JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

19 May 2010 *

In Case T-21/05,

Chalkor AE Epexergasias Metallon, established in Athens (Greece), represented by I. Forrester QC, A. Schulz and A. Komninos, lawyers,

applicant,

v

European Commission, represented by P. Oliver and S. Noë, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for cancellation or reduction of the fine imposed on the applicant by Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 — Copper plumbing tubes),

THE GENERAL COURT (Eighth Chamber),

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

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2008,

gives the following

Judgment

Background

1 Chalkor AE Epexergasias Metallon ('Chalkor' or 'the applicant') is a company incorporated under Greek law and listed on the Athens stock exchange (Greece). Viohalco SA has a majority shareholding in the applicant.

1. *Administrative procedure*

2 Following the communication of information by Mueller Industries Inc. ('Mueller') in January 2001, the Commission of the European Communities carried out unannounced inspections at the premises of several undertakings in the copper tubes industry in March 2001, 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 1959-1962, p. 87).

3 On 9 and 10 April 2001, further inspections were carried out at the premises of KME Germany AG (formerly KM Europa Metal AG), and of Outokumpu Oyj and Luvata Oy (formerly Outokumpu Copper Products Oy) (together 'the Outokumpu group'). 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') with regard both to industrial tubes and to plumbing tubes. Following further investigations, the Commission divided its inquiry in relation to copper tubes into three separate proceedings, namely Case COMP/E-1/38.069 (Copper plumbing tubes), Case COMP/E-1/38.121 (Fittings) and Case COMP/E-1/38.240 (Industrial tubes).

4 By letter of 30 May 2001, the Outokumpu group sent the Commission a memorandum together with a number of annexes describing the copper tube industry and the collusive agreements relating to it.

5 On 5 June 2002, in Case COMP/E-1/38.240 (Industrial tubes), interviews concerning the Outokumpu group's offer of cooperation took place, at the Commission's initiative, with representatives of the group. The Outokumpu group also indicated its willingness for the Commission to conduct interviews with employees who were involved in the arrangements in Case COMP/E-1/38.069 (Copper plumbing tubes).

6 In July 2002, in Case COMP/E-1/38.240 (Industrial tubes), the Commission sent requests for information under Article 11 of Regulation No 17 to Wieland-Werke AG ('Wieland') and to the KME group (comprising KME Germany, KME France SAS (formerly Tréfimétaux SA) and KME Italy SpA (formerly Europa Metalli SpA)), and also invited the Outokumpu group to disclose further information. On 15 October 2002, the KME group replied to the request for information. Its reply included a statement and a request for application of the 1996 Leniency Notice in Case COMP/E-1/38.069 (Copper plumbing tubes). In addition, the KME group gave the Commission permission to use all the information provided in the context of Case COMP/E-1/38.240 (Industrial tubes) in Case COMP/E-1/38.069 (Copper plumbing tubes).

7 On 23 January 2003, Wieland submitted to the Commission a statement including a request for application of the 1996 Leniency Notice in Case COMP/E-1/38.069 (Copper plumbing tubes).

8 On 3 March 2003, the Commission sent requests for information in relation to Case COMP/E-1/38.069 (Copper plumbing tubes) to the Boliden group (comprising Boliden AB, Outokumpu Copper Fabrication AB (formerly Boliden Fabrication AB) and Outokumpu Copper BCZ SA (formerly Boliden Cuivre & Zinc SA)), to HME Nederland BV ('HME') and to Chalkor, as well as, on 20 March 2003, to the IMI group (comprising IMI plc, IMI Kynoch Ltd and Yorkshire Copper Tube).

9 On 9 April 2003, Chalkor's representatives met Commission staff and requested application of the 1996 Leniency Notice in Case COMP/E-1/38.069 (Copper plumbing tubes).

10 On 29 August 2003, the Commission adopted a statement of objections in Case COMP/E-1/38.069 (Copper plumbing tubes) against the companies concerned. After those companies had been given access to the file electronically and had submitted written observations, they took part — with the exception of HME — in a hearing on 28 November 2003.

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

2. *The contested decision*

12 On 3 September 2004, the Commission adopted Decision C(2004) 2826 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case

COMP/E-1/38.069 — Copper plumbing tubes) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* on 13 July 2006 (OJ 2006 L 192, p. 21).

13 The contested decision includes, in particular, the following provisions:

'*Article 1*

The following undertakings infringed 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 copper plumbing tubes sector:

(a) Boliden …, together with [Outokumpu Copper Fabrication] and [Outokumpu Copper BCZ], from 3 June 1988 until 22 March 2001;

(b) [Outokumpu Copper Fabrication], together with Boliden … and [Outokumpu Copper BCZ], from 3 June 1988 until 22 March 2001;

(c) [Outokumpu Copper BCZ], together with Boliden … and [Outokumpu Copper Fabrication], from 3 June 1988 until 22 March 2001;

(d) Austria Buntmetall AG:

(i) together with Buntmetall Amstetten [GmbH], from 29 August 1998 at the latest until 8 July 1999, and

(ii) together with [Wieland] and Buntmetall Amstetten …, from 9 July 1999 until 22 March 2001;

(e) Buntmetall Amstetten …:

(i) together with Austria Buntmetall …, from 29 August 1998 at the latest, until 8 July 1999, and

(ii) together with [Wieland] and Austria Buntmetall …, from 9 July 1999 until 22 March 2001;

(f) [Chalkor] from 29 August 1998 at the latest, until at least beginning of September 1999;

(g) [HME] from 29 August 1998 at the latest, until 22 March 2001;

(h) IMI … together with IMI Kynoch … and Yorkshire Copper Tube …, from 29 September 1989 until 22 March 2001;

(i) IMI Kynoch … together with IMI … and Yorkshire Copper Tube …, from 29 September 1989 until 22 March 2001;

(j) Yorkshire Copper Tube … together with IMI … and IMI Kynoch …, from 29 September 1989 until 22 March 2001;

(k) [KME Germany]:

(i) individually, from 3 June 1988 until 19 June 1995, and

(ii) together with [KME France] and [KME Italy], from 20 June 1995 to 22 March 2001;

(l) [KME Italy]:

(i) together with [KME France], from 29 September 1989 to 19 June 1995, and

(ii) together with [KME Germany] and [KME France], from 20 June 1995 to 22 March 2001;

(m) [KME France]:

(i) together with [KME Italy], from 29 September 1989 to 19 June 1995, and

(ii) together with [KME Germany] and [KME Italy], from 20 June 1995 to 22 March 2001;

…

(s) Outokumpu … together with [Luvata], from 29 September 1989 until 22 March 2001;

(t) [Luvata], together with Outokumpu …, from 29 September 1989 until 22 March 2001;

(u) [Wieland]:

(i) individually from 29 September 1989 until 8 July 1999, and

(ii) together with Austria Buntmetall … and Buntmetall Amstetten …, from 9 July 1999 until 22 March 2001.

Article 2

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

(a) Boliden …, [Outokumpu Copper Fabrication] and [Outokumpu Copper BCZ] jointly and severally: EUR 32.6 million;

(b) Austria Buntmetall … and Buntmetall Amstetten … jointly and severally: EUR 0.6695 million;

(c) Austria Buntmetall …, Buntmetall Amstetten … and [Wieland] jointly and severally: EUR 2.43 million;

(d) [Chalkor]: EUR 9.16 million;

(e) [HME]: EUR 4.49 million;

(f) IMI …, IMI Kynoch … and Yorkshire Copper Tube … jointly and severally: EUR 44.98 million;

(g) [KME Germany]: EUR 17.96 million;

(h) [KME Germany], [KME France] and [KME Italy] jointly and severally: EUR 32.75 million;

(i) [KME Italy] and [KME France] jointly and severally: EUR 16.37 million;

(j) Outokumpu … and [Luvata] jointly and severally: EUR 36.14 million;

(k) [Wieland] individually: EUR 24.7416 million.

