JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

6 May 2009 *

In Case T-122/04,

Outokumpu Oyj, established in Espoo (Finland),

Luvata Oy, formerly Outokumpu Copper Products Oy, established in Espoo,

represented by J. Ratliff, barrister, F. Distefano and J. Luostarinen, lawyers,

applicants,

* Language of the case: English.

Commission of the European Communities, represented by É. Gippini Fournier, acting as Agent,

defendant,

CONCERNING: (1) an application for the annulment of, or reduction in the amount of, the fine imposed on the applicants under Article 2(b) of Commission Decision C(2003) 4820 final of 16 December 2003, relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 — Industrial tubes); and (2) a counter-claim by the Commission that the amount of that fine be increased,

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

composed of E. Martins Ribeiro, President, S. Papasavvas and N. Wahl (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 5 March 2008,

gives the following

Judgment

Background

1 Outokumpu Oyj, a company quoted on the stock exchange with its seat at Espoo (Finland), is the head company in a group present worldwide and active mainly in the production of base metals, steel, copper products and the technologies for manufacturing those products. At the time of the facts, Outokumpu wholly owned Luvata Oy (formerly Outokumpu Copper Products Oy), which produces mainly copper industrial tubes (Outokumpu and Luvata are hereinafter referred to, without distinction, as 'Outokumpu' or 'the applicants').

2 In March 2001, following the communication of information from Mueller Industries Inc., the Commission carried out unannounced inspections at the premises of KME Germany AG (formerly KM Europa Metal AG), KME France SAS (formerly Tréfimétaux SA), KME Italy SpA (formerly Europa Metalli SpA) (hereinafter collectively referred to as 'the KME Group'), Wieland-Werke AG ('Wieland') and the applicants, pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English Special Edition 1959-62, p. 87).

3 On 9 April 2001, Outokumpu offered to cooperate with the Commission under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4,'the 1996 Leniency Notice'). The applicants lodged a memorandum on that subject on 30 May 2001.

4 In response to a request for information under Article 11(2) of Regulation No 17, sent by the Commission to KME Group and Wieland in July 2002, the latter requested, on 30 September 2002, that the 1996 Leniency Notice be applied to it.

5 In response to the same request for information, on 15 October 2002 the KME group applied on its own behalf for the Leniency Notice to be applied to it.

6 After carrying out an inquiry, including additional investigations at the premises of Outokumpu and the KME group and meetings with representatives of the undertakings concerned, and, under Article 11 of Regulation No 17, requests for information, in July 2003 the Commission initiated an infringement proceeding and issued a statement of objections against the KME Group, Wieland and Outokumpu. The undertakings concerned did not request an oral hearing on the case and therefore no hearing was held.

7 On 16 December 2003, the Commission adopted Decision C(2003) 4820 final, relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 — Industrial tubes) ('the contested decision'), a summary of which is published in the *Official Journal of the European Union* of 28 April 2004 (OJ 2004 L 125, p. 50).

8 The contested decision states that, towards the end of the 1980s, the producers organised within an association for the quality of tubes used in the air conditioning and refrigeration business, Cuproclima Quality Association ('Cuproclima'), which included the applicants, extended their cooperation to questions of competition.

9 The meetings held twice a year by Cuproclima constituted a regular opportunity to discuss and fix prices and other commercial conditions applicable to industrial tubes, after the official agenda had been discussed. Those meetings contrary to the competition rules were complemented by bilateral contacts between the undertakings concerned. The undertakings concerned fixed price objectives and other commercial conditions for industrial tubes. They coordinated price rises, shared customers and market shares and monitored the implementation of their anti-competitive arrangements, first, by designating market leaders, and, secondly, by exhanging confidential information.

