JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

19 May 2010 *

In Case T-18/05,

IMI plc, established in Birmingham, West Midlands (United Kingdom),

IMI Kynoch Ltd, established in Birmingham,

Yorkshire Copper Tube, established in Liverpool, Merseyside (United Kingdom),

represented by M. Struys and D. Arts, lawyers,

applicants,

v

European Commission, represented by É. Gippini Fournier and S. Noë, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for (1) annulment of Article 1(h) to (j) and Article 2(f) 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); and (2) in the alternative, reduction in the amount of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Eighth Chamber),

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

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2008,

gives the following

Judgment

Background

1 IMI plc, IMI Kynoch Ltd and Yorkshire Copper Tube (hereinafter collectively referred to as 'the IMI group' or 'the applicants') form part of a group of international engineering companies, the parent company of which, IMI, is an English company quoted on the London Stock Exchange.

1. *Administrative procedure*

2 In January 2001, following the communication of information from Mueller Industries Inc. ('Mueller'), the Commission of the European Communities carried out unannounced inspections at the premises of several undertakings in the copper tubes industry, 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), Outokumpu Oyj and Luvata Oy (formerly Outokumpu Copper Products Oy) (hereinafter collectively referred to as '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 AE Epexergasias Metallon ('Chalkor'), as well as, on 20 March 2003, to the IMI group.

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 under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 — Industrial tubes), a summary of which is published in the *Official Journal of the European Union* of 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 interchangeable 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 has 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'. Finally, the third branch of the cartel involved the arrangements entered into within a wider group of plain copper plumbing tube producers and had been called 'the broader European arrangements'.

Arrangements between the 'SANCO producers'

20 SANCO is both a trade mark and the designation of a specific technical process for the manufacture of high-quality anti-corrosion copper plumbing tubes. The technique was patented in 1980 by the undertaking Usines à cuivre et à zinc. The Boliden

group was the holder of the initial patent for the manufacturing process until its expiry in 2000, but was not the owner of the SANCO trade mark in all European countries. Its competitor, the KME group, applied for and obtained registration of the SANCO trade mark under its own name in several European countries. Subsequently, the KME group had patented a certain number of improvements on the original patent and the two competitors granted each other reciprocal licences on their respective patents and trade marks. Since 1981, the KME group and the Boliden group have granted a trade mark and patent licence to Wieland (recitals 115 to 118 of the contested decision).

21 The Commission took the view in the contested decision that, since 1988, the arrangements between the 'SANCO producers' had gone beyond a simple relationship between 'licensors' and 'licensees'. In its view, there were between those producers, namely the KME group, the Boliden group and Wieland, from June 1988 until the end of the first half of 1994, agreements on price objectives and discount rates as well as on the allocation of sales and market share ('the SANCO arrangements'). Monitoring of the implementation of those agreements was based primarily on the communication, between the 'SANCO producers', of detailed 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 for patented plastic-coated copper plumbing tubes.

23 The WICU trade mark and the related patents belong to the KME group, which, inter alia, granted a trade mark and patent licence to Wieland. Conversely, the Cuprotherm trade mark and related 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 took the view, in the contested decision, that the agreements concluded between the KME group and Wieland concerning WICU and Cuprotherm tubes went beyond a simple relationship between 'licensors' and 'licensees'. The KME group and Wieland had maintained anti-competitive contacts in the form of an exchange of sensitive information and co-ordination of volumes and prices with respect to plastic-coated copper plumbing tubes ('the WICU and Cuprotherm arrangements') (recital 149 of the contested decision).

The broader European arrangements

25 In the contested decision, the Commission states that, in parallel with the SANCO and the WICU and Cuprotherm arrangements, the infringement in question included a third branch, comprising agreements between a more extended 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 more extended group was originally five, namely 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 (composed of Austria Buntmetall and Buntmetall Amstetten), the

number of participants in that group rose to nine ('the group of nine') (recital 216 of the contested decision).

27 According to the Commission, those nine participants attempted to stabilise the market in plain copper plumbing tubes by using market shares of a reference year as a basis for fixing a target for future market shares. It also took the view in the contested decision that those participants made agreements on exchange of sensitive business information, allocation of market shares, monitoring of sales volumes, a market leadership mechanism that involved a shared assessment of markets, 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 Concerning HME, the Buntmetall group and Chalkor, the contested decision shows that the Commission was not able to prove their participation in the cartel in 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 offending undertaking 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 the 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 an application lodged at the Registry of the Court of First Instance on 19 January 2005, the applicants brought the present action.

55 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was, consequently, assigned.

56 The applicants claim that the Court should:

— annul Article 1 of the contested decision in so far as it relates to the undertakings listed under (h) to (j), and Article 2(f) of the contested decision;

— in the alternative, reduce the amount of the fine imposed upon them;

— order the Commission to pay the costs.

57 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

58 By their action, the applicants seek the partial annulment of the contested decision and the reduction of the fine imposed upon them.

1. *The claim for partial annulment of the contested decision*

59 In support of this claim, the applicants raise two pleas, based, respectively, on infringement of the principle of equal treatment and manifest error of assessment, and on infringement of defence rights.

The plea claiming infringement of the principle of equal treatment and manifest error of assessment

Arguments of the parties

60 The applicants state that they do not contest any of the facts on which the Commission has relied in establishing the continuity of the infringement in their regard. By contrast, they argue that the Commission infringed the principle of equal treatment and made a manifest error of assessment by holding that they had participated in the cartel between 16 June 1994 and 11 April 1996 ('the period in dispute'). In that regard, they maintain that their situation was comparable to that of HME, the Buntmetall group, Chalcor and Mueller, in respect of which the Commission took the view that time limitation applied as regards their involvement in the cartel up to 1994.

