Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

27 June 2012*

(Competition — Agreements, decisions and concerted practices — Market for carbonless paper — Price-fixing — Decision finding an infringement of Article 101 TFEU — Decision adopted following annulment of a first decision — Imputation of the infringement to the parent company in its capacity as direct participant — Principle that offences and penalties must have a proper basis in law — Legal certainty — Principle that penalties must be applied only to the offender — Fair hearing — Equal treatment — Reasonable time — Rights of the defence — Fines — Limitation period — Attenuating circumstances — Cooperation)

In Case T-372/10,

Bolloré, established in Ergué-Gabéric (France), represented by P. Gassenbach, C. Lemaire and O. de Juvigny, lawyers,

applicant,

v

European Commission, represented by W. Mölls, F. Castillo de la Torre and R. Sauer, acting as Agents, with N. Coutrelis, lawyer,

defendant,

APPLICATION for annulment or variation of Commission Decision C(2010) 4160 final of 23 June 2010 relating to a proceeding pursuant to Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/36212 — Carbonless paper),

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur) and J. Schwarcz, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2012,

gives the following

* Language of the case: French.

Judgment

Facts of the case

1 In autumn 1996 the Sappi paper group provided the Commission of the European Communities with information which gave the Commission grounds for suspecting the existence of a secret cartel involved in price-fixing in the carbonless paper sector.

2 Throughout 1997 the Commission carried out inspections pursuant to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87) at the premises of a number of producers of carbonless paper, in particular at the premises of Papeteries Mougeot, Sappi and other companies, including Koehler and Arjo Wiggins Appelton plc ('AWA').

3 Neither Copigraph, a company in that business sector, nor the applicant, Bolloré, its sole parent company, was the subject of those inspections.

4 In November 1998 the applicant sold Copigraph to AWA.

5 In 1999 the Commission sent requests for information to a number of companies, including AWA, Papeteries Mougeot, Divipa, Koehler and Copigraph. Thus, on 20 September 1999 Copigraph received a request for information from the Commission.

6 On 26 July 2000 the Commission adopted a statement of objections ('the first statement of objections'), which it addressed to 17 companies, including Copigraph, the applicant, in its capacity as Copigraph's parent company, and also AWA, Divipa, Papeteries Mougeot, Koehler, Sappi, Stora Enso Oyi ('Stora') and Mitsubishi HiTec Paper Bielefeld GmbH.

7 In the first statement of objections the Commission stated that it intended to impute the infringement to the applicant on account of its responsibility, as the parent company owning all the shares in Copigraph at the time of the infringement, for Copigraph's participation in the cartel.

8 On 20 December 2001 the Commission adopted Decision 2004/337/EC relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) (OJ 2004 L 115, p. 1). In that decision, the Commission imputed the infringement to the applicant, no longer solely in its capacity as Copigraph's parent company but also on account of its personal and direct involvement in the cartel's activities.

9 By application lodged at the Registry of the Court of First Instance (now the General Court) on 11 April 2002 and registered as Case T-109/02, the applicant brought an action for annulment of Decision 2004/337.

10 By judgment of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré* v *Commission* [2007] ECR II-947 ('*Bolloré*'), the Court found that the first statement of objections had not enabled the applicant to acquaint itself with the objection based on its personal and direct involvement in the cartel's activities or even with the facts established by the Commission in Decision 2004/337 in support of that objection, so that the applicant had been unable properly to defend itself during the administrative procedure vis-à-vis that objection and the facts in question (*Bolloré*, paragraph 79).

11 However, at paragraphs 80 and 81 of *Bolloré*, paragraph 10 above, the Court considered that the defect found would entail the annulment of Decision 2004/337 only if the Commission's allegations concerned could not be substantiated to the requisite legal standard on the basis of other evidence in

that decision on which the undertakings concerned had been given the opportunity to comment. The Court added that if it should transpire, upon examination of the substance, that the Commission had been correct to hold the applicant liable for the participation of its subsidiary Copigraph in the cartel, the fact that the Commission had erred in law would not be sufficient to justify annulment of the decision because the error could not have had a decisive effect on its operative part.

12 Those considerations led the Court, following its examination of the substance, to hold that the applicant was liable for the infringement of its subsidiary irrespective of the direct involvement of the parent company and to uphold Decision 2004/337 in so far as it ordered the applicant to pay the fine imposed by the Commission.

13 Upon appeal by the applicant on the ground, in particular, of breach of its rights of defence, the Court of Justice, by judgment of 3 September 2009 in Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191 (‘*PAK*’), set aside the judgment in *Bolloré*, paragraph 10 above, and annulled Decision 2004/337 in so far as it concerned the applicant.

14 The Court of Justice considered that the fact that Decision 2004/337 had held the applicant liable on the ground of its involvement in its capacity as Copigraph’s parent company, as well as on the ground of its own personal involvement, did not preclude the possibility that the decision was based on conduct in respect of which the applicant had not been able to defend itself (*PAK*, paragraph 13 above, paragraph 44).

15 The Court of Justice added that this Court had thus erred in law in failing to draw any legal conclusion from its finding that the applicant’s rights of defence had not been respected (*PAK*, paragraph 13 above, paragraph 45) and that the judgment in *Bolloré*, paragraph 10 above, had therefore to be set aside in so far as it concerned the applicant (*PAK*, paragraph 13 above, paragraph 46).

16 The Court of Justice, itself giving final judgment in the matter, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, held, in substance, that the ground of annulment of Decision 2004/337 raised by the applicant, alleging breach of the rights of the defence, was well founded and that that decision had therefore to be annulled in so far as it concerned the applicant (*PAK*, paragraph 13 above, paragraph 48).

17 Following the annulment of that decision, the Commission on 15 September adopted a new statement of objections (‘the second statement of objections’), which it addressed to the applicant.

18 In that statement of objections the Commission informed the applicant that it intended to hold the applicant liable for the infringement in its capacity as Copigraph’s parent company and also for its direct involvement in the cartel (paragraphs 7 and 378 of the second statement of objections).