10 The contested decision includes the following provisions:

'*Article 1*

The following undertakings have infringed the provisions of Article 81(1) [EC] and — from 1 January 1994 — Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices consisting of price fixing and market sharing in the industrial tubes sector:

(a) [Wieland] from 3 May 1988 until 22 March 2001;

(b) Outokumpu …, individually from 3 May 1988 until 30 December 1988, and jointly and severally with [Luvata] from 31 December 1988 until 22 March 2001;

(c) [Luvata], from 31 December 1988 until 22 March 2001 (jointly and severally with Outokumpu …);

(d) [KME Germany], individually from 3 May 1988 until 19 June 1995, and jointly and severally with [KME France] and [KME Italy] from 20 June 1995 to 22 March 2001;

(e) [KME Italy], jointly and severally with [KME France] from 3 May 1988 to 19 June 1995, and jointly and severally with [KME Germany] and [KME France] from 20 June 1995 to 22 March 2001;

(f) [KME France], jointly and severally with [KME Italy] from 3 May 1988 to 19 June 1995, and jointly and severally with [KME Germany] and [KME Italy] from 20 June 1995 to 22 March 2001.

Article 2

For the infringements referred to in Article 1, the following fines are imposed:

(a) [Wieland]: EUR 20.79 million;

(b) Outokumpu … and [Luvata], jointly and severally: EUR 18.13 million;

(c) [KME Germany], [KME France] and [KME Italy], jointly and severally: EUR 18.99 million;

(d) [KME Germany]: EUR 10.41 million;

(e) [KME Italy] and [KME France] jointly and severally: EUR 10.41 million.'

11 Regarding, first, the determination of the starting amount of the fine, the Commission took the view that the infringement, which consisted essentially of price fixing and market sharing, was by its very nature a very serious infringement (recital 294 of the contested decision).

12 In determining the seriousness of the infringement, the Commission also took account of the fact that the cartel had affected the whole of the territory of the European Economic Area (EEA) (recital 316 of the contested decision). The Commission further examined the actual effects of the infringement, and found that the cartel 'overall had an impact on the market' (recital 314 of the contested decision).

13 Finally, still in relation to the determination of the seriousness of the infringement, the Commission took into account the fact that the market in copper industrial tubes constituted an important industrial sector, with an estimated market value in the EEA of EUR 288 million (recital 318 of the contested decision).

14 Having regard to all those circumstances, the Commission concluded that the infringement in question had to be regarded as very serious (recital 320 of the contested decision).

15 Secondly, the Commission applied differential treatment to the undertakings concerned, in order to take account of the effective economic capacity of each of them to cause significant damage to competition. In that regard, the Commission pointed to the existence of a difference between the market shares for industrial tubes in the EEA held, on the one hand, by the KME Group, market leader in the EEA market with a [*confidential*] [1] % share, and, on the other, by the applicants and Wieland, holding respectively a [*confidential*] % and 13.4 % share. Having regard to that difference, the starting amount of the fine imposed on the applicants and Wieland was fixed at 33% of that for the KME Group, namely EUR 11.55 million for Outokumpu and for Wieland and EUR 35 million for the KME Group (recitals 322, 323 and 326 to 328 of the contested decision).

16 Thirdly, in order to take account of the need to fix the fine at a sufficiently deterrent level, the Commission increased the starting amount of the fine on Outokumpu by 50%, thereby taking it to EUR 17.33 million, taking the view that the latter's worldwide turnover, of over EUR 5 billion, indicated that it had a size and economic strength warranting that increase (recital 334 of the contested decision).

17 Fourthly, the Commission classified the duration of the infringement, which lasted from 3 May 1988 until 22 March 2001, as 'long'. The Commission therefore considered it appropriate to increase the starting amounts of fines on the undertakings concerned by 10% for each year of participation in the cartel. Thus, the starting amount of the fine imposed on the applicants was increased by 125%, the basic amount thus being fixed at EUR 38.98 million (recitals 338, 342 and 347 of the contested decision).

18 Fifthly, in respect of aggravating circumstances, the basic amount of the fine imposed on Outokumpu was increased by 50% on the ground that it was guilty of repeat infringement, having been an addressee of Commission Decision 90/417/ECSC of

1 — Confidential data removed.

18 July 1990 relating to a proceeding under Article 65 [CS] concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (OJ 1990 L 220, p. 28) (recital 354 of the contested decision).