61 According to the applicants, the contested decision (recitals 476 and 490) shows that the Commission took the view that the relevant criterion in determining whether an undertaking continued to participate in a cartel was the fact that the undertaking

had maintained contacts or participated in meetings during the period in which it claimed to have ceased its participation in that cartel. The Commission had applied that criterion in concluding that it could not establish the continuity of the participation of HME, the Buntmetall group, Chalkor and Mueller in the infringement in question.

62 The applicants claim that it is undeniable that they did not participate in any meeting of the cartel or maintain any contacts under the broader European arrangements during the period in dispute. As a consequence, the Commission should likewise have held that it could not establish the continuity of their involvement in the cartel either.

63 According to the applicants, the fact that HME, the Buntmetall group, Chalkor and Mueller abstained from participation in the activities of the cartel over a period of three years and the IMI group abstained over a period of nearly two years was not regarded by the Commission as a relevant factor in establishing the continuity or the cessation of their respective participation in the cartel.

64 In any event, the applicants argue that, even if the Commission had taken account of the duration of the interruption of the contacts in question in the context of its conclusion concerning the question of the continuity of the infringing conduct, it should have explained why the absence of any anti-competitive conduct over a period of nearly two years was not sufficient to prove cessation of the infringement, whereas such an absence of anti-competitive conduct over a period of three years had been.

65 Finally, the applicants claim that the Commission's decision to treat them differently from HME, the Buntmetall group, Chalkor and Mueller is based on factors which are not relevant for the purposes of establishing the continuity of the infringement.

66 At the hearing, the applicants explained that they were not calling into question the Commission's finding that they had increased prices in the United Kingdom in November 1994, but that they were taking issue with the assertion that that increase was the result of their participation in collusive meetings in 1994.

67 The Commission argues, first, that it has been proved to a sufficient legal standard that the applicants committed a continuous infringement from 29 September 1989 until 22 March 2001. In that context, it indicates that the contested decision (recitals 479 to 481, 483, 489, 639 and 664) and the administrative file show that the will of the applicants to pursue the coordination of prices and the sharing of markets persisted throughout the period from June 1994 to April 1996.

68 First of all, the applicants did not publicly announce to the other cartel participants that they were withdrawing. Next, the participants in the cartel coordinated and implemented price rises in the United Kingdom until November 1994. It is, moreover, apparent that the effects of that price coordination manifested themselves well beyond that date. Clearly, an undertaking cannot claim to have withdrawn from a cartel if it applies price rises previously agreed with its competitors. Finally, the applicants continued to participate in meetings concerning specific national markets during the period between June 1994 and April 1996.

69 The Commission maintains, secondly, that it did not infringe the principle of equal treatment, since the applicants' situation was not comparable to that of Chalkor, HME, the Buntmetall group and Mueller.

70 In that respect, the Commission argues that the duration of the period for which it was unable to establish the participation of the IMI group in meetings under the broader European arrangements is very different from that at issue concerning HME, the Buntmetall group, Chalkor and Mueller. It had been held in the contested decision that those four undertakings had not taken part in those meetings for more than three years. Specifically, the period of non-participation was three years and four months, namely from 16 June 1994 to October 1997, for Mueller and HME, and four years and two months, namely from 16 June 1994 to 29 August 1998, concerning the Buntmetall group and Chalkor (recitals 282, 305, 306 and 325 of the contested decision). By contrast, the non-participation of the applicants in the meetings held under the broader European arrangements was established only between 16 June 1994 and 11 April 1996, a period of only 1 year and 10 months.

71 The Commission rejects the applicants' argument that, in the contested decision, it did not regard the period for which it was unable to establish the applicants' participation in the collusive meetings as relevant. In its submission, recital 490 of the contested decision shows that it regarded that factor as being particularly relevant for assessing the continuity of their participation in the infringement. It was not required to indicate in the contested decision a precise period or a 'deadline' beyond which the continuity of the participation in the cartel could no longer be established. The essential question was whether that continuity of infringing conduct could be established in relation to a given contravener, and not where the theoretical limit was.

72 In support of its argument that the situation of Chalkor, HME, the Buntmetall group and Mueller was not comparable to that of the applicants, the Commission also argues that the contested decision shows (recitals 277, 282, 305, 306, 325, 497, 589 and 592) that the latter played a decisive role in the infringement and in the resumption of the cartel during the period from 1994 to 1997. The role played by the applicants during

that period stood in no relation to that of the 'newcomers' of more modest size such as HME, the Buntmetall group, Chalkor and Mueller. The fact that those four undertakings began to participate in the infringement in October 1997 and August 1998 indicated that the question of the continuity of their participation in the cartel between July 1994 and July 1997 should not arise.

73 Similarly, the Commission submits that the applicants' argument that it considered that the other four undertakings had interrupted their participation in the undertaking in question is erroneous, since, in the contested decision, the Commission merely established that the commencement of the participation of those four other undertakings in the cartel was subsequent to that of the applicants.

74 Thirdly, the Commission argues that, even if the applicants had been in a situation comparable to that of HME, the Buntmetall group, Chalkor and Mueller, they could not rely on the principle of equal treatment in order to claim that they did not participate in a continuous infringement during the period between 29 September 1989 and 22 March 2001. Since a party may not rely for its own benefit on an illegality committed in favour of another, it is immaterial, for the purposes of establishing whether the applicants participated in a continuous infringement, whether the pleas concerning the continuity of the infringement committed by other participants were erroneous or not.

75 The Commission considers that the case-law shows that non-pursuit of one or more undertakings does not prevent it from pursuing and penalising other undertakings, even if they all participated in the same infringement.

76 The Commission further maintains that the applicants' plea amounts to a claim that the Court should hold that HME, the Buntmetall group, Chalkor and Mueller also participated in a continuous infringement during the period from July 1994 to July 1997. Such a finding does not lie within the jurisdiction of the Court.