19 By observations dated 16 February 2010 the applicant responded to that statement of objections.

20 On 23 June 2010, after consulting the Advisory Committee on Restrictive Practices and Monopolies and in the light of the final report of the hearing officer, the Commission adopted Decision C(2010) 4160 final relating to a proceeding pursuant to Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/36212 — Carbonless paper) (‘the contested decision’).

21 In the contested decision the Commission stated that it was remedying by that decision the illegality found by the Court of Justice in *PAK*, paragraph 13 above, by resuming the procedure at the point at which that illegality had occurred (recitals 6 and 7 to the contested decision).

22 The Commission maintained that the second statement of objections was intended to cure the procedural defect which it committed when adopting Decision 2004/337. The Commission added that the second statement of objections had enabled the applicant to defend itself with respect to its liability for its participation in the infringement not only as parent company for the unlawful conduct of its subsidiary Copigraph, but also for its personal and direct involvement in the cartel (recital 8 to the contested decision).

23 The Commission explained that the contested decision followed on from the second statement of objections and that the wording of that decision was substantially based on that which had led to the Decision of 20 December 2001 and that it took the judgments in both *Bolloré*, paragraph 10 above, and *PAK*, paragraph 13 above, into account (recital 9 to the contested decision).

24 On the basis of its Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), the Commission granted the applicant a further deduction of the amount of the fine of 5% in addition to the 20% which had been granted in 2001 (recital 473 to the contested decision).

25 Article 1 and the first paragraph of Article 2 of the contested decision are worded as follows:

'*Article 1*

Bolloré has infringed Article 101(1) TFEU and Article 53(1) of the EEA Agreement by participating in a series of agreements and contracts in the carbonless paper sector.

The duration of the infringement was from January 1992 until September 19995.

Article 2

A fine of EUR 21 262 500 is imposed on Bolloré for the infringement referred to in Article 1.'

Procedure and forms of order sought by the parties

26 By application lodged at the Court Registry on 3 September 2010, the applicant brought the present action.

27 The applicant claims that the Court should:

— annul Articles 1 and 2 of the contested decision;

— in the alternative, substantially reduce the amount of the fine imposed on the applicant in Article 2 of that decision;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

29 In support of its action, the applicant puts forward six pleas in law.

30 The first plea alleges infringement of Articles 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and Articles 41, 47 and 49 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1) ('the Charter'), in that the penalty imposed on the applicant was pronounced in breach of the principle that offences and penalties must have a proper basis in law, the principle of legal certainty, the principle that

penalties must be applied only to the offender and the right to a fair hearing. The second plea alleges breach of the rules on limitation. The third plea alleges breach of the principle of equal treatment. The fourth plea alleges breach of the 'reasonable time' principle and the fact that it was impossible for the applicant to defend itself owing to the passage of time between the end of the infringement and the second statement of objections. The fifth plea alleges breach of the Guidelines of 14 January 1998 on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and breach of the principle that penalties must be specific to the offender, the principle of proportionality and the obligation to state reasons. The sixth plea alleges breach of the Leniency Notice and breach of the principles of proportionality and equal treatment.

First plea: infringement of Articles 6 and 7 of the ECHR and of Articles 41, 47 and 49 of the Charter

First part: breach of the principle that offences and penalties must have a proper basis in law and the principle of legal certainty referred to in Articles 6 and 7 of the ECHR and Articles 47 and 49 of the Charter, and of the principle that penalties must be applied only to the offender, recognised by the Member States of the European Union.

31 In the applicant's submission, the Commission breached the principle that offences and penalties must have a basis in law by penalising it in its capacity as Copigraph's parent company. There is no provision in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) or in the FEU Treaty on the basis of which a company can be penalised on the ground that it is the parent company of a participant in a cartel. There is a breach of the principle of legal certainty, as it was wholly unforeseeable that the parent companies would be held liable. Last, the penalty imposed on the applicant in its capacity as parent company breaches the principle that penalties must be applied only to the offender.

32 As regards the principle that offences and penalties must have a proper basis in law, the Commission contends, first, that the infringement in question is indisputably defined in Article 101 TFEU and, second, that the applicant cannot deny that the case-law is a source of law. As for the principle of legal certainty, there has been no breach of that principle. As for the reference to the principle that penalties must be applied only to the offender, it misconstrues the basis of the liability of parent companies for the acts of their subsidiaries.

33 The principle that criminal offences and penalties must have a proper basis in law, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, and in particular in Article 7 of the ECHR (see, to that effect, in particular, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 215 to 219; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 49; and Case C-266/06 P *Evonik Degussa* v *Commission*, not published in the ECR, paragraph 38).

34 Article 7 of the ECHR and Article 49 of the Charter provide that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'.

35 That principle that offences and penalties must have a proper basis in law requires that legislation must clearly define offences and the penalties applied to them. That condition is satisfied where the individual concerned is able, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretative guidance given by the courts, to know which acts or omissions will make him criminally liable (*Advocaten voor de Wereld*, paragraph 33 above, paragraph 50, and *Evonik Degussa* v *Commission*, paragraph 33 above, paragraph 39).

36 In that regard, the Court of Justice has recognised that it followed from the case-law of the European Court of Human Rights that the concept of 'law' ('*droit*') for the purpose of Article 7(1) of the ECHR corresponds to 'law' ('*loi*') used in other provisions of that Convention and encompasses both law of legislative origin and that deriving from case-law (*Dansk Rørindustri and Others* v *Commission*, paragraph 33 above, paragraph 216, and *Evonik Degussa* v *Commission*, paragraph 33 above, paragraph 40).

37 Just as it cannot be — and, moreover, as it is not — disputed that the infringement found in the present case is clearly defined in Article 101 TFEU and Article 53 of the EEA Agreement, it cannot be disputed that the imputation to the parent company of the infringement committed by the subsidiary, on the ground that those companies form a single undertaking for the purposes of EU competition law and, therefore, that the parent company is regarded as having participated in the infringement on the same basis as its subsidiary, is also clearly apparent under EU law, according to the long-established case-law of the Court of Justice and this Court.