…'

14 The Commission took the view that the undertakings concerned had participated in a single, continuous, complex and, in the case of the Boliden group, the KME group and Wieland, multiform infringement ('the cartel' or 'the infringement at issue'). The Commission stated that national arrangements were not, as such, covered by the contested decision (recitals 2 and 106 of the contested decision).

Relevant products and markets

15 The industry concerned — copper tube manufacturing — encompasses two product groups: (i) industrial tubes, which are divided into various sub-groups based on their end use (air-conditioning and refrigeration, fittings, gas heaters, filter dryers and telecommunications), and (ii) plumbing tubes, also called 'sanitary tubes', 'water tubes' or 'installation tubes', which are used for water, oil, gas and heating installations in the construction industry (recital 3 of the contested decision).

16 The Commission took the view that Cases COMP/E-1/38.069 (Copper plumbing tubes) and COMP/E-1/38.240 (Industrial tubes) concerned two separate infringements. It relied in that regard mainly on the fact that 'the arrangements pertaining to plumbing tubes on the one hand and those relating to industrial tubes on the other hand involved different companies (and employees), and were organised in a different way'. The Commission also took the view that the plumbing tube industry differed from the industrial tube industry as regards end consumers, end use and technical specifications for the products (recitals 4 and 5 of the contested decision).

17 With regard to copper plumbing tubes, the Commission stated in the contested decision that this product group comprised two 'sub-families' of products: plain copper plumbing tubes and plastic-insulated copper plumbing tubes. It noted that 'plain copper plumbing tubes and plastic-insulated copper plumbing tubes are not necessarily substitutable and might constitute distinct product markets when assessed under the Commission Notice on the definition of relevant market for the purposes of Community competition law' (OJ 1997 C 372, p. 5). However, for the purposes of the contested decision, the Commission took the view that those two 'sub-families' of products were to be regarded as 'one product group … because the arrangements pertaining to both sub-families of products involved essentially the same companies (and employees) and were organised in a similar way' (recitals 13 and 459 of the contested decision).

18 In the contested decision, the Commission also stated that the relevant geographic market was the European Economic Area (EEA). It took the view that, in 2000, the value of the EEA market in plain copper plumbing tubes was approximately EUR 970.1 million, and that in plastic-coated copper plumbing tubes EUR 180.9 million. The

aggregate value of those two markets was therefore assessed as EUR 1 151 million in 2000 in the EEA (recitals 17 and 23 of the contested decision).

Components of the infringement at issue

19 The Commission observed that the infringement at issue manifested itself in three separate but interconnected forms (recitals 458 and 459 of the contested decision). The first branch of the cartel consisted in the arrangements entered into between the 'SANCO producers'. The second branch of the infringement at issue comprised the arrangements concluded between the 'WICU and Cuprotherm producers'. Lastly, the third branch of the cartel involved the arrangements entered into within a wider group of plain copper plumbing tube producers and was referred to as 'the broader European arrangements'.

Arrangements between the 'SANCO producers'

20 SANCO is both a trade mark and the name of a specific technical process for the production of premium anti-corrosive copper plumbing tubes. The process was patented in 1980 by the company Usines à cuivre et à zinc. The Boliden group held the original patent for the production process until its expiry in 2000 but was not the proprietor of the SANCO trade mark in all European countries. Its competitor, the KME group, applied for and obtained registration of the SANCO trade mark in its own name in a number of European countries. Subsequently, the KME group patented a certain number of improvements in respect of the original patent and the two competitors granted each other cross-licences in respect of their respective patents and trade

marks. The KME group and the Boliden group have granted Wieland trade mark and patent licences since 1981 (recitals 115 to 118 of the contested decision).

21 The Commission found in the contested decision that, since 1988, the arrangements between the 'SANCO producers' had gone beyond a mere licensor/licensee relationship. According to the Commission, from June 1988 until the end of the first half of 1994 there were agreements between those producers — the KME group, the Boliden group and Wieland — on target prices and discount rates and on the allocation of volumes and market shares ('the SANCO arrangements'). Monitoring of the implementation of those arrangements was based mainly on the communication among the 'SANCO producers' of their production and sales figures (recitals 125 to 146 and 456 of the contested decision).

Arrangements between the 'WICU and Cuprotherm producers'

22 WICU and Cuprotherm are trade marks relating to patented plastic-coated copper plumbing tubes.

23 The WICU trade mark and associated patents belong to the KME group, which, inter alia, granted a trade mark and patent licence to Wieland. Conversely, the Cuprotherm trade mark and associated patent belong to Wieland, which granted a trade mark and patent licence to the KME group (recital 121 of the contested decision).

24 The Commission found in the contested decision that the arrangements between the KME group and Wieland concerning WICU and Cuprotherm tubes went beyond a mere licensor/licensee relationship. The KME group and Wieland had anti-competitive contacts in the form of an exchange of sensitive information and coordination of volumes and prices with respect to plastic-coated copper plumbing tubes (the 'WICU and Cuprotherm arrangements') (recital 149 of the contested decision).

Broader European arrangements

25 In the contested decision the Commission stated that, in addition to the SANCO arrangements and the WICU and Cuprotherm arrangements, the infringement at issue included a third branch, consisting of the arrangements between the members of a larger group of plain copper plumbing tube producers (recitals 102, 104, 105, 108 to 111, 147, 148, 461 and 462 of the contested decision).

26 The number of participants in that larger group was originally five: the KME group, Wieland, the Outokumpu group, the IMI group and Mueller ('the group of five'). Following the arrival of Chalkor, HME, the Boliden group and the Buntmetall group (comprising Austria Buntmetall and Buntmetall Amstetten), the number of participants rose to nine ('the group of nine') (recital 216 of the contested decision).

27 According to the Commission, the members of the group of five and the group of nine attempted to stabilise the plain copper plumbing tube market by using market shares of a reference year as a basis for fixing a target for future market shares. Furthermore, it found in the contested decision that the members had reached agreement

on exchange of sensitive information, allocation of market shares, monitoring of sales volumes, a 'market leadership' mechanism and coordination of prices, including price-lists, the application of 'price-lines' and rebates (recital 192 of the contested decision).

Duration and continuous nature of the infringement at issue

28 The Commission noted in the contested decision that the infringement at issue had started on 3 June 1988 in the case of the KME group and the Boliden group, on 29 September 1989 in the case of the IMI group, the Outokumpu group and Wieland, on 21 October 1997 in the case of Mueller, and on 29 August 1998 at the latest in the case of Chalkor, the Buntmetall group and HME. As regards the date on which the infringement came to an end, the Commission found that this was 22 March 2001, except in the case of Mueller and Chalkor which, according to the Commission, ceased to participate in the cartel on 8 January 2001 and in September 1999 respectively (recital 597 of the contested decision).

29 As regards the continuous nature of the infringement at issue, in the case of the Boliden group, the IMI group, the KME group, the Outokumpu group and Wieland, the Commission observed in the contested decision that, although there were periods of reduced cartel activity between 1990 and December 1992, and between July 1994 and July 1997, the unlawful activity was never entirely interrupted, so that the infringement at issue effectively constituted a single infringement that was not time-barred (recitals 466, 471, 476, 477 and 592 of the contested decision).

30 With regard to HME, the Buntmetall group and Chalkor, it is clear from the contested decision that the Commission was unable to prove their participation in the cartel for the period before 29 August 1998 (recitals 592 and 597 of the contested decision).

Determination of the amount of the fines

31 In the contested decision, the Commission imposed fines, pursuant to Article 23(2) 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) and Article 15(2) of Regulation No 17, on the Boliden group, the Buntmetall group, Chalkor, HME, the IMI group, the KME group, the Outokumpu group and Wieland (recital 842 and Article 2 of the contested decision).