77 Thus, since it was established to a sufficient legal standard in the contested decision that the applicants participated in a continuous infringement, they cannot rely on excessively favourable or unlawful treatment which might have been granted to other undertakings in order to invalidate that finding.

78 Fourthly, the Commission observes that, in their application, the applicants request the Court to annul Article 1 of the contested decision 'in so far as it relates to the companies listed in Article 1(h) [to] (j)'. That implies that the applicants challenge the finding in the contested decision that they infringed Article 81(1) EC and, as from 1 January 1994, Article 53(1) of the EEA Agreement by participating, from 29 September 1989 to 22 March 2001, in a series of agreements and concerted practices concerning the fixing of prices and the sharing of markets in the copper plumbing tubes sector. The Commission submits that there is nothing in the application to support the applicants' challenge concerning Article 1 of the contested decision as regards the period from 29 September 1989 to July 1994 and the period from July 1996 to 22 March 2001. It therefore considers that the claim for annulment of Article 1 should be dismissed in its entirety.

Findings of the Court

79 As a preliminary observation, it should be noted that, although the applicants have presented their arguments from the angle of an alleged infringement of the principle

of equal treatment and a manifest error of assessment, they are in reality challenging the fact that the contested decision claims that their participation in the cartel was uninterrupted between September 1989 and March 2001. It should also be noted that, in support of their plea, the applicants present only arguments concerning the period in dispute.

80 It follows that the examination by the Court must concern the question whether, in the contested decision, the Commission demonstrated to a sufficient legal standard that the applicants participated uninterruptedly in the cartel during the period in dispute.

81 In that context, it should be noted that the contested decision shows that the applicants are held responsible only for their participation in the third branch of the cartel, namely the broader European arrangements (recitals 458 and 461 of the contested decision). That decision also shows that, in the context of the cartel, 'practically no agreement on volumes or prices was concluded and/or implemented between May 1994 and July 1997' and that, as regards the broader European arrangements, it has not been established that there were collusive contacts in 1995 (recitals 285 and 485). Moreover, it is undisputed between the parties that it has not been established that the applicants had collusive contacts in the context of the broader European arrangements during the period in dispute.

82 The Commission concluded, however, that the infringement in question was uninterrupted from September 1989 to March 2001, even as regards the applicants (recital 463 of the contested decision). In coming to that conclusion, it based its reasoning principally on the following factors.

83 First, there was a manifest continuity in the methods and practices of the cartel during the whole of the period from September 1989 to March 2001 (recital 486 of the contested decision). In that respect, it should be noted that that is not sufficient to prove to a sufficient legal standard that the applicants participated continuously in the cartel during the period in dispute. The fact that the cartel as such was uninterrupted

does not exclude the possibility that one or more of its participants may have interrupted their participation for a certain time.

84 Secondly, the Commission argues, although the applicants did not participate in any meeting and did not maintain any contacts in the context of the broader European arrangements during the period in dispute, their participation in the cartel was uninterrupted throughout that period, since they implemented price increases in the United Kingdom until November 1994, actively contributed to negotiations for relaunching the cartel in 1996, took an active role in enlarging the number of cartel participants in 1997 and 1998, and played a crucial role by taking over the role as a market leader for the United Kingdom (recital 490 of the contested decision).

85 None of the abovementioned factors, apart from the finding of the increase in prices in November 1994 (in that respect, see paragraphs 90 to 92 below), are relevant for the purposes of establishing the uninterrupted participation of the applicants in the infringement in question, since they concern only their conduct after the period in dispute without elucidating the facts present during that period.

86 Thirdly, the Commission argues that the applicants have not demonstrated that, during the period in dispute, they had manifestly shown their intention no longer to participate in the cartel (recitals 479 to 481 and 490 of the contested decision). In that regard, it should be noted that that finding cannot become relevant before the Commission has discharged its burden of proof (see, to that effect, Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraphs 62 and 63), namely the submission of evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two

specific dates (Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 125 and case-law cited).

87 Fourthly, it is implicit from recital 490 of the contested decision that the disputed period of absence of collusive contacts, namely about 22 months, was not regarded by the Commission as long enough to constitute an interruption of the applicants' participation in the cartel.

88 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, paragraphs 66 to 69). Thus, in the absence of evidence directly establishing the duration of an infringement, the Commission should, as indicated in paragraph 86 above, adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.

89 Therefore, although the period separating two manifestations of infringing conduct is a relevant criterion in order to establish the continuous nature of an infringement, the fact remains that the question whether or not that period is long enough to constitute an interruption of the infringement cannot be examined in the abstract. On the contrary, it needs to be assessed in the context of the functioning of the cartel in question.

90 In this case, the contested decision shows that the undertakings which were members of the third branch of the cartel were habitually in contact several times a year from

1989 until 1994, in particular by exchanges of sensitive information on their sales, their market shares and the agreed prices (recitals 199 to 202 and 236 to 284 of the contested decision). However, in respect of the period in dispute, the only contact or the only manifestation of a collusive nature on the part of the applicants which the Commission has been able to establish is the increase in prices in the United Kingdom in November 1994.

91 In that regard, this Court does not accept the applicants' argument that the Commission has not proved that that increase arose from the cartel. Recital 277 of the contested decision shows that, at a meeting which the applicants attended in the spring of 1994, an increase in prices in the United Kingdom was discussed, facts which the applicants do not dispute. Given that they rapidly increased their prices in the United Kingdom after that meeting, the burden is on the applicants to prove that that increase did not constitute the manifestation of their participation in the cartel.

92 The applicants have not discharged that burden. The report which they annexed to their application merely states that that increase was 'essentially' due to the parallel increase in the price of copper. Moreover, that report shows that, apart from the evolution of the copper price, the applicants' prices in the United Kingdom increased between April and November 1994 by 5 to 6%.