19 Sixthly, in respect of attenuating circumstances, the Commission stated that, without the cooperation of Outokumpu, it would have been able to establish the existence of the infringing conduct for a period of only four years, and it therefore reduced the basic amount of its fine by EUR 22.22 million, in order that the said amount correspond to the fine which would have been imposed for such a period (recital 386 of the contested decision).

20 Seventhly and lastly, in accordance with Section D of the 1996 Leniency Notice, the Commission reduced the amount of the fines by 50% for Outokumpu, 20% for Wieland, and 30% for the KME Group (recitals 402, 408 and 423 of the contested decision).

Procedure and forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 29 March 2004, the applicant brought the present action.

22 Following modification of the composition of the chambers of the Court of First Instance, the Judge-Rapporteur was assigned to Eighth Chamber, to which this case was therefore also assigned.

23 In its rejoinder, the Commission requested that the fine imposed on the applicants be increased on the ground that the applicants have called back into question, in the reply, certain facts which were not challenged in the administrative procedure. The Court of First Instance invited the applicants to submit their observations on that counterclaim, which they did within the prescribed period.

24 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, invited the parties to lodge certain documents and put written questions to them, to which they replied within the prescribed period.

25 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 5 March 2008. On that occasion, the applicants reaffirmed their willingness, which they had already stated in their observations on the report for the hearing, to withdraw two arguments put forward in their plea alleging the erroneous finding of repeat infringements, concerning the importance of an earlier fine and the temporal limitation of the Commission's power to find repeat infringement in this case.

26 The applicants claim that the Court should:

— annul or reduce the amount of the fine imposed in Article 2(b) of the contested decision;

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the action;

— increase the amount of the fine imposed on the applicants;

— order the applicants to pay the costs.

28 By letter of 1 April 2008, the applicants indicated that they were withdrawing their third plea, alleging an erroneous 50% increase in the amount of the fine for deterrence purposes. By order of 23 April 2008, the Court of First Instance decided to reopen the oral procedure, in accordance with Article 62 of its Rules of Procedure, and, in accordance with Article 64 of the Rules of Procedure, decided to place the said letter on the file. By letter of 5 May 2008, the Commission submitted its observations on that withdrawal.

29 The oral procedure was closed on 2 June 2008.

Law

30 In support of this action, the applicants make two pleas, alleging, respectively, an erroneous increase in the amount of the fine for repeat infringements, and an inadequate assessment, for the purposes of calculating the starting amount, of the size of the market affected by the infringement.

31 As a preliminary point, it should be noted, first, that, as appears from recitals 290 to 387 of the contested decision, the fines which the Commission imposed for the infringement were imposed by virtue of Article 15(2) of Regulation No 17, and, secondly, that, although the Commission does not expressly refer to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3,'the Guidelines'), it is undisputed that it determined the amount of the fines by applying the methodology defined in those guidelines.

32 Whilst the Guidelines may not be regarded as rules of law, they nevertheless form rules of practice from which the Commission may not depart in an individual case without giving reasons (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91 and case-law cited).

33 It is therefore for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning. In that regard, it should be noted that the Court of Justice has confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is there indicated (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313).

34 The self-limitation on the Commission's discretion arising from the adoption of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion. The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with the provisions of Regulation No 17, as interpreted by the Court of Justice (*Dansk Rørindustri*, paragraph 267).

35 Moreover, in areas such as determination of the amount of a fine imposed pursuant to Article 15(2) of Regulation No 17, where the Commission has a discretion, for example, as regards the amount of increase for repeat infringement, review of the legality of those assessments is limited to determining the absence of manifest error of assessment (see, to that effect, Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraphs 64 and 79).

36 Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard prejudge the exercise by the Community judicature of its unlimited jurisdiction (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 538), which empowers it to annul, increase or reduce the fine imposed by the Commission (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 60 to 62; Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).

The first plea, alleging erroneous increase, for repeat infringement, of the amount of the fine imposed on the applicants

Arguments of the parties

37 The applicants recall that, in respect of aggravating circumstances, the basic amount of the fine imposed on Outokumpu was increased by 50% on the ground that they were repeat offenders, having been involved in the stainless steel case which gave rise to Decision 90/417.