32 The amounts of the fines were fixed by the Commission in accordance with the gravity and duration of the infringement at issue, those being the two criteria explicitly mentioned in Article 23(3) of Regulation No 1/2003 and Article 15(2) of Regulation No 17, which, according to the contested decision, was applicable at the time of the infringement at issue (recitals 601 to 603 of the contested decision).

33 In fixing the amount of the fine imposed on each undertaking, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'), even if it did not systematically refer to them. In the contested

decision, the Commission also assessed whether, and to what extent, the undertakings concerned met the requirements laid down in the 1996 Leniency Notice.

Starting amount of the fines

— Gravity

34 In assessing the gravity of the infringement at issue, the Commission took account of the nature of the infringement, its actual impact on the market and the extent and size of the relevant geographic market (recitals 605 and 678 of the contested decision).

35 It stated that, by their nature, market-sharing and price-fixing practices of the kind at issue in the present case constituted a very serious infringement, and found that the geographic market affected by the cartel corresponded to the territory of the EEA. The Commission also took account of the fact that the copper plumbing tubes market was a very important industrial sector, with an estimated market value in the EEA of EUR 1 151 million in 2000, the last full year of the cartel (recitals 606 and 674 to 678 of the contested decision).

36 As regards the actual impact on the market, the Commission observed that there was sufficient proof that the cartel had overall had an impact on the relevant market,

particularly on prices, although it was not possible to quantify it precisely (recitals 670 and 673 of the contested decision). It based that finding on a number of factors. First of all, it relied on the implementation of the cartel, referring to the fact that the participants had exchanged information on sales volumes and price levels (recitals 629 and 630 of the contested decision).

37 Second, it took into account the fact that the members of the cartel held a significant share — 84.6% — of the EEA market (recital 635 of the contested decision).

38 Third, the Commission relied on tables, memoranda and notes drawn up by members of the cartel in connection with its meetings. These documents showed that prices had increased during certain periods of the cartel and that its members had achieved additional earnings compared with earlier periods. Some of the documents indicated that the people involved in the cartel took the view that it had enabled the undertakings concerned to achieve their price targets. The Commission also relied on the statements made by Mr M, a former director of one of the companies in the Boliden group, and by Wieland, by the Boliden group and by Mueller in the context of their respective cooperation (recitals 637 to 654 of the contested decision).

39 Finally, the Commission found that the respective market shares of the cartel participants had remained relatively stable throughout the period of the infringement, although customers had fluctuated between the participants (recital 671 of the contested decision).

40 The Commission concluded from this that the undertakings concerned had committed a very serious infringement (recital 680 of the contested decision).

— Differential treatment

41 In the contested decision the Commission identified four groups which it regarded as being representative of the relative importance of the undertakings involved in the infringement at issue. The Commission's division of the members of the cartel into several categories was based on the respective market shares of the cartel members in the sales of the relevant products in the EEA in 2000. Consequently, the KME group was regarded as being the main player in the relevant market and was placed in the first category. The Wieland group (comprising Wieland and the Buntmetall group, of which Wieland took control in July 1999) and the IMI and Outokumpu groups were regarded as medium-sized operators in that market and were placed in the second category. The Boliden group was placed in the third category. HME and Chalkor were placed in the fourth category (recitals 681 to 692 of the contested decision).

42 Market shares were determined on the basis of the turnover achieved by each offender from sales of plumbing tubes in the combined market for plain and plastic-coated copper plumbing tubes. Therefore, the market shares of the undertakings which did not sell WICU and Cuprotherm tubes were calculated by dividing their turnover of plain copper plumbing tubes by the overall size of the combined market for plain and plastic-coated copper plumbing tubes (recitals 683 and 692 of the contested decision).

43 The Commission therefore set the starting amount of the fines at EUR 70 million for the KME group, EUR 23.8 million for the Wieland, IMI and Outokumpu groups, EUR 16.1 million for the Boliden group and EUR 9.8 million for Chalkor and for HME (recital 693 of the contested decision).

44 In view of the fact that Wieland and the Buntmetall group formed a single undertaking after July 1999 and that, until June 1995, KME France and KME Italy jointly formed an undertaking separate from KME Germany, the starting amounts of the fines imposed on each of them were fixed as follows: EUR 35 million for the KME group (KME Germany, KME France and KME Italy jointly and severally); EUR 17.5 million for KME Germany; EUR 17.5 million for KME Italy and KME France jointly and severally; EUR 3.25 million for the Wieland group; EUR 19.52 million for Wieland and EUR 1.03 million for the Buntmetall group (recitals 694 to 696 of the contested decision).

45 In order to take account of the need to set the fine at a level that would ensure its deterrent effect, the Commission increased the starting amount of the fine imposed on the Outokumpu group by 50%, thus taking it to EUR 35.7 million, on the basis that its worldwide turnover — in excess of EUR 5 billion — indicated that its size and economic power were such as to justify such an increase (recital 703 of the contested decision).

Basic amount of the fines

46 It is apparent from the contested decision that the Commission increased the starting amounts of the fines by 10% per full year of infringement and by 5% for any additional

period of six months or more but less than a year. Accordingly, the Commission found that:

— since the IMI group had participated in the cartel for 11 years and 5 months, the starting amount of the fine of EUR 23.8 million should be increased by 110%;

— since the Outokumpu group had participated in the cartel for 11 years and 5 months, the starting amount of the fine of EUR 35.7 million fixed following the increase for deterrence purposes should be increased by 110%;

— since the Boliden group had participated in the cartel for 12 years and 9 months, the starting amount of the fine of EUR 16.1 million should be increased by 125%;

— since Chalkor had participated in the cartel for 12 months, the starting amount of the fine of EUR 9.8 million should be increased by 10%;

— since HME had participated in the cartel for 2 years and 6 months, the starting amount of the fine of EUR 9.8 million should be increased by 25%;

— since the KME group had participated in the cartel for 5 years and 7 months, the starting amount of the fine of EUR 35 million should be increased by 55%;

— since KME Germany had participated in the cartel for 7 years and 2 months, the starting amount of the fine of EUR 17.5 million should be increased by 70%;

— since KME France and KME Italy had participated in the cartel for 5 years and 10 months, the starting amount of the fine of EUR 17.5 million should be increased by 55%;

— since Wieland was held to be individually liable for a period of 9 years and 9 months, and jointly and severally liable with the Buntmetall group for an additional period of 1 year and 8 months, the starting amount of the fine of EUR 19.52 million for which Wieland was solely liable should be increased by 95%, and the starting amount of the fine of EUR 3.25 million for which Wieland and the Buntmetall group were jointly and severally liable should be increased by 15% (recitals 706 to 714 of the contested decision).

47 Therefore, the basic amounts of the fines imposed on the undertakings involved are as follows:

— the KME group: EUR 54.25 million;

— KME Germany: EUR 29.75 million;

— KME France and KME Italy (jointly and severally): EUR 27.13 million;

— the Buntmetall group: EUR 1.03 million;

— the Wieland group: EUR 3.74 million;

— Wieland: EUR 38.06 million;

— the IMI group: EUR 49.98 million;

— the Outokumpu group: EUR 74.97 million;

— Chalkor: EUR 10.78 million;

— HME: EUR 12.25 million;

— the Boliden group: EUR 36.225 million (recital 719 of the contested decision).

Aggravating and attenuating circumstances

48 The basic amount of the fine imposed on the Outokumpu group was increased by 50% on the ground that it was responsible for a repeat infringement, having been the addressee of Commission Decision 90/417/ECSC of 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) (recitals 720 to 726 of the contested decision).