38 In Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, the Court of Justice considered that the fact that the subsidiary had separate legal personality was not sufficient to preclude the possibility that its conduct should be imputed to the parent company. The Court of Justice further held that that could be the case in particular where the subsidiary does not decide independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (paragraphs 132 and 133 of the judgment).

39 In Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, a case involving the actions of a wholly-owned subsidiary of AEG, the Court of Justice imputed to AEG the conduct of its subsidiary, in reliance on the presumption that the subsidiary necessarily followed the policy laid down by the parent company (paragraph 50 of the judgment).

40 In Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, the Court of Justice observed that it was settled case-law that the anti-competitive conduct of a company can be attributed to another company where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other company, having regard in particular to the economic and legal links between them (paragraph 27 of the judgment). The Court of Justice added that, in those circumstances, the interpretation by this Court of Article 15(2) of Regulation No 17 could not be regarded as contrary to the principle of legality, because the appellants, to which the anti-competitive actions of the association marketing their products had been attributed, had received a fine under that article for an infringement which, as a result of that attribution of liability, they themselves were deemed to have committed (paragraph 28 of the judgment).

41 Last, in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 58; Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 37; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 96; and Case C-520/09 P *Arkema* v *Commission* [2011] ECR I-8901, paragraph 38, the Court confirmed that the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

42 It follows from the foregoing considerations that, contrary to the applicant's suggestion, the contested decision, whereby a fine was imposed on the applicant on the ground that it was the parent company of a participant in the cartel with which it formed an economic unit, does not in any way breach the principle that offences and penalties must have a proper basis in law.

43 Furthermore, and contrary to the applicant's assertion, the conditions in which parent companies are held liable for the acts of their subsidiaries are not vitiated by 'absolute unforeseeability' which in its view constitutes a breach of the principle of legal certainty.

44 First of all, even before the period covered by the infringement, the Court of Justice had clearly accepted that there is a presumption that a parent company which holds 100% of the capital of its subsidiary effectively exercises decisive control over the latter's conduct (*AEG-Telefunken* v *Commission*, paragraph 39 above, paragraph 50).

45 That approach was subsequently implemented in keeping with the judgment cited at paragraph 44 above (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 149 and 150; Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 80; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 960, 961 and 984; Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290; Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraphs 58 to 60; Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraphs 219 to 221; Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraphs 81 to 83; Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 125; Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 146; Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraphs 60 to 62; Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraphs 541 to 560; Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraphs 56 to 58; Case T-12/03 *Itochu* v *Commission* [2009] ECR II-883, paragraphs 49 to 51; Case T-175/05 *Akzo Nobel and Others* v *Commission*, not published in the ECR, paragraphs 91 and 92; and Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 59).

46 That last assertion, relating to the implementation of that approach in keeping with *AEG-Telefunken* v *Commission*, paragraph 39 above, is not undermined by the reference which the applicant makes to point 198 of the Opinion of Advocate General Bot in *ArcelorMittal Luxembourg* v *Commission*, paragraph 41 above. In its judgment (paragraphs 95 to 100) the Court of Justice did not follow the proposals which the Advocate General made at point 213 of his Opinion.

47 As for the argument that the liability of the parent companies is unforeseeable, because it is based on the concept of an 'undertaking', which is itself imprecise and constantly evolving, it must be rejected.

48 The fact that the concept of an undertaking applies to potentially different ways of carrying out an economic activity, since, according to the case-law, an undertaking in EU competition law includes any entity carrying out an economic activity, irrespective of its legal status and the way in which it is funded, and that the concept of an undertaking, in that context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see Case C-98/07 P *Akzo Nobel and Others* v *Commission*, paragraph 41 above, paragraphs 54 and 55and the case-law cited), does not alter the fact that the concept of an undertaking, as an economic unit, is perfectly identified and foreseeable in the case of relations between parent companies and their wholly-owned subsidiaries.

49 Furthermore, the fact that the Commission may impose the fine solely on the subsidiary, or solely on the parent company, or on both, does not constitute a breach of the principle of legal certainty, which requires that legal rules be clear and precise and aims to ensure that situations and legal relationships remain foreseeable (Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 69).

50 The Commission's power to impose the penalty on one or the other of the entities — parent company and subsidiary — that form an undertaking which has infringed Article 101 TFEU or Article 53 of the EEA Agreement clearly follows from the joint and several nature of their liability, noted in the case-law cited at paragraph 45 above (see also, to that effect, Case C-195/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 99 *in fine*, and *Dansk Rørindustri and Others* v *Commission*, paragraph 33 above, paragraph 118 *in fine*).

51 Last, as regards the argument that the imposition of the penalty imposed on the applicant disregards the principle that penalties must be applied only to the offender, whereby no one is to be punished except for his own act, it is sufficient to observe that that argument ignores the basis of the liability of the parent company, which is not strict liability incurred on behalf of another but liability for its own misconduct and personal in nature.

52 As the Court of Justice has observed, EU competition law is based on the principle of the personal liability of the economic entity which has committed the infringement. If the parent company is part of that economic unit, it is regarded as jointly and severally liable with the other legal persons making up that unit for the infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability (Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 41 above, paragraph 77). In such a situation, the parent company is penalised for an infringement which it is deemed to have committed itself (*Metsä-Serla and Others* v *Commission*, paragraph 40 above, paragraph 34, and *Schunk Kohlenstoff-Technik and Others* v *Commission*, paragraph 45 above, paragraph 74).

53 It follows from the foregoing considerations that the applicant is wrong to maintain that the contested decision breaches the principle that offences and penalties must have a proper basis in law, the principle of legal certainty and the principle that penalties must be applied only to the offender. The present part of the first plea must therefore be rejected.

Second part of the first plea, alleging that the conditions in which the applicant was heard infringed the right to a fair hearing referred to in Article 6 of the ECHR and Articles 41 and 47 of the Charter, and also the requirement of impartiality

54 In the present part of its first plea, the applicant maintains, in essence, that its right to a fair hearing was infringed by the Commission. The applicant claims that it was not heard by 'its judges', as none of the members of the College of the Commission attended its hearing. Furthermore, the requirement that the procedure be both objectively and subjectively impartial was not satisfied.