38 The applicants claim that, by increasing the fine on grounds of recidivism, the Commission infringed Article 15(2) of Regulation No 17, the Guidelines, the obligation to state reasons under Article 253 EC and the general principle of equal treatment. Moreover, the Commission committed a manifest error of assessment regarding the relevant facts. In that respect, they make the following arguments.

39 First, the applicants maintain that the infringement in question cannot constitute a repeat infringement, since the previous infringement fell within the CS Treaty, whereas the cartel at issue here is penalised under the EC Treaty.

40 Secondly, the applicants consider that the two infringements are not of the same type. The Commission infringed the Guidelines and the concept of repeat infringement as follows from Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, in that it examined whether the two infringements were of the same type having regard only to the nature of the infringing conduct in question (price fixing, quotas and sharing of the market), while ignoring the context in which the two infringements were committed. According to the applicants, the Commission's approach is too formal. In examining the question of repeat infringement, the Commission should have taken into consideration the particular circumstances surrounding the infringement established by Decision 90/417, especially since those circumstances are readily apparent from that decision.

41 In that respect, the applicants refer to Decision 90/417, to the Commission's file in that case, and to other documents relating thereto. Those factors demonstrate, in their submission, that the stainless steel case arose from a lack of coordination between the Commission's commercial policy and its competition policy. In that case, Outokumpu, following pressure placed upon it and on the industry as a whole by the Commission and certain governments in the context of the commercial policy practised at the time between the Community and Finland, had 'reluctantly' and 'against its own interests', adhered to an agreement restrictive of competition without intending to restrain competition and believing that it was not acting in breach of Article 65 CS.

42 Thus, the infringement established by Decision 90/417 was not ordinary and gave rise to contacts between the Commission and the national authorities in order to reach a lawful solution to remedy the crisis affecting the steel industry at Community level, whereas the infringement at issue in the present case was ordinary, concerning

operations intentionally carried out unknown to the Commission and whereby the applicants sought to protect their own commercial interests.

43 The applicants also argue that, in breach of Article 253 EC, the Commission has not provided an adequate explanation as to why, despite those special circumstances, it was necessary to increase the amount of the fine for repeat infringement.

44 The applicants also argue that the fact that, in decisions subsequent to Decision 90/417, the Commission did not increase for repeat infringement the fines imposed on other companies involved in the stainless steel case confirmed that that case was so unusual in character that the applicants could not be expected to regard it as a relevant warning in relation to the infringing conduct penalised in the contested decision.

45 The applicants argue that, in any event, and in view of the particular circumstances of the stainless steel case, the 50% increase in the amount of the fine imposed in this case is disproportionate. In their submission, an unintentional infringement should give rise to a smaller uplift for repeat infringement. In support of that argument, the applicants further refer to several previous decisions of the Commission in which the increase in the amount of the fines for repeat infringement was smaller.

46 The applicants maintain, finally, that the fact that the Commission moved from a decision not imposing any fine to a decision imposing a fine increased for repeat infringement breaches the principle of proportionality.

47 The Commission contends that this plea should be dismissed. It further observes that the applicants are raising for the first time in their reply infringement of the principle of equal treatment having regard to the Commission's decision-making practice in the matter of the increase of fines for repeat infringement, and that that argument should therefore be declared inadmissible.

Findings of the Court

48 As regards, first, the allegation that insufficient reasons were given, the case-law is consistent that the reasoning for an individual decision must show, in a clear and unequivocal fashion, the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.

49 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and case-law cited).

50 As regards the determination of fines for infringement of competition law, the essential procedural requirement to state reasons is satisfied where the Commission indicates in

its decision the factors which enabled it to determine the gravity of the infringement and its duration (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 463 and case-law cited).