49 In respect of attenuating circumstances, the Commission took into account the fact that the KME and Outokumpu groups had provided it with information when each cooperated to an extent not covered by the 1996 Leniency Notice.

50 Therefore, the Commission reduced the basic amount of the fine imposed on the Outokumpu group by EUR 40.17 million, corresponding to the fine that would have been imposed on it for the period of the infringement from September 1989 to July 1997, the finding in respect of which had been made possible by the information which had been provided to the Commission (recitals 758 and 759 of the contested decision).

51 As regards the KME group, the basic amount of the fine which was imposed on it was reduced by EUR 7.93 million for its cooperation, which had enabled the Commission to establish that the infringement at issue extended to plastic-coated copper plumbing tubes (recitals 760 and 761 of the contested decision).

Application of the 1996 Leniency Notice

52 Under Section D of the 1996 Leniency Notice, the Commission granted reductions of fines of 50% to the Outokumpu group, 35% to the Wieland group, 15% to Chalkor,

10% to the Boliden group and to the IMI group and 35% to the KME group. HME was not granted any reduction under that notice (recital 815 of the contested decision).

Final amount of the fines

53 Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission set the amounts of the fines to be imposed on the addressees of the contested decision as follows:

— the Boliden group: EUR 32.6 million;

— the Buntmetall group: EUR 0.6695 million;

— Chalkor: EUR 9.16 million;

— HME: EUR 4.49 million;

— the IMI group: EUR 44.98 million;

— the KME group: EUR 32.75 million;

— KME Germany: EUR 17.96 million;

— KME France and KME Italy (jointly and severally): EUR 16.37 million;

— the Outokumpu group: EUR 36.14 million;

— the Wieland group: EUR 2.43 million;

— Wieland: EUR 24.7416 million (recital 842 of the contested decision).

Procedure and forms of order sought

54 By application lodged at the Registry of the Court on 21 January 2005, the applicant brought the present action.

55 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber to which, in consequence, the present case was assigned.

56 The applicant claims that the Court should:

— annul Article 1(f) and Article 2(d) of the contested decision to the extent that a fine is thereby imposed on it;

— in the alternative, reduce the fine imposed on it;

— order the Commission to pay the costs.

57 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

58 The applicant puts forward six pleas in law in support of the present action alleging, respectively, that (i) the Commission failed to take account of the fact that the applicant was coerced into participating in the cartel; (ii) the starting amount of the fine was set incorrectly; (iii) the starting amount of the fine was wrongly increased by reason of the duration of the cartel; (iv) attenuating circumstances were not taken into account; (v) the 1996 Leniency Notice was misapplied; and (vi) the amount of the fine was disproportionate.

59 Before examining the pleas raised by the applicant, it should be pointed out that it is clear from recitals 601 and 842 of the contested decision that the fines which the Commission imposed for the infringement were imposed by virtue of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. Furthermore, the Commission fixed the amount of the fines by applying the method set out in the Guidelines and the 1996 Leniency Notice (see paragraph 33 above).

60 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 which are compatible with the principle of equal treatment (see Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91 and the case-law cited).

61 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 principle of the Guidelines and, second, of the general 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).

62 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 Regulations No 17 and No 1/2003, as interpreted by the Court of Justice (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 61 above, paragraph 267).

63 Therefore, in areas where the Commission has maintained a discretion, for example as regards the uplift for duration, 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).

64 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 Court 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, and Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).

1. *Plea alleging that the Commission failed to take account of the fact that the applicant was coerced into participating in the cartel*

Arguments of the parties

65 The applicant submits, in essence, that its participation in the cartel was essentially prompted by fear of retaliation by members of the group of five, the main operators in the relevant market. It claims to have been a victim, not an instigator or dominant member of the cartel. Consequently it claims that, although it infringed Article 81 EC, it should not be fined, or should be fined only a reduced or even a symbolic amount.

66 The applicant refers in that context to a number of previous Commission decisions in which undertakings which were the victims of coercive action requiring them to take part or to continue to take part in an anti-competitive agreement were not fined at all or were penalised by fines that were substantially reduced.

67 In support of its assertion that it was put under pressure, the applicant claims that, being a small undertaking and a relative newcomer to the Western European markets, it needed from time to time to attend industry meetings as a means of legitimately gathering information about the plumbing tube market. Therefore, when it decided to attend the meeting on 28 August 1998 to which the Commission refers in the contested decision, it did so convinced that it had been invited in order to discuss the 'European Drinking Water Directive' and was surprised by the collusive nature of the meeting. During that meeting, the applicant was the victim of coercive action which induced it to attend six subsequent meetings, albeit in a passive and subordinate capacity.

68 At those meetings, the market leaders in each of the five countries concerned — Germany, United Kingdom, France, Spain and the Netherlands — proposed price and discount targets for the coming months. However, the applicant did not change its pricing or sales policy in those five Western markets, and its exports to those countries actually continued to increase.

69 The applicant also refers to various documents in the Commission's file, in particular from the KME group and from Wieland. It maintains that, in view of the 'conspiratorial' context in which those documents were drawn up, they confirm, first of all, that the group of five intended to intimidate undertakings which refused to yield to their entreaties and, second, that the threats made against the applicant in the meeting on

28 August 1998 had been planned in advance and that it had reason to regard them as credible.

70 The Commission contends that the present plea should be dismissed.

Findings of the Court

71 The applicant's reference to previous Commission decisions must be rejected at the outset, since the Commission's practice in previous decisions 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).

72 Furthermore, the case-law shows that pressure which is brought to bear by undertakings and which is intended to lead other undertakings to participate in an infringement of competition law does not, however great, absolve the undertaking concerned from its responsibility for the infringement committed or in any way alter the gravity of the infringement and cannot constitute an attenuating circumstance for the purposes of calculating fines, since the undertaking concerned could have reported any pressure to the competent authorities and made a complaint to them (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 61 above, paragraphs 369 and 370; Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647, paragraph 50; and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 63).

73 The present plea must therefore be dismissed.

2. *Plea alleging that the starting amount of the fine was set incorrectly*

74 By this plea, the applicant submits that, when setting the starting amount of the fine imposed on the applicant, the Commission erred in law in so far as it failed to take into consideration the fact that the applicant had participated only in the third branch of the cartel and the fact that the geographic extent of the arrangements in which it had been involved was limited to five countries.

The applicant's limited participation in the cartel

Arguments of the parties

75 The applicant claims that the differential treatment applied by the Commission, which is based on the market shares of the cartel participants, is inadequate and infringes the principle of equal treatment since the difference between the participants' market shares does not reflect its limited participation in the cartel.

76 According to the applicant, it is undisputed that the infringement for which it is held responsible consists solely in its participation, in the context of the third branch of the cartel, in the unlawful cooperation of the group of nine between August 1998 and April 1999 as part of the broader European arrangements.

77 It maintains that both the cooperation observed in the SANCO arrangements and the WICU and Cuprotherm arrangements and the cooperation between the members of the group of five was more intense than the cooperation between the members of the group of nine.

78 The applicant also submits that the Commission was wrong to conclude in recital 690 of the contested decision that its participation in the cartel made the activities of the cartel more efficient. The applicant states in that regard that it never adhered to the quotas proposed under the broader European arrangements and that its sales to the countries covered by the cartel had, on the contrary, increased during its participation.

79 The applicant concludes that the starting amount of the fine imposed on it should be reduced to take account of the difference in the nature, extent and quality of its involvement in the cartel by comparison with the other participants.

80 The Commission contends that it is apparent from the contested decision that it found a single infringement comprising three branches.

81 It claims that, for the purposes of fixing the starting amount of the fine, it was not obliged to make a distinction between the applicant and the undertakings which had participated in the SANCO and the WICU and Cuprotherm arrangements, or between the members of the group of five and the members of the group of nine.