55 The Commission states in response that it is not a court or a tribunal. The fact that none of its members took part in the hearing does not in any way vitiate the procedure, which is an administrative procedure. The complaint alleging failure to satisfy the requirement of impartiality is irrelevant, since it is based on the premiss that the Commission is a court or tribunal. Moreover, the Commission, which does not deny being subject to that requirement, satisfied it.

56 First of all, the argument that the applicant's right to a fair hearing was infringed on the ground that it was not heard by 'its judges' must be rejected.

57 That argument is based on the premiss that the Commission is a court or tribunal within the meaning of Article 6 of the ECHR and Article 47 of the Charter. However, it has consistently been held that the Commission is not a court or tribunal within the meaning of those provisions (Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 81; Case T-384/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 56; and *Lafarge* v *Commission*, paragraph 45 above, paragraph 38).

58 Furthermore, as regards, more particularly, the fact that none of the members of the College of the Commission took part in the applicant's hearing, that circumstance is not such as to vitiate the administrative procedure before the Commission.

59 Thus, in a case in which the applicant relied specifically on the absence of members of the Commission at its hearing, the Court of Justice held that, in the context of the administrative procedure in a competition matter, there was nothing to prevent the members of the Commission who were responsible for taking a decision imposing fines from being informed of the outcome of the hearing by such persons as the Commission had appointed to conduct it (Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraphs 19 to 23).

60 That approach, based on the administrative — and not judicial — nature of the procedure before the Commission, was adopted in the context of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) and, more precisely, of Article 9(1) of that regulation. It continues to apply in the context of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] and, more precisely, Article 14(1) of that regulation.

61 It follows from the foregoing considerations that the argument alleging infringement of the right to a fair hearing, on the ground that the applicant 'was not heard by its judges', is unfounded.

62 It is appropriate, next, to examine the applicant's argument that the requirement of both objective and subjective partiality in the procedure was not satisfied.

63 In the first place, the applicant claims that the Commission fails to satisfy the requirement of objective impartiality by combining the functions of investigation and punishment.

64 It should be observed, however, that that argument, just like the applicant's reference in that context to the *Dubus S.A. v. France* judgment of 11 June 2009 of the European Court of Human Rights, No 5242/02, again rests on the incorrect premiss that the Commission is a court or tribunal within the meaning of Article 6 of the ECHR and Article 47 of the Charter.

65 Admittedly, and as the Commission indeed itself observes, the Commission is required, during the administrative procedure, to respect the general principles of EU law (see 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, paragraph 718 and the case-law cited), which include the right to a fair hearing laid down in Article 6 of the ECHR and Article 47 of the Charter, and of which the requirement of impartiality, which in the applicant's submission has not been satisfied, constitutes an aspect.

66 However, the fact that the Commission, as an administrative body, carries out the functions of investigating and imposing penalties for infringements of Article 101 TFEU does not constitute a breach of that requirement of impartiality, since its decisions are amenable to review by the EU Courts (see, to that effect, *Enso Española* v *Commission*, paragraph 57 above, paragraphs 56 to 64, and Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraphs 102 and 103).

67 The fact that the contested decision was adopted after a first decision had been annulled by the EU Courts does not call that assessment in question.

68 In the second place, the applicant claims that the Commission breached the requirement of subjective impartiality by its conduct and its statements before and during the procedure leading to the adoption of the contested decision.

69 The applicant refers, first, to certain statements made by the member of the Commission responsible for competition policy concerning cases involving the 'readoption' of decisions which have been annulled on procedural grounds; second, to certain words used by the Commission to describe the present procedure; and, last, to certain words in the contested decision, from which it is allegedly apparent that so far as the Commission was concerned the contested decision was merely an 'administrative formality', whose unfavourable outcome for the applicant was not in doubt.

70 More specifically, even before the present procedure was initiated, the member of the Commission responsible for competition policy allegedly made no secret, in a number of press releases relating to previous cases involving the 'readoption' of decisions, of the fate which the Commission has in store for

undertakings whose rights have been found by the EU Courts to have been breached. The member of the Commission concerned thus stated that 'the undertakings [could] therefore be certain that they [would] not escape, on procedural grounds, the fines imposed in the cartel cases' and that 'the Commission [was] sending a clear message that participants in a cartel cannot escape fines on procedural grounds'.

71 Furthermore, the words used by the Commission to describe the present proceedings allegedly leave little doubt as to their main purpose and their planned outcome: in its press release concerning the contested decision, the Commission states that it has 'readopted' its decision with respect to the applicant and describes the present procedure in the contested decision as a mere 'resumption' of the initial procedure and not as a new procedure.

72 Last, the purpose of the second statement of objections was on the Commission's own admission to communicate to the applicant the new objection relating to its personal participation. In that regard, the fact that the Commission appears to be surprised that the applicant 'took advantage' of that procedure in order to respond to the first objection concerning its role as parent company shows that the present procedure is, so far as the Commission is concerned, a 'mere administrative formality'.

73 It should be observed that the Commission's assertion that it is determined that the members of anti-competitive cartels should not escape, on procedural grounds, the penalties applicable under EU law, is not a manifestation of bias but merely the assertion of a clear intention, wholly consistent with the task entrusted to the Commission, of making good, on a case-by-case basis, the procedural irregularities found, in order not to undermine the effectiveness of EU competition law.

74 Nor is there any bias in the fact that the Commission should resume the procedure at the point at which the illegality was found. In that regard, it follows from the case-law that annulment of a Community measure does not necessarily affect the preparatory acts (see Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 32 and the case-law cited), and the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred (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 73).

75 In the present case, the illegality was the consequence of a difference between Decision 2004/337 and the first statement of objections, since that decision declared, for the first time, that the applicant was also liable for the infringement in its capacity as a direct participant. In sending the applicant a new statement of objections addressed to it in that capacity as well, the Commission remedied the illegality found by the Court of Justice.