51 In this case, in the contested decision, the Commission referred to the fact that the two infringements were of the same nature, since they concerned fixing of quotas and prices to control production and share markets (recital 353). Moreover, it held (recital 352) that: 'a repeated infringement occurs when an undertaking, which has been addressee of a Commission decision in the past as party to an infringement, is later found responsible for another infringement of the same type. In addition to ordering the undertaking to end the infringement, the function of such a decision is to warn and deter the undertaking in question from committing similar infringements in future, even if for some reason no fine is imposed.' More precisely, the Commission stated (recital 354): 'That Outokumpu continued its infringement in the industrial tubes sector after being ordered to end its infringement in the stainless steel sector by a Commission decision clearly shows that the previous decision did not have a sufficiently deterrent effect on Outokumpu's market behaviour. Hence, future deterrence has to be ensured by increasing the amount of fine in this case'. Therefore, the Commission has, to a sufficient legal standard, given reasons for its decision to increase the fine imposed on the applicants for repeat infringement.

52 As regards, secondly, the objection to admissibility raised by the Commission, it should be noted that infringement of the principle of equal treatment has not actually been expressly raised by the applicants in the context of this plea.

53 It is, however, clear from the case-law and from Article 21 of the Statute of the Court of Justice and Article 44 of the Rules of Procedure of the Court of First Instance that the applicant is not obliged to cite the articles of the Treaty or the general principles of law which it relies on. It is sufficient for the facts, the pleas in law, and the forms of order

sought by the applicant to appear in the application, so that the Commission can effectively defend its interests and the court can exercise its power of review (see, to that effect, Case T-18/90 *Jongen* v *Commission* [1991] ECR II-187, paragraph 13, and case-law cited). That requirement is satisfied in this case since it is clear from the application that the applicants criticise the 50% increase in the amount of the fine imposed upon them as erroneous, particularly having regard to the rates of increase applied by the Commission for repeat infringement in its earlier decisions.

54 Therefore, all the claims made in support of this plea must be declared admissible.

55 As regards, thirdly, the question whether the plea is well founded, it should be noted that the founding treaties established a single legal order in which the AE Treaty constitutes, and the CS Treaty constituted until 23 July 2002, a *lex specialis* in derogation from the *lex generalis* represented by the EC Treaty (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 102, and case-law cited). In addition, the case-law shows that the prohibition of cartels is laid down by two similar provisions, namely Article 81 EC and Article 65 CS, which, although emanating from two separate treaties, are inspired by identical legal concepts (see, to that effect *Thyssen Stahl*, cited in paragraph 40 above, at paragraphs 269, 270 and 277; Case T-145/94 *Unimétal* v *Commission* [1999] ECR II-585, paragraphs 248 and 252; Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 181).

56 It must, therefore, be accepted that, once the Commission has established by way of a decision, in accordance with the competence which is granted to it by the Community legal order, that an undertaking participated in a cartel, that decision may serve as the basis for assessing, in the context of a new decision regarding Community law, the propensity of that undertaking to infringe the Community rules on cartels.

57 Moreover, there is nothing in the Guidelines to indicate that the indication that the repeat infringement in question must be a repeat infringement of the same undertaking(s) in an infringement of the same type must be understood as meaning that the Commission may not take into account, in order to establish repeat infringement under Article 81 EC, infringements found under the CS Treaty. On the contrary, the heading of the Guidelines shows that they apply both to the calculation of fines imposed under Article 15(2) of Regulation No 17 and to those imposed pursuant to Article 65(5) CS.

58 As regards the argument that the special circumstances surrounding the earlier infringement prevented the Commission from finding the applicants guilty of repeat infringement, this must be rejected since the case-law shows that the concept of repeat infringement implies only a previous finding of infringement of Community competition law (*Danone*, cited in paragraph 36 above, at paragraph 41).

59 In this case, it is clear from Articles 1 and 4 of Decision 90/417 that Outokumpu had been warned that, in concluding price agreements and sharing markets and customers with its competitors, it had infringed Community competition law and had to abstain from repetition of such conduct. Nevertheless, it is clear from Article 1 of the contested decision that the applicants subsequently participated in an almost identical infringement.

60 As regards the argument that the applicants suffered discriminatory treatment compared with other undertakings against which Decision 90/417 was not held to be an aggravating factor, it is important to emphasise that the fact that, in earlier decision-making practice, the Commission held that certain factors did not constitute an aggravating factor for the purposes of determining the amount of the fine does not imply that it must make the same assessment in a subsequent decision (see, by analogy, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 57).