82 In the first place, the Commission alleges in that regard that the applicant's active participation in the cartel from 28 August 1998 until the beginning of September 1999 was not qualitatively or quantitatively different from that of the other offenders.

It also observes that the fact that certain undertakings participated in the cartel for longer than others does not alter the gravity of their infringement. A longer period of participation is reflected in the increase of the fine for duration.

83 In the second place, the Commission recalls that it has consistently been held that, in assessing the real impact of the infringement committed by each participant, the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market.

84 The division into different categories based on the turnover accounted for by products which have been the subject of a restrictive practice necessarily leads to starting amounts for fines that are roughly the same per percentage point of market share. This means that the starting point of a fine imposed on an undertaking with a large market share will be set at a higher level than that of a fine imposed on an undertaking with a lesser market share. That is why the starting amount of the fine imposed on the KME group was set at EUR 70 million, whereas the starting amount of the fine imposed on Chalkor was only EUR 9.8 million. Clearly that approach does not infringe the principle of equal treatment.

85 In the third place, the Commission contends that it is contrary to the case-law for an undertaking involved in two or three branches of a cartel to be punished more severely than another undertaking with the same market share but which participated in only one branch of that cartel (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 121; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 91; Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643; and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 91).

86 In the fourth place, the Commission observes that there is no proof that the SANCO arrangements and the WICU and Cuprotherm arrangements involved significantly closer cooperation than the cooperation within the broader European arrangements. Accordingly, there is no reason for the first two branches of the cartel to be regarded as more serious infringements of the rules on competition than the third branch.

87 In the fifth place, the Commission takes the view that there was no reason to differentiate within the broader European arrangements between the members of the group of five and the four other producers — the Boliden group, HME, the Buntmetall group and Chalkor — since the participation of those four producers was important for the functioning of the cartel and they benefited from it to the same extent as the other participants in the period between 1998 and 2001.

88 In the sixth place, the Commission maintains that Chalkor's participation made the activities of the cartel more effective. The mere fact that the members of the group of five invited Chalkor and three other companies to join them demonstrates that they were important for the cartel's effectiveness. The Commission claims that the fact that Chalkor's sales increased while it was participating in the cartel does not prove that its participation in cartel meetings did not reinforce the unlawful arrangements. The increase in sales could be accounted for by a seasonal effect or by the fact that, after a certain amount of time, Chalkor had fewer scruples about cheating the other offenders.

89 In the seventh place, the Commission contends that, even if it had found a more intense cooperation between some of the addressees of the contested decision, that finding would have resulted in higher fines being imposed on those undertakings rather than lower fines being imposed on the other addressees. Therefore, the Commission submits that, if the Court were to accept Chalkor's arguments on that point, it would have to consider, in the exercise of its unlimited jurisdiction, increasing the

fines imposed on the 'SANCO producers', namely the KME group, Wieland and the Boliden group, rather than reducing the fine imposed on Chalkor.

Findings of the Court

90 It is necessary to recall at the outset the principles established by the case-law as regards the individual liability which arises from an infringement of Article 81(1) EC, such as a cartel.

91 First of all, concerning liability for the infringement as such, the case-law shows that the fact that an undertaking has not participated directly in all the elements constituting an overall cartel cannot absolve it from liability for infringement of Article 81(1) EC if it is established that it must necessarily have known, first, that the collusion in which it was participating was part of an overall plan, and, second, that that overall plan included all the constituent elements of the cartel (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 87; Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 121; and Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraphs 130 and 131).

92 Having established the existence of a cartel and identified its participants, the Commission is required, in order to impose fines, to examine the relative seriousness of the participation of each of them. That is apparent both from the case-law (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 91 above, paragraphs 90 and 150; *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 61 above, paragraph 145; and *AC-Treuhand* v *Commission*, cited in paragraph 91 above, paragraph 133) and from the Guidelines, which provide for differential treatment in respect of the starting amount (specific starting amount) and for account to be taken of aggravating and attenuating circumstances allowing the amount of the fine to be

adjusted, notably by reference to the active or passive role of the undertakings concerned in the implementation of the infringement.

93 However, an undertaking may never be fined an amount which is calculated to reflect its participation in a collusion for which it is not held liable (Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraphs 79 to 82).

94 It is in the light of the abovementioned principles that the Court must examine the applicant's claim that the Commission did not take account of its limited participation in the cartel.

95 In the first place, it is necessary to consider the complaint relating to the applicant's non-participation in the SANCO arrangements and in the WICU and Cuprotherm arrangements.

96 In that context, it must be borne in mind that it is undisputed that the applicant participated only in the broader European arrangements and is being held liable only for its participation in that branch of the cartel (recital 461 of the contested decision). However, the Commission has not examined the question whether an offender who participates in a single branch of a cartel commits a less serious infringement, for the purposes of Article 23(3) of Regulation No 1/2003, than an offender who, in the context of the same cartel, participates in all of its branches. That question was particularly important in this case, since the applicant has not been held liable for the two other branches of the cartel, namely the SANCO and the WICU and Cuprotherm arrangements.

97 The Commission concluded, in recital 689 of the contested decision, that there was no need to treat offenders who had participated only in the broader European arrangements differently from those who had also participated in the SANCO arrangements, since the cooperation within the SANCO arrangements had not been significantly closer than that which existed within the broader European arrangements.

98 It must be held that the Commission's reasoning is erroneous, since a comparison between the intensity of the various branches of the cartel might have been relevant if the applicant had been involved in several branches of it, which was not the case here.

99 An undertaking whose liability is established in relation to several branches of a cartel contributes more to the effectiveness and the seriousness of the cartel than an offender involved in only one branch of it. Thus, the first undertaking commits a more serious infringement than the second.

100 In this respect, it must be emphasised that, in accordance with the principle of individual liability and that penalties should fit the individual offender, the Commission is required to take into account, when assessing the relative seriousness of the participation of each offender in a cartel, the fact that certain offenders may not be held liable, for the purposes of the judgment in *Commission* v *Anic Partecipazioni*, cited in paragraph 91 above (paragraph 87), for all the branches of that cartel.

101 With regard to the application of the Guidelines, that assessment necessarily has to be made at the stage when a specific starting amount is set, since the taking into account of attenuating circumstances only allows the basic amount of the fine to be adjusted by reference to the arrangements for the offender's implementation of the cartel. An offender who is not held responsible for certain branches of that cartel cannot have

been involved in the implementation of those aspects. The infringement of the rules of competition law is, owing to the limited scope of the infringement established in respect of that offender, less serious than that attributed to offenders who participated in all aspects of the infringement.

102 The Commission's argument that all the members of the broader European arrangements profited from the restriction on competition established by the 'SANCO producers' cannot be accepted, since it did not hold the applicant liable for the branch of the infringement in question concerning the SANCO arrangements. In that regard, it should also be noted that the anti-competitive impact of a cartel upon prices is by nature likely to benefit all suppliers present on the relevant market and not merely the undertakings which are members of that cartel.

103 As regards the judgments cited in paragraph 85 above to which the Commission refers in its rejoinder, suffice it to note that they do not relate to the question whether an offender who is held liable for a single branch of a cartel commits a less serious infringement than an offender who, within the same cartel, is held liable for all of its branches.

104 Having regard to the above, it must be concluded that the Commission infringed the principle of equal treatment by failing to take into consideration, when calculating the amount of the fines, the fact that, unlike the KME group, Wieland and the Boliden group, the applicant had participated in only one branch of the cartel, and by therefore treating different situations in an identical manner, without such treatment being objectively justified.