76 The fact that the Commission, in the English version of its press release concerning the contested decision, stated that it had 'readopted' a decision — whereas the French version refers to the 'adoption of a new decision' — does not prove that the Commission was biased against the applicant in the context of the procedure leading to that decision.

77 The applicant does not establish that the Commission saw the resumption of the procedure as a 'mere administrative formality', in the sense that it afforded no significance to the evidence put forward by the applicant in that procedure. It is apparent, on the contrary, that the Commission adopted the contested decision, which indeed includes a reduction of the amount of the fine imposed on the applicant, following an inter partes procedure and in the light of the evidence put forward by the applicant.

78 Furthermore, and in so far as the applicant seeks to denounce what it claims to be prejudice against it by the Commission, it should be borne in mind that the existence of an infringement must be assessed solely by reference to the evidence gathered by the Commission. Thus, where the reality of an infringement has actually been proved at the end of an administrative procedure, evidence of the Commission's premature display during that procedure of its belief as to the existence of that infringement cannot deprive the evidence of the infringement of its reality. The only relevant issue is

whether, in substance, proof of the infringement is or is not made out (*Cimenteries CBR and Others* v *Commission*, paragraph 65 above, paragraph 726, and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 414).

79 It follows from the foregoing considerations that the plea alleging breach of the requirement of impartiality must be rejected.

80 As no part of the first plea claiming annulment is well founded, the plea must be rejected.

81 As regards the subsequent examination of the present action, it should be observed that the second plea, alleging breach of the rules on limitation relating to the imposition of penalties, can by definition concern only the imposition of the fine and not the finding of infringement itself (see, to that effect, Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraphs 40 to 64, and Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 18). Consequently, the second plea will be examined after the pleas contesting the legality of the contested decision with respect to the finding of the infringement.

82 In those circumstances, examination of the present action will continue with the third plea.

Third plea, alleging breach of the principle of equal treatment

83 The applicant maintains that it was treated unequally in the contested decision by comparison with Stora, which, like the applicant, was the parent company of a subsidiary which had participated in the infringement but which, unlike the applicant, was not penalised in its capacity as a parent company, although, at the time of the first statement of objections, it, unlike the applicant, was still a minority shareholder in its former subsidiary and was one of the world leaders on the paper market.

84 The Commission observes that Stora was in a different situation from the applicant at the time when Decision 2004/337 was adopted. However that may be, an undertaking cannot escape its liability in competition law merely because other undertakings were treated differently. Last, once the undertaking which has committed the infringement has been identified, the Commission has a discretion as to the person to whom the decision is addressed and who must pay the fine.

85 According to the case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

86 It must be stated at the outset that, contrary to the applicant's contention, Stora and the applicant were not in comparable situations.

87 Although those companies were indeed both parent companies of subsidiaries involved in the infringement and in that capacity were addressees of the first statement of objections, the fact none the less remains that it was only in the case of the Bolloré group that the Commission found that the parent company was also liable for the infringement in its capacity as a direct participant in the infringement. Thus, at recital 355 to Decision 2004/337, and then at recital 376 to the contested decision, the Commission expressly stated that there was evidence directly implicating the applicant in the infringement.

88 The circumstances to which the Commission referred inevitably helped to reinforce the evidence that the applicant exercised decisive influence over its subsidiary during the infringement period and therefore its liability as parent company, whereas, in contrast, in Stora's case the Commission observed, at recital 360 to Decision 2004/337 and then at recital 31 to the contested decision, that the

Stora group's activities in the carbonless paper field had been carried out 'directly' by the subsidiary Stora Feldmühle AG until late 1992, while from 1993 those activities had been concentrated within a new subsidiary of the subsidiary Stora Feldmühle AG.

89 Those findings by the Commission establish to the requisite standard that the parent companies of the Stora and Bolloré groups were not in comparable situations during the infringement period and, accordingly, that the imputation of liability for the infringement to the applicant in its capacity as parent company, when Stora was ultimately not penalised in that capacity, does not constitute a breach of the principle of equal treatment.

90 The fact that after the infringement period Stora, unlike the applicant, was still a shareholder of its former subsidiary and active on the world paper market, does not alter the findings set out in the preceding paragraph.

91 In addition to the sufficient considerations set out above, it should be noted that, in the case of the Bolloré group, the subsidiary involved in the infringement (Copigraph) had ceased trading in December 1999 and it was therefore unlikely, at the time when Decision 2004/337 was adopted, that that subsidiary would be able to pay any fine. In contrast, Stora's subsidiary, which in the meantime had been sold to the Mitsubishi group, was still fully active when Decision 2004/337 was adopted.

92 While those facts do not in themselves explain why Stora was not penalised in 2001 as parent company whereas the applicant was, they none the less shed light on the background to the adoption of Decision 2004/337 and on why, in order to ensure that its decision would be effective and serve as a deterrent to the applicant, the Commission found it necessary to penalise the parent company rather than its non-trading subsidiary, whereas in Stora's case the same objectives could be achieved by proceeding against the subsidiary.

93 Last, and in any event, it should be borne in mind that where an undertaking, by its conduct, has infringed Article 101 TFEU, it cannot escape being penalised altogether on the ground that other traders have not been fined when, as in the present case, those traders' circumstances are not even the subject of proceedings before the EU Courts (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 197; Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 141; and Case T-276/04 *Compagnie maritime belge* v *Commission* [2008] ECR II-1277, paragraph 94).

94 In the light of all of the foregoing considerations, the present plea must be rejected.

Fourth plea, alleging breach of the 'reasonable time' requirement and inability to provide a defence owing to the passage of time between the end of the infringement and the second statement of objections

95 The applicant takes issue with the Commission for having notified the second statement of objections to it after an unreasonable time, namely more than 14 years after the facts, and maintains that that period is attributable to the fact that the Commission persisted in maintaining an initial decision which the Court of Justice subsequently annulled.