93 As regards the Commission's affirmation that the applicants continued to participate in collusive meetings concerning specific national markets during the period from June 1994 to April 1996, this must be rejected. First, such an affirmation is not substantiated by the contested decision. Moreover, the evidence to which the Commission refers in its defence in support of its affirmation is, at best, inconclusive.

94 As regards the United Kingdom market, the Court finds that the Commission used a biased citation method which has led to the Commission's reproduction contradicting

the substance of the text cited. The citation which the Commission included in its pleading was cut in such a way that the text which referred to a suspension of meetings in the United Kingdom between July 1994 and June 1996 was removed. At the hearing, after initially relying on its citation, the Commission, following a question from the Court, apologised and acknowledged that the citation was misleading.

95 Regarding the Netherlands market, the document to which the Commission refers mentions only collusive meetings organised about once every three months between 1989 and 2001. However, none of the evidence adduced by the Commission demonstrates that the applicants actually participated in the collusive meetings concerning the Netherlands market during the period in dispute.

96 It follows from all of the above considerations that the period during which there were no contacts or manifestations of collusion on the part of the applicants amounts to a little more than 16 months, from 1 December 1994 to 11 April 1996. Since that period exceeds by more than one year the intervals at which the undertakings which were members of the third branch of the cartel habitually manifested their respective intentions to restrict competition (see paragraph 90 above), it must be concluded that the Commission has made an error of law, and that the contested decision must be annulled in so far as it holds the applicants responsible for participation in the cartel between 1 December 1994 and 11 April 1996.

97 However, having regard to the fact that the applicants resumed and repeated, after a period of slightly more than 16 months, their participation in an infringement which they do not dispute was a manifestation of the same cartel in which they had participated before the interruption, limitation for the purposes of Article 25 of Regulation No 1/2003 and Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport

and competition (OJ 1974 L 319, p. 1) does not apply in this case. Nevertheless, the amount of the fine imposed on the applicants must be amended in order to take account of their sequential participation in the cartel. The specific consequences of that amendment will be set out in paragraphs 187 to 190 below.

The plea alleging infringement of defence rights

Arguments of the parties

98 The applicants claim that the Commission infringed their defence rights by invoking in the contested decision factors which, although referred to in the statement of objections, had not been mentioned in that statement for the purposes of justifying the difference in treatment between them and Chalkor, HME, the Buntmetall group and Mueller as regards the continuity of the infringement in question. According to the applicants, none of the factors cited in recital 490 of the contested decision appeared in the statement of objections for the purposes of distinguishing their situation from that of Chalkor, the Buntmetall group, HME and Mueller.

99 The applicants argue that if the Commission had continued to rely on the factors which it regarded as relevant at the stage of the statement of objections, it would not have been able to conclude, in the contested decision, that their situation was different from that of Chalkor, HME, the Buntmetall group and Mueller.

100 In reply to the Commission's argument that the contested decision is not vitiated by an infringement of defence rights, since it does not contain any new objection and relies only on facts already stated in the statement of objections, the applicants argue that re-use, in the contested decision, of factual elements on which the Commission did not previously rely to justify applying to the applicants treatment different from that of the other undertakings concerned seriously infringes their defence rights.

101 In their submission, the contested decision neither complements nor modifies the reasoning followed by the Commission in the statement of objections in order to reply to the arguments put forward by the applicants in their answer to that statement. The Commission radically changed its reasoning and cited factors in relation to which the applicants had not had the opportunity to submit observations or even defend themselves. The applicants maintain that that attitude is in flagrant contradiction to the case-law.

102 The Commission contends that the plea should be dismissed.

Findings of the Court

103 It needs to be examined whether the Commission infringed the applicants' defence rights in relation to the facts which it took into account in recital 490 of the contested decision in order to conclude that their participation in the cartel had been uninterrupted.

104 In that regard, it should be noted that, as is apparent from paragraphs 84 and 85 above, apart from the finding of the November 1994 price increases in the United Kingdom, none of the factors set out in recital 490 of the contested decision was held relevant for the purposes of establishing, to a sufficient legal standard, the continuous participation of the applicants in the cartel. It is further apparent from paragraph 96 above that the contested decision must be annulled in so far as it holds the applicants responsible for participation in the cartel between 1 December 1994 and 11 April 1996.

105 Therefore, the present plea is operative only in so far as it concerns the question of infringement of the applicants' defence rights as regards the finding of the November 1994 price increases in the United Kingdom.

106 It should be noted in that respect that the statement of objections must enable the parties concerned properly to identify the conduct complained of by the Commission. That obligation is satisfied if the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 109).

107 Therefore, the Commission may rely in its final decision only on the objections on the subject of which the undertakings concerned have had the opportunity to state their views (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 86).

108 The case-law shows, however, that the Commission's final decision is not necessarily required to be a replica of the statement of objections, and that defence rights are infringed by a discordance between the statement of objections and the final decision

only if an objection relied upon in the latter was not sufficiently set out in the former to enable the addressees to defend themselves (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 100; Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 189).

109 The right to be heard extends to all the matters of fact and of law which form the basis for the decision-making act but not the final position which the administration intends to adopt (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 94 and case-law cited).

110 In this case, the applicants do not argue that, in the contested decision, the Commission invoked new objections or based its reasoning on a new factor which did not appear in the statement of objections. They merely indicate that, in reaction to their reply to the statement of objections, the Commission adopted a new reasoning to justify the finding that they had participated in the cartel between 1994 and 1996.

111 The applicants' argument amounts to claiming that, before adopting the contested decision, the Commission should have heard their observations on the reasoning by which it intended to refute the arguments put forward in their reply to the statement of objections. Such a requirement finds no support in the case-law, and cannot be imposed on the Commission.

