some of the Commission's officials were aware of the cover quotes practice (third complaint).

— The first and second complaints

180 First, as regards the assertion that Gosselin was not actively involved in the creation of the cartel and did not participate in the written agreements, it should be noted that its first documented involvement in the implementation of the agreement on commissions was indeed in 1992, although those practices were set up in the 1980s. However, that factor is relevant only in the context of ascertaining whether an undertaking has played a role of leader or instigator, which may be considered an aggravating circumstance under point 28 of the 2006 Guidelines. Moreover, the fact that an undertaking was not actively involved in the creation of the anti-competitive arrangements at issue is not, in itself, a mitigating circumstance.

181 Second, as regards the allegedly very limited nature of its involvement in the infringement, it is common ground that Gosselin was never involved in the written price-fixing agreements or in the meetings with an anti-competitive object.

182 In that connection, it should be noted that, under the third indent of point 29 of the 2006 Guidelines, in order to benefit from a reduction of the fine on account of mitigating circumstances, the undertaking concerned must '[provide] evidence that its involvement in the infringement is substantially limited' and 'thus [demonstrate] that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market'. Those conditions are not met in the present case.

183 However, the use of the expression 'such as' shows that the list of circumstances set out in point 29 of the 2006 Guidelines is not exhaustive. In addition, as was noted in the context of Portielje's fourth plea and Gosselin's second plea, the specific circumstances of the case, in particular whether the undertaking participated in all the

aspects of the infringement, must be taken into account, if not in assessing the gravity of the infringement, at least in the course of adjusting the basic amount of the fine for mitigating or aggravating circumstances. That obligation was one of the reasons why the Court of Justice stated that the concept of a single and continuous infringement is not contrary to the principle that responsibility for infringements of competition law is personal in nature (*Commission* v *Anic Partecipazioni*, cited in paragraph 76 above, paragraph 84). The criteria laid down in the third indent of point 29 are not capable on their own of ensuring this. Consequently, the specific circumstances of the case must be assessed.

184 In that connection, it is common ground that the infringement at issue changed over time. The written agreements were applied during the first stage of the infringement from 1984 until the beginning of the 1990s and were subsequently abandoned. The second stage of the infringement was characterised by the use of cover quotes and commissions. Consequently, the proportion of the value of sales to be taken into account under point 19 of the 2006 Guidelines could, in principle, be adjusted over time. That fact could also justify a reduction of the fine on account of mitigating circumstances.

185 However, it must be found that the conduct in which Gosselin participated does not amount to a less serious infringement than the written price-fixing agreements or the ad hoc fixing of prices for specific moves. Contrary to what Gosselin asserts, the cover quotes and commissions also had effects on prices (see paragraph 67 et seq. above). Similarly, in the circumstances of the present case, the fact that Gosselin did not participate in the anti-competitive meetings, which were no longer arranged at the time it was part of the cartel, is irrelevant for the purpose of assessing the gravity of the infringement, since the cartel operated through mechanisms which rendered such meetings pointless.

186 It follows that it was open to the Commission to set a single rate for the entire duration of the single and continuous infringement and not to take into account as a mitigating circumstance the changes in the infringement over time.

187 Third, regarding the applicants' complaint that liability for a single and continuous infringement is not adequate grounds for rejecting a mitigating circumstance connected with the limited role of a particular undertaking, it must be considered that this assertion is correct. However, the fact that Gosselin was unaware of the overall plan of the cartel does not constitute a mitigating circumstance. That argument would be relevant if the applicants intended to challenge the finding of a single and continuous infringement, a complaint which, however, they have not raised.

188 These complaints must therefore be dismissed.

— The third complaint

189 As regards the allegation that the Commission was aware of the practice of cover notes, it should be noted that the last indent of point 29 of the 2006 Guidelines provides that '[t]he basic amount [of the fine] may be reduced … where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation'.