96 The applicant claims that the passage of time between the end of the infringement and the second statement of objections prevented it from defending itself against the objection relating to its liability as Copigraph's parent company. The applicant must now defend itself, for the first time, in relation to the reality of the facts alleged against Copigraph, to which it did have to respond in the initial procedure and in respect of which it would not in any event have been able to defend itself in the context of that procedure.

97 Such a passage of time also prevented the applicant from defending itself against the objection relating to its personal participation in the infringement.

98 The Commission contends that the succession of procedures in the present case shows that there was nothing unreasonable about the time taken. It observes that, so far as the imposition of the fine is concerned, the 'reasonable time' principle is implemented by the limitation rules.

99 The reference to a period of 14 years ignores the first statement of objections and Decision 2004/337. Nor can the duration of the proceedings before the EU Courts be taken into consideration. The assertion that the Commission 'persisted' in maintaining Decision 2004/337 cannot be substantiated.

100 As for the allegation that the passage of time between the end of the infringement and the second statement of objections affected the applicant's rights of defence, it has not been proved.

101 As regards the applicant's liability as Copigraph's parent company, the second statement of objections is no different from the first. The applicant was in a position to defend itself on that point in 2000 and to contest the reality of the facts, had it wished to do so. The fact that it did not is the consequence of a free choice of defence on its part. As for the fact that the applicant was not involved in the procedure from the outset, the Commission observes that the inter partes stage of the procedure begins with the statement of objections, that the undertakings have no right to be the subject of an inspection and that the way in which the Commission carries out its investigation cannot depend on the specific circumstances of each undertaking. In its action against Decision 2004/337, moreover, the applicant demonstrated its ability to defend itself on the substance.

102 As regards the applicant's liability for its personal participation in the infringement, the Commission also maintains that the applicant's inability to defend itself has not been proved. The factual circumstances set out in the contested decision are the same as those set out in Decision 2004/337 and were known to the applicant. Having been warned of its liability both as parent company and as employer of individuals who had participated in the cartel meetings, the applicant never substantially contested the facts while those employees were still employed by it, but raised the argument only after they had left.

103 It should be borne in mind that, in accordance with the 'reasonable time' principle, which is a general principle of EU law and which is set out in Article 47(2) of the Charter, the Commission is required to act within a reasonable time in the context of its administrative procedures (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 74 above, paragraph 179, and Case T-196/01 *Aristoteleio Panepistimio Thessalonikis* v *Commission* [2003] ECR II-3987, paragraph 229).

104 In that regard, it is settled case-law that the reasonableness of the duration of an administrative procedure must be determined in relation to the particular circumstances of each case and, in particular, the background to the case, the various procedural stages followed, the complexity of the case and its importance for the various parties involved (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 74 above, paragraph 187; Case T-182/96 *Partex* v *Commission* [1999] ECR II-2673, paragraph 177; and *Aristoteleio Panepistimio Thessalonikis* v *Commission*, paragraph 103 above, paragraph 230).

105 Furthermore, it must be borne in mind that the fact that a reasonable time is exceeded, even on the assumption that it is established, does not necessarily constitute a ground for annulment of the decision. For the purposes of the application of the competition rules, the fact of exceeding a reasonable time can constitute a ground for annulment only, in the case of a decision finding infringements, where it has been established that the breach of that principle adversely affected the rights of defence of the undertakings concerned. Other than in that specific situation, failure to observe the duty to deal with the matter within a reasonable time has no effect on the validity of the administrative procedure under Regulation No 17 and Regulation No 1/2003 (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 49; Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraphs 47 and 48; and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 227; see also Opinion of Advocate General Kokott in Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, points 95 to 106).

106 In the present case, the applicant contends, in essence, that in sending it the second statement of objections, more than 14 years after the end of the infringement being investigated, the Commission breached the 'reasonable time' principle and infringed the applicant's rights of defence. Owing to that belated notification of the statement of objections, the applicant was deprived of the real opportunity to defend itself, both in its capacity as Copigraph's parent company and in its capacity as a direct participant in the infringement. The applicant observes that the duration of the procedure is essentially attributable to the fact that the Commission applied, in December 2001, and persisted in maintaining, in spite of the action brought by the applicant, a decision which the Court of Justice subsequently annulled in *PAK*, paragraph 13 above, for breach of the rights of the defence.

107 As to whether the reasonable time was observed in the present case, it should be borne in mind, first of all, that the reasonable nature of an administrative procedure must be assessed by reference to the background and the various procedural stages that have been followed (see the case-law cited at paragraph 104 above). A mere reference to the 14-year period to which the applicant refers, without taking the background and the various stages of the case into account, does not enable an answer to the question whether the Commission complied with the 'reasonable time' requirement.

108 In the present case, the first statement of objections was sent to the applicant on 26 July 2000, 4 years and 10 months after the end of the infringement and 3 years and 6 months after the beginning of the investigation, in January 1997. As for Decision 2004/337, it was adopted 1 year and 5 months after the first statement of objections.

109 Those periods cannot be considered to have exceeded a reasonable time, in view, in particular, of the large number of undertakings involved in the preliminary inspections and then in the inter partes procedure. Furthermore, and as the Commission observes, the applicant did not maintain, either in its action against Decision 2004/337 or in the present action, that the Commission had failed to act within a reasonable time at that stage of the procedure.

110 At most, the applicant takes issue with the Commission for having involved it in the administrative procedure at too late a stage, at a time when Copigraph had in any event already been sold to another group. That complaint is examined at paragraphs 139 to 154 below.

111 As regards the judicial proceedings initiated by the action in Case T-109/02, it should be observed that the period during which the EU Courts examined the legality of decision 2004/337, and then the validity of the judgment in *Bolloré*, paragraph 10 above, cannot be taken into account in determining the duration of the procedure before the Commission (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 45 above, paragraph 123, and Case T-66/01 *Imperial Chemical Industries* v *Commission* [2010] ECR II-2631, paragraph 102). In its judgment in *PAK*, paragraph 13 above (paragraphs 146 to 149), moreover, the Court of Justice expressly stated that the duration of the proceedings before this Court had not exceeded a reasonable time.