112 The case-law shows, on the contrary, that the Commission's final decision does not necessarily have to be a replica of the statement of objections (see paragraph 108 above). The legal classification of the facts made in the statement of objections is, by definition, only provisional, and a subsequent Commission decision cannot be

annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate classification (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 100).

113 If the Commission is indeed required to hear the addressees of a statement of objections and, where necessary, to take account of their observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence (*Mannesmannröhren-Werke*, cited in paragraph 112 above, at paragraph 100), it did precisely that in this case.

114 In the light of the foregoing, this plea cannot succeed.

2. *The claim for reduction of the amount of the fine*

115 In support of this claim, the applicants raise two pleas, respectively alleging infringement of the equal treatment principle and infringement of the principle of proportionality.

116 Before examining the applicants' pleas, it should be noted that recitals 601 and 842 of the contested decision show that the fines imposed by the Commission for the infringement were imposed pursuant to Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. In addition, the Commission determined the amount of the fines by applying the methodology set out in the Guidelines and the 1996 Leniency Notice (see paragraph 33 above).

117 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 (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).

118 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).

119 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*, cited in paragraph 118 above, at paragraph 267).

120 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).

121 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 plea claiming infringement of the equal treatment principle

122 In the context of this plea, the applicants put forward two claims, respectively concerning the manner in which the Commission conducted its investigation and the alleged discriminatory treatment suffered by the applicants in comparison with the participants in the SANCO arrangements and the WICU and Cuprotherm arrangements.

The discriminatory manner in which the Commission allegedly conducted its investigation

— Arguments of the parties

123 The applicants consider that the manner in which the Commission conducted its investigation allowed the Outokumpu and KME groups, Wieland, the Boliden group, HME and Chalkor to better appreciate its scope and gave them the opportunity to be

the first undertakings to submit offers of cooperation under the 1996 Leniency Notice. As a result, all of those undertakings, except the Boliden group, obtained greater rates of reduction of their fines than that granted to the applicants, who observe that they were the last to receive a request for information and, therefore, the last to request application of the 1996 Leniency Notice.

124 Thus, the applicants obtained a reduction of only 10% of the amount of their fine, since they had cooperated with the Commission at a time when the infringement in question had already been established. Therefore, the Commission infringed the principle of equal treatment by failing to place the undertakings which had participated in the cartel on an equal footing.

125 In this context, the applicants point out that the Commission, first, in April 2001, carried out additional inspections at the premises of the Outokumpu and KME groups without subsequently announcing them publicly; second, in July 2002, sent to the KME group and Wieland, which participated in both the industrial tubes and the copper plumbing tubes cartels, written requests for information concerning Case COMP/E-1/38.240 (Industrial tubes); and, third, in the context of Case COMP/E-1/38.069 (Copper plumbing tubes), sent requests for information to the Boliden group, HME and Chalkor on 3 March 2003 and to the IMI group on 20 March 2003.

126 The Commission contends that the plea should be dismissed.

— Findings of the Court

127 In the context of this plea, the applicants set out from the premiss that the 1996 Leniency Notice requires the Commission at all times to inform the undertakings forming the subject-matter of an infringement proceeding of the progress of the investigation

in order that the latter may assess whether, and to what extent, it is appropriate to cooperate with the Commission.

128 However, the wording and the scheme of that notice show that, first, it is for the undertaking seeking its application to contact the Commission, and, second, that a strategy of late or minimal cooperation is likely to lead to a small reduction in the amount of the fine, or to no reduction at all (see Sections B to D and E1 of the 1996 Leniency Notice).

129 If the 1996 Leniency Notice has given rise to legitimate expectations on which undertakings wishing to inform the Commission of the existence of a cartel may rely (see *BASF* v *Commission*, cited in paragraph 109 above, at paragraphs 487 and 488 and case-law cited), those expectations can concern only the manner in which their contributions are taken into account by the Commission once they have shown their wish to cooperate. It is not in any way apparent from the wording of the 1996 Leniency Notice or from the logic inherent in the mechanism which it has established that the Commission is required, during the administrative procedure, to inform undertakings which have not shown their wish to cooperate of the measures which it has taken in the context of its investigation or the evolution thereof.

130 All the participants in a cartel have the possibility of asking to benefit at any moment during the administrative procedure from the application of the 1996 Leniency Notice, whatever investigative measures have been taken by the Commission. Thus, it is for each participant in a cartel to decide whether, and at what point, it wishes to avail itself of the 1996 Leniency Notice.

131 In this case, the applicants could have demonstrated their wish to cooperate with the Commission at any time after the publication of the 1996 Leniency Notice, particularly after the inspection which they underwent on 22 March 2001.

132 The Commission cannot therefore be blamed for carrying out additional inspections at the premises of other undertakings or, in the context of Case COMP/E-1/38.240 (Industrial tubes), sending requests for information without informing the applicants.

133 As regards the argument based on the sending of requests for information in the context of Case COMP/E-1/38.069 (Copper plumbing tubes), it should be noted that, although appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors, such as the order in which they are questioned by the Commission (Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 140), the degrees of cooperation provided by various undertakings cannot be regarded as comparable unless those undertakings supply the Commission, at the same stage of the administrative procedure and in similar circumstances, similar information (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 245).

134 In this case, it is undisputed that, in the context of Case COMP/E-1/38.069 (Copper plumbing tubes), the Commission sent requests for information to the Boliden group, HME and Chalkor on 3 March and the applicant on 20 March 2003. In this regard, it should be noted that, amongst those four undertakings, it is only Chalkor which started cooperating with the Commission before the Commission sent the statement of objections. Although Chalkor began cooperating with the Commission in April 2003, the applicants did not submit their offer to cooperate until a much later stage of the procedure, namely in November 2003, after receiving the statement of objections

on 29 August 2003. As the applicants have not demonstrated that their late cooperation was due to the fact that they received the requests for information 17 days later than the Boliden group, HME and Chalkor, their argument based on the late sending of those requests for information must be rejected.