105 As regards the consequences to be drawn from that finding, the Commission proposes, as regards the SANCO arrangements, that the Court should increase the amounts

of the fines imposed on the 'SANCO producers' rather than reducing the fine imposed on the applicant. The Court considers, however, in the exercise of its unlimited jurisdiction, that the starting amount adopted by the Commission is appropriate in relation to the seriousness of the three branches of the cartel as a whole, and that the starting amount of the fine imposed on Chalkor should be reduced in order to take account of the fact that the Commission held it liable for participation only in the third branch of the cartel.

106 Furthermore, the Court must reject the Commission's arguments set out in paragraphs 83 and 84 above in so far as they may be regarded as a submission to the effect that the applicant's non-participation in the SANCO arrangements was sufficiently reflected in the specific starting amount of the fine imposed on it. That argument is based on the premiss that the market share of Chalkor, which did not sell SANCO tubes, was calculated on the basis of the aggregate turnover of all producers of plain copper plumbing tubes, including sales of SANCO tubes.

107 The SANCO arrangements and the broader European arrangements concerned the same relevant market, namely that for plain copper plumbing tubes. Therefore, the Commission was required, even in the absence of the SANCO arrangements, to take account of the turnover generated by sales of SANCO tubes in order to calculate the applicant's market share on the relevant market.

108 By contrast, as regards the WICU and Cuprotherm arrangements, the situation is different. Those arrangements concerned products which could not be substituted for plain copper plumbing tubes. Recital 459 of the contested decision shows that plain copper plumbing tubes and plastic-coated copper plumbing tubes constitute distinct relevant markets.

109 Accordingly, by calculating the market share of the applicant, which was active in the plain copper plumbing tube market, on the basis of turnover achieved in both the plain and plastic-coated copper plumbing tube markets, the applicant was in fact deemed to have a smaller market share and, therefore, allocated a lower specific starting amount than would have been set if its market share had been calculated solely on the basis of turnover in the market in respect of which it actually participated in the cartel.

110 In the second place, as regards the question whether the fact that cooperation within the group of five was more intense than cooperation within the group of nine justified different treatment with regard to fines, the Court finds as follows.

111 The group of five and the group of nine both operated in the third branch of the cartel, in respect of which the applicant has been held responsible. In recital 690 of the contested decision, the Commission stated that the applicant was not a member of the group of five because of its size. The applicant did not challenge that statement.

112 Consequently, the Commission cannot be blamed for concluding that the gravity of the applicant's participation in the broader European arrangements was adequately taken into consideration by the Commission's division of the offenders into categories on the basis of their market shares.

113 Having regard to all of the above, it is appropriate merely to amend the amount of the fine imposed on the applicant to reflect the fact that it did not participate in the SANCO arrangements. The specific consequences of that adjustment are detailed in paragraphs 183 to 186 below.

The extent of the geographic market in which the applicant participated in the cartel

Arguments of the parties

114 In essence, the applicant challenges the fact that, in using its market share as a basis for different treatment, the Commission included sales in Greece in addition to sales in Germany, France, Spain, the United Kingdom and the Netherlands. It claims that the geographic scope of the arrangements in which it was involved between August 1998 and September 1999 was limited to Germany, France, Spain, the United Kingdom and the Netherlands. By taking sales in Greece into account, the Commission increased the applicant's market share from 2.2% to 3.8%, amounting to a 72% increase in the starting amount of the fine imposed.

115 According to the applicant, the fact that it participated in the cartel following threats made in relation to the Greek market does not mean that Greece was part of the territory covered by the cartel. In the contested decision, the Commission confuses the subject-matter of the cartel and the means employed in connection with that cartel.

116 The Commission's claims that the applicant benefited from a tacit agreement not to compete on the home market of each member of the cartel are not supported by the evidence in the file. The Commission's assertions are, moreover, contradicted by conclusive evidence. There is nothing to indicate that, apart from the members of the group of five and the participants in the SANCO arrangements, the other participants in the cartel agreed to restrict, or in fact restricted, their sales in Greece. In reality, imports into Greece by the applicant's competitors rose from 3 263 tonnes in 1997

to 3 548 tonnes in 1999. Furthermore, the applicant's exports to France, Germany, the United Kingdom and Spain rose from 4 135 tonnes in the second half of 1998 to 5 201 tonnes in the first half of 1999, an increase of 26%.

117 According to the applicant, it would be illogical to claim that it adhered to a policy of not competing on the home markets of each participant in the cartel when its exports actually increased. First, it was not aware of the existence of such an agreement and, second, it did not participate in the cartel in order to protect its domestic market but for fear of retaliation (dumping) by the group of five on the Greek market.

118 The Commission contends that this complaint should be rejected.

Findings of the Court

119 It must be borne in mind that the Commission was entitled, in accordance with Section 1 A of the Guidelines, to take account of the extent of the relevant geographic market for the purposes of assessing the gravity of the infringement at issue.

120 In the present case, it found that the territory of the EEA constituted the relevant geographic market affected by the cartel (recital 17 of the contested decision). That finding was not challenged by the applicant, which merely claims that the infringement for which it has been held responsible covered only Germany, France, Spain, the United Kingdom and the Netherlands. That argument cannot be accepted.

121 Since the relevant geographic market corresponds to the territory of the EEA, it must be held that, even on the assumption that the Greek market was not affected by the infringement at issue, the Commission was entitled, in setting the amount of the applicant's fine, to take account of the applicant's sales in Greece.

122 In the light of the above, the present complaint must be rejected.

3. *Plea alleging that the starting amount of the fine was wrongly increased by reason of the duration of the cartel*

123 The applicant states that, given that its participation in the cartel lasted less than 12 months, the Commission made a manifest error by increasing the starting amount of the fine imposed on the applicant by 10% for duration. In the alternative, the applicant claims that the Commission should have applied a smaller increase.

Duration of participation in the cartel

Arguments of the parties

124 The applicant claims that the starting point for the infringement it has been found to have committed should be the date on which it participated in a collusive meeting for the second time, 10 September 1998, not the date on which it first attended a meeting of the cartel, namely 28 or 29 August 1998. It submits that it was ignorant of the real purpose and collusive nature of the meeting held in August 1998 until its

representatives took part in it. It also claims, by reference to an internal note prepared by one of its employees present at that meeting, that it did not agree to any unlawful conduct during that meeting. Its representatives expressly declined to accede to the requests made of them and stated that they had to consult Chalkor's management.

125 As regards the date on which the applicant ended its participation in the cartel, it states that this was when it ceased to participate in the cartel's activities and not when the other members of the cartel became aware of its withdrawal from the cartel. The applicant recalls that it ceased to participate in meetings of the cartel in April 1999 even though it continued until August 1999 to submit confidential data to its competitors on a monthly basis, its last submission being in respect of July 1999. Therefore, the applicant maintains that its participation in the cartel ended in July 1999 or, at the latest, in August 1999.

126 Consequently, the applicant takes the view that its participation in the cartel lasted less than 12 months and that, as the Guidelines show, no increase in the starting amount of the fine should have been applied to it for duration.

127 The Commission contends that this complaint should be rejected.

Findings of the Court

128 As a preliminary point, it must be observed that, although the applicant raised this complaint with a view to obtaining a reduction of the fine imposed on it, it is in fact also challenging the legality of Article 1(f) of the contested decision, according to

which the infringement imputed to the applicant lasted from 29 August 1998 at the latest until the beginning of September 1999.

129 In that context, it should be recalled that Article 81(1) EC does not apply unless there exists a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 69).

130 Furthermore, the case-law shows that it is sufficient for the Commission to establish that the undertaking concerned participated in obviously anti-competitive meetings between competitors in order to prove to the requisite legal standard that the undertaking participated in the cartel. Where participation in such 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 (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155).