190 However, there is nothing in the documents before the Court which shows that the Commission, as an institution, authorised, encouraged or requested cover quotes. In point of fact, the Commission would have had no interest in encouraging or tolerating the system of cover notes, since it adversely affected its interests. The fact that certain employees might have requested cover notes for a move ultimately reimbursed

by the Commission does not mean that the institution was aware of that practice, nor that it took part in it, since a distinction must be drawn between the officials of the Commission and the Commission as an institution. The person in contact with the undertaking which carries out the removal is not the true customer of the removal companies. The true customer is the institution or undertaking for which that person works and which pays the removal costs.

191 Even if an official of an institution did request cover quotes, Gosselin ought to have known that such requests could not be formulated on behalf of or at the instigation of the institutions, since they were clearly contrary to their financial interests. The requirement to provide two or three estimates is intended precisely to ensure a minimum level of competition and to prevent a single removal company from being able to set unilaterally the price of a move.

192 In addition, mere knowledge of anti-competitive conduct does not imply that that conduct was implicitly 'authorised or encouraged' by the Commission within the meaning of the last indent of point 29 of the 2006 Guidelines. Alleged inaction cannot be treated in the same way as a positive act such as authorisation or encouragement.

193 In any event, Gosselin's arguments relate only to the cover quotes. The practice of cover quotes is only one element of a single and continuous infringement. The arguments raised cannot possibly justify the payment of commissions.

194 Therefore, this complaint must be rejected and, accordingly, the last part of this plea.

4. *Portielj's fifth plea and Gosselin's third plea, alleging infringement of the principle of equal treatment*

195 This plea is raised in the alternative and is expressed in two parts.

Arguments of the parties

196 First, the applicants claim that, if the arguments they have put forward in that regard in the preceding pleas were not to be upheld, Article 2(e) of the Decision should be annulled for infringement of the principle of equal treatment on the ground that the Commission takes no account, when determining the fine, of the objective qualitative distinction between their conduct and that of the removal companies which participated in the 'classic' cartel (Arthur Pierre, Interdean, Transworld and Ziegler).

197 Second, if the arguments they have put forward in that regard in the preceding pleas were not to be upheld, that would mean, according to the applicants, that, when the value of sales was determined for the purpose of calculating the fine, Gosselin received unequal treatment, without objective justification.

198 The Commission refers to its observations in connection with the preceding pleas.

Findings of the Court

199 The first part of this last plea has no separate dimension in relation to Gosselin's second plea. It has, in essence, already been examined (see paragraph 134 et seq. above).

200 Since the Commission has acknowledged that the third part of Gosselin's second plea, concerning the value of sales, is well founded, it is no longer necessary to examine the second part of this plea, which was raised only in the alternative.

201 It is apparent from all the foregoing that it is necessary to annul the Decision in so far as it concerns Portielje (paragraph 59 above) and in so far as it finds that Gosselin participated in an infringement of Article 81(1) EC from 30 October 1993 to 14 November 1996 (paragraph 168 above). Furthermore, it is no longer necessary to rule on the part of the plea concerning the value of sales to be taken into account for the purpose of calculating the basic amount of the fine imposed on Gosselin (paragraph 173 above). The amount of that fine must, therefore, be reduced to EUR 2.32 million (paragraph 174 above). The action in Case T-208/08 must be dismissed as to the remainder.

Costs

202 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 Commission has been unsuccessful in Case T-209/08, it must be ordered to pay the costs, as applied for by Portielje. In Case T-208/08, each party has been unsuccessful in part and it has been declared that part of the case should not proceed to

judgment. Therefore, each party must be ordered to bear its own costs in this case, in accordance with Article 87(3) and (6) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **In Case T-208/08, annuls Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International removal services) in so far as that decision finds that Gosselin Group NV participated in the infringement of Article 81(1) EC from 30 October 1993 to 14 November 1996;**

2. **Sets the amount of fine imposed on Gosselin Group in Article 2 of Decision C(2008) 926, as amended by Commission Decision C(2009) 5810 final of 24 July 2009, at EUR 2.32 million;**

3. **Dismisses the action as to the remainder;**

4. In Case T-209/08, annuls Decision C(2008) 926, as amended by Decision C(2009) 5810, in so far as it relates to Stichting Administratiekantoor Portielje;

5. In Case T-208/08, orders each party to bear its own costs;

6. In Case T-209/08, orders the European Commission to pay the costs.

Papasavvas Wahl Dittrich

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

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