135 Having regard to the whole of the above, the plea alleging that the Commission conducted its investigation in a discriminatory manner must be dismissed.

The alleged discriminatory treatment of the applicants in comparison with the participants in the SANCO arrangements and the WICU and Cuprotherm arrangements

— Arguments of the parties

136 The applicants primarily argue that, in fixing the amount of the fines, the Commission should have made a distinction between themselves, who had participated in only one branch of the cartel and the undertakings which had participated in two or three of its branches.

137 In that respect, the applicants challenge the Commission's conclusion in recital 689 of the contested decision that it could not be demonstrated that the concertation between the participants in the SANCO arrangements had been considerably closer between 1988 and 1995 than that existing between the participants in the broader European arrangements. According to the applicants, the SANCO arrangements,

contrary to what the Commission concluded in the contested decision, constituted a much closer and considerably more anti-competitive cooperation than the broader European arrangements.

138 Regarding the solution proposed by the Commission in its defence pleading, namely an increase in the amount of the fines imposed on the 'SANCO producers' in order to remedy any inequality of treatment, the applicants claim that this constitutes an implicit but clear recognition that the lack of differentiation in the amount of the fines imposed on the undertakings in question is not justified.

139 Concerning the WICU and Cuprotherm arrangements, the applicants emphasise that the fact that, for the purposes of determining market shares, the Commission had, in the context of differentiated treatment, added together the turnover for plain copper tubes with that for plastic-coated copper plumbing tubes cannot be regarded as a means of penalising more severely the 'WICU and Cuprotherm producers'. In the applicants' submission, that cumulation was necessary, since the Commission had established, in recital 459 of the contested decision, that the arrangements concerning plain copper plumbing tubes necessarily also had an effect on plastic-coated copper plumbing tubes.

140 The applicants further argue that the de facto immunity granted to the KME group in relation to its participation in the WICU and Cuprotherm arrangements (recitals 760 and 761 of the contested decision) could have been permissible only if the 'WICU and Cuprotherm producers' had, from the outset, been placed in a different category for the purposes of determining the starting amount of the fines.

141 The applicants claim finally that the Commission does not give reasons for its decision not to establish, for the purposes of fixing the amount of the fines, a distinction between the undertakings, like themselves, which were involved only in the broader

European arrangements, and the KME group and Wieland, which were involved not only in the broader European arrangements but also in the WICU and Cuprotherm arrangements. They argue that that omission constitutes an infringement of Article 253 EC.

142 The Commission contends that the plea should be dismissed. In support of its defence, it argues, with reference to recitals 459, 461 and 462 of the contested decision, that it held that the undertakings involved in two (the Boliden group) or three (the KME group and Wieland) branches of the infringement had committed a multiform infringement, the manifestations of which were distinct, but interconnected. By contrast, the Commission emphasises that the undertakings which participated only in the third branch of the infringement, namely the IMI and Outokumpu groups, Mueller, the Buntmetall group, HME and Chalkor, were not regarded as having participated in the SANCO arrangements and the WICU and Cuprotherm arrangements.

143 Consequently, the Commission considers that, by holding the applicants responsible for an infringement which they have committed, it has not infringed the principle that penalties should fit the individual offender.

144 As regards the SANCO arrangements, the Commission maintains that the gravity of the infringement committed by the 'SANCO producers' is comparable to that committed by the applicants. Referring to recitals 130, 131, 137, 138, 199 to 213, 236, 265, 277 and 310 of the contested decision, the Commission maintains that the broader European arrangements envisaged the allocation of customers, a system of regular and systematic monitoring and agreements on prices.

145 As regards the coexistence of the SANCO arrangements and the broader European arrangements, the Commission points out that the 'SANCO producers' were regarded as a distinct group within the broader European arrangements and that they reached agreements between themselves before the meetings of the broader group. The members of the broader European arrangements profited from the restriction

of competition established by the 'SANCO producers' by incorporating it into their illegal agreements. However, the coordination between the 'SANCO producers' and that observed within the broader European arrangements essentially concerned the same questions.

146 The Commission argues that, even if the Court were to accept the applicants' argument that the SANCO arrangements were more anti-competitive in nature than the broader European arrangements, there is no reason to reduce the amount of the fine imposed upon them. The Commission considers that the amount of the fine imposed on the applicants exactly reflects the gravity of the infringement which they have obviously committed. In that context, it refers to recital 490 of the contested decision to emphasise that the applicants played a very important role in the cartel.

147 Therefore, the Commission considers that the most appropriate way to remedy the defect alleged in this case would be to increase the amount of the fines imposed on the 'SANCO producers', namely the KME group, Wieland and the Boliden group, rather than reducing the amount of the fine imposed on the applicants.

148 As regards the WICU and Cuprotherm arrangements, the Commission maintains that it did carry out a differentiated treatment between the applicants on the one hand and the KME group and Wieland on the other.

149 In that respect, the Commission argues that, if distinct infringements had been found in the contested decision, one concerning plain copper plumbing tubes and the other plastic-coated copper plumbing tubes, the categorisation of the undertakings, for the purposes of differentiated treatment as regards the infringement concerning plain copper plumbing tubes, would have been based solely on sales of that product. In that case, the applicants' market share would have been greater and the amount of the fine imposed upon them would have been higher. The relevant turnover for the applicants, namely that concerning sales of plain copper plumbing tubes, would be identical to the turnover used by the Commission in the contested decision, but the

size of the global market, namely total sales of plain copper plumbing tubes, would be lower than that to which the Commission refers in the contested decision, namely total sales of plain and plastic-coated copper plumbing tubes.