131 In this instance, it has been established that, on 29 August 1998 at the latest, Chalkor participated in a meeting in connection with the cartel and that it became aware at least in the course of that meeting if not before of its obviously anti-competitive nature. The applicant has not been able to demonstrate that it had indicated to the other participants in that meeting that it was participating in that meeting in a spirit that was different from theirs and that it was opposed to the idea of collusion in the copper plumbing market.

132 On the contrary, as the Commission alleges, the applicant's internal notes indicate instead that, during that meeting, Chalkor's representatives were concerned about

the quota which they had been allocated and did not oppose the idea of collusion (recital 326 of the contested decision). The applicant's argument that its representatives indicated during that meeting that they had to consult their management might have been relevant if they had refrained from participating in subsequent collusive meetings, which is not the case.

133 In the light of the above, it must be held that the Commission did not make a mistake in finding that the applicant's participation in the cartel had started on 29 August 1998 at the latest.

134 With regard to the date on which the applicant ended its participation in the cartel, it must be noted that, under the information exchange system which was one of the constituent parts of the cartel (recitals 450 and 486 of the contested decision), the parties had agreed to submit their figures to the administrator of the system on a monthly basis (recitals 306 and 308 of the contested decision).

135 Therefore, in the absence of a formal cessation of its participation in that arrangement, it must be held that the applicant's withdrawal from that arrangement did not take effect until, at the earliest, the moment it failed to fulfil its monthly obligation to communicate sensitive data, that is in September 1999.

136 It follows from this that the Commission did not make a mistake in finding that the applicant was responsible for its participation in the cartel until the beginning of September 1999. Consequently, the complaint relating to the duration of Chalkor's participation in the cartel must be rejected.

Rate of increase

Arguments of the parties

137 The applicant submits that, even if it was established that its participation lasted 12 months, the rate of increase in the fine of 10% per year of infringement is disproportionate. It claims in that regard that its participation in the cartel became less intense after April 1999 and that the Commission should have increased the starting amount of the fine imposed on it by less than 10% to take account of that reduced intensity. It refers to a number of previous Commission decisions in that regard.

138 The applicant also claims that a comparison of the various increases for duration applied to the addressees of the contested decision confirms that the increase applied in respect of the applicant was unfair. In particular, an increase of 110% of the starting amount of the fine imposed on the Outokumpu group was applied for its participation of 11 years and 5 months, which would imply that 5 months were left out of account. However, that 5-month period amounts to almost half of the period of the applicant's participation in the cartel and considerably more than half of the period during which it participated in the meetings at issue. The same applies in respect of the Boliden group, since the starting amount of the fine imposed on that group was subject to an increase of 125% for its participation of 12 years and 9 months. The four months of participation which were not taken into account correspond to half of the period during which the applicant participated in the meetings at issue.

139 The Commission contends that the plea should be dismissed.

Findings of the Court

140 As a preliminary point, it must be stated that the previous Commission decisions referred to by the applicant are not relevant, since the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters (see paragraph 71 above).

141 It should also be noted that an increase in the amount of the fine by reference to duration is not limited to the situation in which there is a direct relation between the duration and serious harm caused to the objectives referred to in the competition rules (see, to that effect, *Michelin* v *Commission*, cited in paragraph 71 above, paragraph 278 and the case-law cited). It is, moreover, clear from the Guidelines that the Commission has not established any overlap or interdependence between assessment of the gravity and that of the duration of the infringement.

142 On the contrary, in the first place, it is clear from the general system of the Guidelines that they prescribe assessment of the gravity of the infringement as such for the purposes of fixing a starting amount for the fine. In the second place, the gravity of the infringement is analysed in relation to the characteristics of the undertaking concerned, notably its size and its position in the relevant market, which may give rise to a weighting of the starting amount, the allocation of the undertakings into categories and the fixing of a specific starting amount. In the third place, the duration of the infringement is taken into account for fixing the basic amount, and, in the fourth place, the Guidelines require account to be taken of aggravating and attenuating circumstances allowing the amount of the fine to be adjusted, notably by reference to the active or passive role of the undertakings concerned in the implementation of the infringement.

143 It follows that the mere fact that the Commission reserved for itself the possibility of increasing the fine per year of infringement, going in the case of infringements lasting 12 months or more up to 10% of the amount adopted for the gravity of the infringement, does not in any way oblige it to fix that uplift by reference to the intensity of the activities of the cartel or its effects, or to the gravity of the infringement. It is for the Commission to choose, in the context of its wide discretion (see paragraph 63 above), the uplift which it intends to apply in respect of the duration of the infringement.

144 In the present case, the Commission found that the applicant had participated in the infringement at issue for a period of 12 months and, accordingly, increased the starting amount of the fine imposed on it by 10%. In so doing, the Commission did not depart from the rules which it imposed upon itself in the Guidelines.

145 Moreover, the Commission's approach of increasing the starting amount of the fine by 10% per full year and 5% for any additional period of six months or more (see paragraph 46 above) does not, in the circumstances of this case, give rise to significant disparities between offenders. Therefore, there is no need for the Court to substitute its own assessment for that of the Commission as regards the rate of increase applied for duration.

146 It follows from all the foregoing that this plea must be dismissed in its entirety.

4. *Plea alleging that the voluntary cessation of the applicant's participation in the cartel was not taken into account*

Arguments of the parties

147 The applicant submits that the Commission should have taken into account, as an attenuating circumstance, the fact that it had voluntarily withdrawn from the meetings of the cartel in 1999, before the Commission opened its investigation. The applicant takes the view that, if the Commission's assertion that its participation reinforced the activities of the cartel is correct, its voluntary withdrawal should have weakened the cartel's activities.

148 The applicant notes that the Guidelines provide that the Commission will reduce the amount of the fine imposed on an undertaking where it terminates the infringement as soon as the Commission intervenes, in particular when it carries out inspection visits.

149 By contrast, withdrawal from a cartel before the Commission begins its inquiry is not recognised as an attenuating circumstance by the Guidelines. The applicant claims that it is illogical and 'bad justice' and 'bad policy' for no credit to be given to undertakings which withdraw voluntarily from a cartel. The applicant concludes that the voluntary termination of participation must be regarded as an attenuating circumstance in connection with the setting of the amount of a fine. Any other conclusion would be incompatible with the objective of the Commission's fining policy, which is deterrence. The voluntary termination of an infringement does not call for any element of deterrence.

150 The Commission contends that the plea should be dismissed.

Findings of the Court

151 It is sufficient to note that the case-law shows that the Commission is under no obligation, in the exercise of its discretion, to reduce a fine for the termination of an infringement which had already come to an end before the Commission intervened (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 128 and the case-law cited).

152 Furthermore, the fact that Chalkor voluntarily brought its infringement to an end before the Commission initiated its inquiry was taken sufficiently into account in the calculation of the duration of the infringement period found against Chalkor, so that it cannot rely on the third indent of Section 3 of the Guidelines.

153 The present plea must, therefore, be dismissed.

5. *Plea alleging that the reduction of the fine was insufficient, having regard to the applicant's cooperation pursuant to the 1996 Leniency Notice*

Arguments of the parties

154 The applicant takes the view that, in light of the benefit of its cooperation to the conduct of the inquiry, it should have been granted a more substantial reduction of the

fine under Section D of the 1996 Leniency Notice than the 15% reduction obtained. It points out that it could have chosen not to cooperate with the Commission and to withhold much of the evidence that was in its possession.

155 In that regard it submits that (i) it voluntarily and promptly provided the Commission, at the same stage of the procedure as the KME group and Wieland, with all the relevant information in its possession, (ii) the information which it provided was detailed and was useful to the Commission's inquiry, and (iii) because of its limited participation in the cartel, it was not in a position to provide the same amount of information as the KME and Outokumpu groups or Wieland.

156 The applicant also submits that it is difficult to understand why the Outokumpu and KME groups were granted a more substantial reduction of their fines than was granted to the applicant.