112 On 15 September 2009, or 12 days after Decision 2004/337 was annulled by the Court of Justice in *PAK*, paragraph 13 above, the Commission sent the applicant the second statement of objections. The contested decision was then adopted on 23 June 2010, or a little over nine months after that statement of objections. In this instance too, it must be held that the duration of the administrative procedure carried out by the Commission after the annulment of Decision 2004/337 did not exceed a reasonable time.

113 It follows from the foregoing considerations that the 14-year period that elapsed between the end of the infringement and the second statement of objections may be explained by a succession of procedural stages, none of which exceeded a reasonable time.

114 The applicant none the less maintains that the breach of the reasonable time requirement has been proved. In the light of the right of everyone to have his affairs dealt with in a reasonable time by the EU institutions (Article 47 of the Charter), the Commission was not entitled to prosecute and penalise

the applicant in respect of objections notified more than 14 years after the facts. The applicant observes that that extremely long period is essentially attributable to the fact that the Commission applied, in December 2001, and persisted in maintaining, in spite of the action brought by the applicant, a decision that the Court of Justice subsequently annulled in *PAK*, paragraph 13 above, for breach of the rights of the defence.

115 In so far as the applicant seeks by that argument to rely on a breach of the reasonable time requirement in order to secure annulment of the contested decision with respect to the fine, irrespective of whether the infringement has been established, it should be borne in mind that, according to the case-law, while the fact that a reasonable period is exceeded may, in certain circumstances, justify annulment of a decision finding an infringement of the competition rules, that does not apply where what is being disputed is the amount of the fines imposed by that decision, since the Commission's power to impose fines is governed by rules which have established a limitation period for that purpose (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 321, and *Hoechst* v *Commission*, paragraph 105 above, paragraph 220).

116 Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), and then Regulation No 1/2003, which succeeded it in the field of competition, established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the EU competition rules. In that regard, it should be emphasised that, with respect to fines in the context of the application of the EU competition rules, it follows from Article 25(5) of Regulation No 1/2003 (formerly Article 2(3) of Regulation No 2988/74) that the limitation period expires after 10 years where it is interrupted pursuant to Article 25(3) of Regulation No 1/2003 (formerly Article 2(1) of Regulation No 2988/74), so that the Commission cannot put off a decision about fines indefinitely without incurring the risk of the limitation period expiring (*CMA CGM and Others* v *Commission*, paragraph 115 above, paragraph 324, and Case T-410/03 *Hoechst* v *Commission*, paragraph 105 above, paragraph 223).

117 In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period (*CMA CGM and Others* v *Commission*, paragraph 115 above, paragraph 324, and Case T-410/03 *Hoechst* v *Commission*, paragraph 105 above, paragraph 224; see also, to that effect, Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 to 22, and *Imperial Chemical Industries* v *Commission*, paragraph 38 above, paragraphs 46 to 49).

118 It follows that, in so far as the applicant relies on breach of the reasonable time requirement in order to secure annulment of the contested decision with respect to the fine, independently of whether the infringement has been established, that claim must be rejected.

119 In so far as the applicant relies on a breach of the reasonable time requirement in order to secure annulment of the contested decision with respect to the finding of the infringement, even in the absence of a breach of its rights of defence, it should be observed that, according to the consistent case-law cited at paragraph 105 above, the fact that a reasonable time is exceeded can constitute a ground for annulment only, in the case of a decision finding infringements of Community competition law, where it has been established that the breach of that principle adversely affected the rights of defence of the undertakings concerned. Other than in that specific situation, failure to observe the duty to deal with the matter within a reasonable time has no effect on the validity of the administrative procedure under Regulation No 17 and Regulation No 1/2003.

120 Next, as regards the complaint that the Commission persisted in maintaining Decision 2004/337 in spite of the action brought against that decision, it is sufficient to bear in mind, first, that, according to Article 278 TFEU, '[a]ctions brought before the Court of Justice of the European Union shall not have

suspensory effect', and, second, that an act is presumed to be valid so long as it has not been annulled (see, to that effect, Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraph 69, and Case C-199/06 *CELF and ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 60).

121 As regards the assertion that the Commission was not entitled to resume the administrative procedure following the annulment, in *PAK*, paragraph 13 above, of Decision 2004/337, it should be borne in mind that, under Article 266 TFEU, the institution whose act has been declared void is to be required to take the necessary measures to comply with the judgment of annulment.

122 In *PAK*, paragraph 13 above, the Court of Justice, after stating that it is necessary that the statement of objections indicate in which capacity an undertaking is called upon to answer the allegations (paragraph 39 of the judgment), held that the applicant could not foresee, from the wording of the first statement of objections, that it was the Commission's intention to hold it liable, in Decision 2004/337, for the infringement on account of its direct and personal involvement in the cartel activities as well (paragraph 40 of the judgment).

123 The Court of Justice did not rule on the question whether the applicant was thenceforth not able to defend itself. It merely observed that the fact that in Decision 2004/337 the applicant was held liable on the ground that it was involved in its capacity as Copigraph's parent company, as well as on the ground of its direct involvement, did not preclude the possibility that the decision had been based on conduct in respect of which the applicant had not been able to defend itself (paragraph 44 of the judgment).

124 It follows from the foregoing that there was nothing in the findings of the Court of Justice to prevent the Commission, in the context of the measures adopted in order to implement the judgment in *PAK*, paragraph 13 above, from sending the applicant a new statement of objections implicating it, no longer solely in its capacity as Copigraph's parent company, but also in its capacity as a direct participant in the infringement.

125 In doing so, the Commission, contrary to the applicant's contention, did not seek to make good the breach of the rights of the defence found by the Court of Justice by adopting a purely formal measure.

126 On the contrary, by the second statement of objections the Commission, by notifying the applicant that it was implicated not only in its capacity as Copigraph's parent company but also in its capacity as a direct participant in the infringement, implemented the judgment in *PAK*, paragraph 13 above, by initiating a new inter partes procedure which gave the applicant the opportunity to defend itself on all the objections.