61 It follows from the above that the Commission did not make any error in holding the applicants guilty of repeat infringement.

62 As regards the claims made against the 50% increase applied in the contested decision, it should be noted that the Commission may, in determining the amount of the increase for repeat infringement, take account of evidence tending to confirm the propensity of the undertaking concerned to ignore the competition rules, including the time which has elapsed between the infringements in question.

63 In this case, it should be noted that, on the date on which Decision 90/417 was adopted, namely 18 July 1990, the cartel forming the subject-matter of the contested decision had already commenced. Despite Decision 90/417's finding of an almost identical infringement of the competition rules on the part of the applicants, the latter decided to continue their participation in the new cartel. That fact as such justifies the amount of the increase determined in the contested decision.

64 It is true that the applicants refer to a series of circumstances which surrounded the infringement found in Decision 90/417 and are set out in detail in Title X, paragraph 12 of the said decision. However, those circumstances, which indeed justified a fine not being imposed on the applicants in that decision, are necessarily proper to the latter and have no connection with the propensity of the applicants to ignore the competition rules from 18 July 1990 onwards. They cannot therefore be taken into account for the purposes of determining the amount of increase of the fine for repeat infringement.

65 As regards the argument that the applicants suffered discriminatory treatment in comparison with other undertakings in respect of which the finding of repeat infringement entailed a less severe increase than that in respect of the applicants, it

should be noted, first, that the Commission's earlier decision-making practice does not serve as a legal framework for the fines imposed in competition matters (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 292) and, moreover, that, in the context of Regulation No 17, the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 216) and the power at any time to adapt the level of fines to the needs of that policy (*Dansk Rørindustri*, cited in paragraph 33 above, at paragraph 169).

66 Having regard to the above, the Commission did not make any manifest error of assessment by applying to the applicants, for repeat infringement, a 50% increase in the amount of the fine imposed. Nor does the Court of First Instance consider it necessary, in the exercise of its unlimited jurisdiction, to alter the amount of that increase.

The second plea, alleging inadequate assessment of the size of the sector affected by the infringement, for the purposes of calculating the starting amount of the fine

Arguments of the parties

67 By this second plea, the applicants argue that, by holding that the value of the market concerned was EUR 288 million, the Commission exaggerated its size and thus also exaggerated the seriousness of the infringement, leading to an excessive fine.

68 The applicants make the preliminary observation that, in the industrial tubes industry, the overall price of products consists normally of the price of the copper, based on the quotation on the London Metal Exchange ('the LME'), and the cost of processing, which corresponds to the value added by the manufacturer ('the processing margin'). The raw material necessary for the manufacture of industrial tubes is provided either by the customer, or by the tube manufacturer itself, which then invoices it in the overall price.

69 According to the applicants, the size of the market concerned is important in determining the starting amount of the fine. At the very least, the applicants claim that, in this case, the Commission determined the starting amount by reference to the size of the market concerned.

70 The applicants argue that, as manufacturers of industrial tubes, they have no influence on the price of the main raw material, namely copper, which represents about two thirds of the final price paid by their customers. In that regard, the applicants point out that the price of the metal is determined by daily quotations of the LME and that, in procuring that metal, they merely follow the instructions given by the buyers of industrial tubes. It is therefore the customers themselves who determine the price of the metal. Consequently, the price of the metal is only an element to be passed on to customers. Thus, the real economic weight of the market was limited to the processing margin.

71 On the strength of the above, the applicants argue that the Commission should have deducted about two thirds of the overall price of the products in question when assessing the size of the market concerned, which would have led to the determination of a lower starting amount for the fine. The applicants argue that, by failing to deduct the price of copper from the turnover of the market concerned, the Commission ignored the economic reality of the market and determined a starting amount for the fine which was exaggerated in relation to the seriousness of the infringement.