157 In support of its claim that the rate of reduction applied to the fine imposed on it was insufficient, the applicant again refers to previous Commission decisions.

158 Finally, the applicant notes that both the Boliden group and the IMI group obtained a reduction of 10% because they did not contest the facts set out in the statement of objections. Accordingly, given that the applicant did not contest the facts either, it should have been awarded a more substantial reduction for its cooperation than it actually obtained.

159 The Commission contends that the plea should be dismissed.

Findings of the Court

160 It must be stated, first of all, that the applicant's references to previous Commission decisions are entirely irrelevant, since the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters (see paragraph 71 above).

161 Next, it must be borne in mind that, according to settled case-law, a reduction in the fine on grounds of cooperation during the administrative procedure is based on the consideration that such cooperation facilitates the Commission's task of identifying an infringement (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 325, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363).

162 Finally, it must be noted that, in assessing the cooperation provided by members of a cartel, only an obvious error of assessment by the Commission is capable of being censured, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88). None the less, in making that assessment, the Commission cannot ignore the equal treatment principle.

163 In the present case, it is apparent from recitals 803 to 807 of the contested decision that the Commission took the view that the applicant's cooperation was of limited value, since it already had proof of the existence of the infringement at issue in its possession when that cooperation was provided.

164 The applicant did not put forward any evidence to cast doubt on that conclusion. It merely claimed that its cooperation could not have been more extensive because its participation in the cartel had been very limited in terms of both time and substance. That argument is, however, unfounded since the Commission cannot be required, when determining the rate of reduction pursuant to the 1996 Leniency Notice, to take into account factors other than the objective usefulness of the cooperation provided by an undertaking for the purposes of establishing an infringement.

165 It follows from the foregoing that the Commission cannot be criticised for, on the one hand, having reduced the fine imposed on Chalkor by 15% to take account of the information which it supplied and the fact that it did not contest the facts in the statement of objections and, on the other, for having reduced the fine imposed on the Boliden group and on the IMI group by 10% solely on the ground that they had not contested the facts set out in the statement of objections.

166 With regard to the reference to the rate of reduction of the fines applied to the KME group and to Wieland, the applicant concedes that their respective contributions were more extensive than its own. Similarly, it is undisputed that the Outokumpu group cooperated more than a year before the applicant. Consequently, there is no need to consider further the allegation of discrimination against the applicant as compared with those undertakings.

167 Finally, by the applicant's assertion that the rate of reduction which it was granted is insufficient since it could have chosen not to cooperate with the Commission and to withhold much of the evidence that was in its possession, the applicant is effectively implicitly challenging the conclusion in recital 803 of the contested decision, according to which a considerable part of the information provided by the applicant to the Commission fell within the ambit of the applicant's duty pursuant to Article 11 of Regulation No 17.

168 In that context, this Court has a comprehensive power of review as to whether the cooperation provided by the applicant goes beyond its obligation under Article 11 of Regulation No 17 and Article 18 of Regulation No 1/2003 to reply to the Commission's requests for information (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 531). However, it must be noted that the applicant did not specify in its written pleadings which parts of the information that it provided it could have omitted to communicate to the Commission.

169 In the light of the above, the present plea must be dismissed in its entirety.

6. *Plea alleging that the fine set was disproportionate*

Arguments of the parties

170 The applicant takes the view that the final amount of the fine imposed on it, which was set at EUR 9.16 million, is disproportionate by comparison with the fines imposed on the other undertakings to which the contested decision was addressed. In that regard it refers, in the first place, to the case of HME, which was of a similar size to the applicant at the material time and whose participation in the cartel lasted two and a half times longer. However, the final amount of the fine imposed on HME is only EUR 4.49 million.

171 In the second place, the applicant submits that the fine imposed on it is equivalent to a fine of EUR 760 000 per month of participation in the infringement, whereas the

fines imposed on other undertakings range from EUR 210 000 to EUR 440 000 per month of participation in the infringement.

172 In the third place, the applicant submits that the number of collusive meetings attended by an undertaking is an indication of its level of involvement in a cartel. It remarks that, for its attendance at seven meetings, it was fined EUR 1.83 million per meeting, whereas Wieland and KME, which attended virtually all of the 120 meetings held in connection with the cartel, were fined EUR 0.206 million and EUR 0.56 million respectively per meeting.

173 In the fourth place, the applicant claims that it is the only small, independent undertaking able to compete with large European producers. According to the applicant, the fine imposed on it for its passive participation in the cartel is unreasonably high and will have an impact on its ability to compete.

174 The Commission contends that the plea should be dismissed. It observes, in particular, that the final amount of the fine imposed on HME is the result of the tacit application of the 10% limit set by Article 23(2) of Regulation No 1/2003.

Findings of the Court

175 First, in view of the explanation provided by the Commission and the absence of any challenge by the applicant, the Court must dismiss the complaint relating to the difference between the final amount of the fine imposed on HME and that set for the applicant.

176 Second, even on the assumption that the applicant could argue that the amount of the fine imposed on it is capable of reducing its competitiveness, so as to demonstrate that the fine is disproportionate, it must be noted that the applicant has not put forward any specific evidence in this respect.

177 As to the remainder, it must be observed that the other arguments put forward by the applicant in relation to the present plea are indirectly aimed at calling into question the scheme for the calculation of fines established by the Guidelines.

178 By dividing the final amounts of the fines by the number of months of participation in the cartel or by the number of meetings attended by the offenders, the applicant is, in reality, attempting to challenge anew the Commission's determination of the amount of the fine imposed on account of the duration of the infringement.

179 In that context, it must be held that it is clear from the general system of the Guidelines that those undertakings which participate in a cartel for the longest period of time will have the smallest fines imposed on them if the amounts are divided by the number of months of participation in the cartel, since the Commission is restricted, in the Guidelines, to prescribing increases in the starting amounts of fines of up to a maximum of 10% per year of infringement. The applicant cannot rely on that self-limitation in order to obtain a reduction of the fine imposed in its case.

180 The reasoning set out in paragraph 179 above applies equally to the applicant's argument concerning the relationship between the amount of the fine imposed on it and the number of meetings which it attended, since the number of meetings which it attended is linked to the duration of its participation in the cartel.

181 In the light of the above, this final plea must also be dismissed.

7. *Determination of the final amount of the fine*

182 As is clear from paragraphs 90 to 113 above, it is necessary to vary the contested decision inasmuch as the Commission failed, in setting the amount of the fine, to take account of the fact that the applicant did not participate in the SANCO arrangements.

183 As to the remainder, the considerations which the Commission set out in the contested decision and the method of calculation of the fines that was applied in the present case remain unchanged. The final amount of the fine is therefore calculated as follows.

184 The starting amount of the fine imposed on the applicant is reduced by 10% to take account of the lesser gravity of its participation in the cartel by comparison with that of the 'SANCO producers'. The new starting amount of the fine imposed on the applicant is, therefore, set at EUR 8.82 million.

185 The application of the 10% uplift for duration results in a basic amount of EUR 9.702 million. Taking into account the 15% reduction which the Commission granted the applicant pursuant to Section D of the 1996 Leniency Notice, the final amount of the fine imposed on the applicant is, therefore, EUR 8.2467 million.

Costs

186 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, pursuant to the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads or where the circumstances are exceptional.

187 In view of the fact that each party has been partially unsuccessful, it must be held that each party shall bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Orders that the fine imposed on Chalkor AE Epexergasias Metallon under Article 2(d) of Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 — Copper plumbing tubes) shall be set at EUR 8.2467 million;**

2. Dismisses the action as to the remainder;

3. Orders Chalkor Epexergasias Metallon and the European Commission to bear their own costs.

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 19 May 2010.

[Signatures]

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