150 The Commission also rejects the applicants' argument that cumulation of the turnover for plain copper plumbing tubes and that for plastic-coated copper plumbing tubes would have been necessary even if the WICU and Cuprotherm arrangements had not existed. The Commission considers that that argument is 'intrinsically illogical'. It would imply that, in the absence of illegal agreements concerning plastic-coated copper plumbing tubes, undertakings producing both plain copper plumbing tubes and plastic-coated copper plumbing tubes should face higher fines than those manufacturing only plain copper plumbing tubes. Undertakings of the same relative importance in the cartel would thus be penalised by fines the amount of which would differ according to whether or not they produced tubes not covered by the cartel.

151 The Commission states that if the Court were to accept the applicants' argument, it would propose to it, in the exercise of its unlimited jurisdiction, that it should increase the fine imposed upon them in order to reflect their higher market share and, hence, their increased relative importance in the cartel concerning plain copper plumbing tubes.

— Findings of the Court

152 As regards, first, the alleged infringement of the duty to state reasons, the case-law shows that, in the context of determining fines for breach of competition law, that

obligation is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (*Limburgse Vinyl Maatschappij*, cited in paragraph 107 above, at paragraph 463 and case-law cited).

153 In this case, the applicants do not argue that the contested decision does not indicate the factors on the basis of which the Commission assessed the gravity and duration of the infringement which they committed. Their complaint, which merely concerns the fact that the Commission did not explain why they were not treated differently from the 'WICU and Cuprotherm' producers, must therefore be rejected. Having regard to the case-law referred to in paragraph 152 above, Article 253 EC cannot be interpreted as requiring the Commission to explain in its decisions the reasons why, in relation to calculation of the amount of the fine, it did not adopt alternative approaches to the one in fact adopted in the contested decision (see to that effect, and by analogy, Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 127).

154 As regards, secondly, the question whether this complaint is well founded, 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 of the cartel type.

155 Concerning liability for the infringement as such, the case-law shows that the fact that an undertaking has not directly participated 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; Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraphs 130 and 131).

156 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 155 above, at paragraphs 90 and 150; *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 118 above, at paragraph 145; and *AC-Treuhand*, cited in paragraph 155 above, at paragraph 133) and from the Guidelines, which provide for differential treatment, leading to the calculation of a 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.

157 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).

158 It is in the light of the abovementioned principles that the Court must examine the applicants' claim that the Commission did not take account of their limited participation in the cartel.

159 It is undisputed that the applicants participated only in the broader European arrangements and that they are being held liable only for their 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 applicants have not been held liable in respect of the two other branches of the cartel, namely the SANCO and the WICU and Cuprotherm arrangements.

160 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.

161 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 applicants had been involved in several branches of it, which was not the case here.

162 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.

163 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 155 above (paragraph 87), for all the branches of that cartel.

164 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.

165 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 applicants 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.

166 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 applicants 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.

167 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 applicants. 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 the applicants should be reduced in order to take account of the fact that the Commission held them liable for participation only in the third branch of the cartel.

168 The Commission's argument that the applicants played an important role in the cartel does nothing to invalidate that conclusion. In the first place, the Commission did not take the view in the contested decision that the role played by the IMI group within the broader European arrangements constituted an aggravating circumstance within the meaning of the Guidelines. Secondly, the Commission has not put forward in these proceedings the reasons why its assessment in that regard was erroneous. Therefore, in the context of determining the amount of the fine, there is no cause for the Court to substitute its own assessment for that of the Commission as regards the role played by the applicants within the broader European arrangements.

169 Moreover, in so far as it can be claimed that the applicants' non-participation in the SANCO arrangements has been sufficiently reflected in their specific starting amount, since the market share of the applicants, which did not market 'SANCO tubes', was calculated having regard to the turnover of all plain copper plumbing tube producers, including that corresponding to sales of 'SANCO tubes', the Court finds as follows.

170 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 market share of the applicants on the relevant market.

171 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.

172 Accordingly, by calculating the market share of the applicants, which were 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 applicants were in fact deemed to have a smaller market share and, therefore, allocated a lower specific starting amount than would have been set if their market share had been calculated solely on the basis of turnover in the market in respect of which they actually participated in the cartel.

173 The applicants' argument that cumulation of the turnover achieved with plain copper plumbing tubes and that achieved with plastic-coated copper plumbing tubes would have been necessary even if the WICU and Cuprotherm arrangements had not existed is clearly without foundation. There is nothing in either the case-law or the Guidelines to suggest that the Commission is required, in the calculation of cartel members' market shares for the purposes of differentiated treatment, to take account of turnover figures for products other than those which form the subject-matter of the infringement in question.

174 Having regard to the whole of the above, it is necessary only to amend the amount of the fine imposed on the applicants in order to reflect the fact that they did not participate in the SANCO arrangements. The practical consequences of that amendment will be set out in paragraphs 187 to 190 below.

The plea alleging infringement of the principle of proportionality

Arguments of the parties

175 The applicants consider that there is a disproportion between the amount of the fine imposed upon them and the economic value of their activities in the area of copper plumbing tubes. That disproportion, they submit, is due to the fact that the size of the market and the turnover achieved by the applicants, on which the Commission relied in determining the amount of the fines, were artificially high and gave an entirely erroneous view of the actual value of the market and the turnover achieved.

176 In that regard, the applicants claim that, as tube manufacturers, they have no influence over the price of their main raw material, namely copper, which represented between 50 and 65% of the final price paid by their customers. The applicants argue that the activities of the cartel did not concern the supply of copper, and could have absolutely no effect on the price of copper, since the price of the metal is determined by daily fixes on the London Metal Exchange. The price of the metal was only a factor to be passed on to customers at the same level as that paid by the applicants.