72 The Commission argues that the applicants' plea should be dismissed. The Commission further insists, in its rejoinder, that the applicants should specify whether they deny having participated in an infringement affecting the industrial tubes industry as a whole. The Commission argues that, if that is indeed the case, this is an inadmissible plea, because it was not raised at the application stage. Moreover, the Commission maintains that such a denial would lead it to ask the Court to increase the amount of the fine imposed on the applicants, since the latter benefited from a 50% reduction of the said amount for having, inter alia, stated that they did not challenge the materiality of the facts on which the Commission based its accusations.

73 In their written observations on the Commission's request, the applicants argue that they do not deny having participated in a single infringement covering the sharing of markets and customers, the implementation of a system of market leader on the market concerned, and agreements on conditions for supplying industrial tubes. They also admit that that infringement affected the industrial tubes industry as a whole. However, they emphasise that the infringement did not extend to the price of copper.

Findings of the Court

74 It should be noted at the outset that there is no need to adjudicate either on the Commission's plea of inadmissibility or its counterclaim. The applicants have clearly indicated in their observations on the Commission's request that they admit that the infringement affected the industrial tubes industry as a whole.

75 As regards the substance, it should be noted, first, that the methodology set out in the Guidelines, which were applied by the Commission in the contested decision (see paragraph 31 above), corresponds to a flat-rate logic, whereby the overall starting amount of the fine, determined in relation to the seriousness of the infringement, is calculated by reference to the nature of the infringement, its actual impact on the market when it is measurable and the extent of the geographical market concerned (Section 1 A, first paragraph, of the Guidelines). Subsequently, the overall starting amount of the fine is individualised for each participant by reference, in particular, to its size.

76 Moreover, for the purposes of determining the starting amount of the fine, the Commission may have regard to the size of the market affected but is not obliged to do so (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 134; and Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 149 and 150).

77 In the light of that case-law, it is apparent that the applicants' premiss, according to which the size of the relevant market is, as such, a decisive factor for assessing the seriousness of an infringement, and, thus, for assessing the starting amount of a fine, is unfounded.

78 It is, however, clear from the contested decision that the Commission did, in this case, choose to take account of the size of the industrial tubes market in the EEA in its assessment of the seriousness of the infringement in question. Although the Commission had already concluded, on the basis of the nature of the infringement, that it was 'very serious' within the meaning of the Guidelines (recital 294), it did, in the contested decision, determine the seriousness of the infringement and thus the general starting point for the fine taking into account the actual effects of the cartel on the market (recitals 295 to 314), the geographical extent of the market in question (recitals

315 to 317) and the fact that the industry forming the subject of the infringement was an important market, the size of which in the EEA was assessed at EUR 288 million (recitals 318 and 319).

79 Whilst, for the purposes of assessing the seriousness of the infringement and the general starting point of the fine, the size of the market concerned constituted only one of the factors used by the Commission in the contested decision, the fact remains that the latter did in fact determine the said amount taking account of it. Therefore, the Commission's statement that the starting amount of the fine imposed on the applicants would not necessarily have been less than EUR 11.55 million if the price of copper had been deducted from that market turnover must be rejected.

80 It therefore needs to be examined whether the Commission was wrong, when assessing the size of the affected market, to take the price of copper into account.

81 The applicants argue in that regard, first, that the price of copper is outside the control of industrial tube manufacturers, since it is fixed in accordance with the LME, and that, moreover, it is the buyers of industrial tubes who themselves decide at what price the metal is acquired.

82 It must nevertheless be held that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Commission has rightly pointed out, there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which, therefore, cannot be excluded from its

turnover when fixing the starting amount of the fine (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 5 030 and 5 031). The fact that the price of copper constitutes an important part of the final price of industrial tubes or that the risk of fluctuations of copper prices is far higher than for other raw materials does not invalidate that conclusion.

83 This Court therefore finds that the Commission was right to take account of the copper price for the purposes of determining the size of the market concerned. The second plea is thus also unfounded.

84 The action must therefore be dismissed.

Costs

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the Commission's application.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. Dismisses the action.

2. Orders Outokumpu Oyj and Luvata Oy to pay the costs.

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 6 May 2009.

[Signatures]