177 The applicants emphasise that their argument concerns not the assessment of the seriousness of the infringement and its relation to the size of the market, but the principle of proportionality as mentioned in Section 5(b) of the Guidelines. The applicants also refer, in support of that argument, to the decision-making practice of the Commission.

178 The applicants add that they have sold their copper plumbing tube business, the net accounting value of which was approximately EUR 34 million, for about EUR 18.1 million. That price demonstrates, in their submission, that the amount of the fine imposed, namely EUR 44.98 million, is disproportionate.

179 The Commission contends that the plea should be dismissed.

Findings of the Court

180 As a preliminary observation, it should be noted that, for the purposes of determining the starting amount of the fine, the Commission may have regard to the size of the market affected (*BASF* v *Commission*, cited in paragraph 109 above, at paragraph 134; Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 149 and 150), as it did in this case, but is not obliged to do so.

181 The applicants' plea is based on the premiss that the Commission was wrong to take account of the copper price in its assessment of the value of the sector concerned.

182 However, that premiss is erroneous. 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 5030 and 5031).

183 The fact that the price of copper constitutes an important part of the final price of plumbing tubes or that the risk of fluctuations of copper prices is far higher than for other raw materials does not invalidate that conclusion and does not require the Commission to apply Section 5(b) of the Guidelines.

184 Moreover, the Commission decisions referred to by the applicants are irrelevant, since the Commission's earlier decision-making practice does not serve as a legal framework for fines in competition matters.

185 In addition, the figures which the applicants have submitted, claiming that the amount of the fine imposed upon them exceeds their copper plumbing tubes business, are not sufficient to support the conclusion that the amount of their fine was disproportionate. The applicants have not indicated the factors on which those figures are based.

186 This plea must therefore be dismissed in its entirety as unfounded.

3. *The determination of the final amount of the fine*

187 As is apparent from paragraphs 79 to 97 and 154 to 174 above, the contested decision must be amended in so far as the Commission, in determining the amount of the fine, did not take account, first, of the interruption of the applicants' participation in the

cartel between 1 December 1994 and 11 April 1996 and, second, the fact that they did not participate in the SANCO arrangements.

188 As to the remainder, the considerations of the Commission set out in the contested decision and the method of calculating fines applied in this case remain unchanged. The final amount of the fine is thus calculated as follows.

189 The starting amount of the fine imposed on the applicants is reduced by 10% to take account of the lesser seriousness of their participation in the cartel in comparison with that of the 'SANCO producers'. The new amount of the fine imposed on the applicants is thus determined at EUR 21.42 million.

190 Since the applicants participated twice in the cartel during an effective period of 10 years and 1 month, an increase of 100% for duration must be applied, which leads to a basic amount of EUR 42.84 million. Taking account of the 10% reduction granted to the applicants by the Commission under Section D of the 1996 Leniency Notice, the final amount of the fine imposed on the applicants is thus established at EUR 38.556 million.

Costs

191 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, under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances

are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

192 Having regard to the fact that each party has been partially unsuccessful and to the finding in paragraph 94 above, the Court decides that, on a just assessment of the circumstances of the case, the Commission should be ordered to pay its own costs and 40% of the applicants' costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Article 1(h) to (j) 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) in so far as it relates to the period from 1 December 1994 to 11 April 1996;**

2. **Determines the amount of the fine imposed jointly and severally on IMI plc, IMI Kynoch Ltd and Yorkshire Copper Tube in Article 2(f) of Decision C(2004) 2826 at EUR 38.556 million;**

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

4. Orders the European Commission to pay its own costs and 40% of the costs incurred by IMI, IMI Kynoch and Yorkshire Copper Tube;

5. Orders IMI, IMI Kynoch and Yorkshire Copper Tube to bear 60% of their own costs.

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 19 May 2010.

[Signatures]

Table of contents

Background ..... II - 1777

1. Administrative procedure ..... II - 1777

2. The contested decision ..... II - 1780

Relevant products and markets ..... II - 1786

Components of the infringement at issue ..... II - 1787

Arrangements between the 'SANCO producers' ..... II - 1787

Arrangements between the 'WICU and Cuprotherm producers' ..... II - 1788

The broader European arrangements ..... II - 1789

Duration and continuous nature of the infringement at issue ..... II - 1790

Determination of the amount of the fines ..... II - 1791

Starting amount of the fines ..... II - 1792

— Gravity ..... II - 1792

— Differential treatment ..... II - 1794

Basic amount of the fines ..... II - 1795

Aggravating and attenuating circumstances ..... II - 1798

Application of the 1996 Leniency Notice ..... II - 1799

Final amount of the fines ..... II - 1800

Procedure and forms of order sought ..... II - 1801

Law ..... II - 1802

1. The claim for partial annulment of the contested decision ..... II - 1803

The plea claiming infringement of the principle of equal treatment and manifest error of assessment ..... II - 1803

Arguments of the parties ..... II - 1803

Findings of the Court ..... II - 1808

The plea alleging infringement of defence rights ..... II - 1814

Arguments of the parties ..... II - 1814

Findings of the Court ..... II - 1815

2. The claim for reduction of the amount of the fine ..... II - 1818

The plea claiming infringement of the equal treatment principle ..... II - 1820

The discriminatory manner in which the Commission allegedly conducted its investigation ..... II - 1820

— Arguments of the parties ..... II - 1820

— Findings of the Court ..... II - 1821

The alleged discriminatory treatment of the applicants in comparison with the participants in the SANCO arrangements and the WICU and Cuprotherm arrangements ..... II - 1824

— Arguments of the parties ..... II - 1824

— Findings of the Court ..... II - 1828

The plea alleging infringement of the principle of proportionality ..... II - 1835

Arguments of the parties ..... II - 1835

Findings of the Court ..... II - 1836

3. The determination of the final amount of the fine ..... II - 1837

Costs ..... II - 1838