127 The question arises, however, whether the applicant, as it contended in its response to the second statement of objections and then in the present action, was, owing to the time that had elapsed before that statement of objections was issued, put in a position in which it was impossible to defend itself against the objections set out therein.

128 If that were the case, and it is for the applicant to prove that it is so (see, to that effect, *Technische Unie* v *Commission*, paragraph 105 above, paragraph 61), the adoption of the decision would constitute a breach of the rights of the defence.

129 The Court must therefore examine the applicant's objection that it was unable to defend itself owing to the time that had elapsed between the end of the infringement and the second statement of objections, first of all, from the aspect of the imputation of the infringement to the applicant in its capacity as Copigraph's parent company and then from the aspect of the imputation of the infringement to the applicant in its capacity as a direct participant in the infringement.

130 As regards, first of all, the imputation of the infringement to the applicant in its capacity as Copigraph's parent company, the applicant maintains that it is no longer in a position to defend itself. Since the Commission's objections relating to Copigraph's acts were notified directly to Copigraph in

the first statement of objections, the applicant was not itself required to answer for them. The applicant therefore defended itself solely with respect to the evidence characterising its own liability as parent company, that is to say, its conduct as the controlling entity of Copigraph. The applicant, as the sole addressee of the second statement of objections, must now also defend itself against the objections relating to Copigraph's acts, which in practice is impossible owing to the passage of time.

131 The applicant further maintains that it was unable to defend itself with respect to Copigraph's acts at the time of the first administrative procedure owing to the Commission's errors in the conduct of that procedure and a fortiori is unable to do so now.

132 As regards, in the first place, the argument that the applicant was not required to answer for Copigraph's acts in the first administrative procedure, it should be borne in mind that the first statement of objections was notified to both the applicant and Copigraph and that, owing to the economic unit formed by those companies, the acts forming the basis of the objections against Copigraph were just as much those of the applicant, which was implicated for an infringement which it was deemed to have committed itself (see paragraph 52 above).

133 The fact that the first statement of objections dealt separately with the question of the imputability of the infringement to the applicant and the description of the facts of the infringement themselves merely shows that the question of the imputability of the infringement to the applicant called for specific explanations. As the Commission observes, however, those explanations were merely additional to the description of the facts of the infringement and did not replace them so far as the parent company was concerned. Thus, and contrary to the applicant's argument, those explanations did not constitute an objection that was separate from another objection addressed only to the subsidiary. They did not permit the applicant to take the view that the description of the facts of the infringement were of no concern to it.

134 The applicant contends that the Commission's position 'is pernicious in that a company which disputes the control which it exercises over another company cannot logically be required to assume in its defence liability for the acts of that company'.

135 It must be held that that objection ignores the case-law on the personal liability of parent companies where they form an economic unit with their subsidiaries, which was well established at the material time. Nor is there any inconsistency per se in relying, in the alternative to a defence based on the absence of an economic unit between the parent company and its subsidiary, on a defence relating to the facts of the infringement themselves.

136 Last, the Court rejects that objection in so far as it suggests that a parent company which claims not to have control over its subsidiary cannot legitimately be required to have, at the same time, the material which will enable it to defend itself against the acts committed by its subsidiary.

137 Either the parent company does not exercise effective control over the subsidiary, in which case the question of the liability of the parent company does not even arise, with the consequence that it is irrelevant that it must defend itself with respect to the acts of the subsidiary, or it does exercise such control, in which case it is for the parent company to have at its disposal, whether by keeping them in its archives or by any other means, records which will enable it to defend itself if it is personally implicated as a parent company forming an economic unit with its subsidiary (see, to that effect, Case T-161/05 *Hoechst* v *Commission*, paragraph 45 above, paragraph 171).

138 It follows from the foregoing considerations that the applicant's argument that it was not concerned by the evidence in the first statement of objections concerning the facts of the infringement must be rejected.

139 In the second place, the Court must examine the argument that the applicant was in any event, at the time of the first administrative procedure and owing to the Commission's errors in the conduct of that procedure, unable to defend itself against the facts alleged against Copigraph.

140 The applicant claims that it was involved at too late a stage by the Commission in that administrative procedure, when it had already sold Copigraph in November 1998, with all its archives, to a third party and when Copigraph had ceased trading. For that reason, the applicant was unable, at the time of the first administrative procedure, to defend itself with respect to the unlawful acts committed by Copigraph, and is even less able to do so now.

141 The applicant takes issue with the Commission for having left it, unlike the other undertakings penalised in that case, in ignorance of the pending procedure, although from the outset the Commission had at its disposal all the information on the links between the applicant and Copigraph. The applicant was thus treated less favourably than the other undertakings involved.

142 It should be borne in mind that the administrative procedure in competition matters is divided into two separate and successive stages, each having its own internal logic, namely a preliminary investigation stage and an inter partes stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 1/2003 and which covers the period up until the notification of the statement of objections, is intended to enable the Commission to gather all the relevant information confirming or not the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the inter partes stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 74 above, paragraphs 181 to 183; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 38; and Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraph 47).

143 It is not until the beginning of the inter partes stage of the administrative procedure that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 74 above, paragraphs 315 and 316; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 142 above, paragraph 47; and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 59).

144 It follows that the purpose of the preliminary investigation stage is not to enable the undertakings to defend themselves, but to enable the Commission to gather all the essential evidence; the Commission is free to determine the way in which it conducts its investigation and to collect information from the undertakings which it deems likely to be in possession of useful information. The Commission is under no obligation to put the same questions, at the preliminary investigation stage, to all the undertakings which it suspects of participating in an infringement. Indeed, such an obligation would detract from the Commission's freedom of action in the conduct of its investigations in competition cases and would therefore undermine their effectiveness (see, to that effect, T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 212).

145 Admittedly, as regards compliance with the 'reasonable time' requirement, the Court of Justice has held, in essence, that the assessment of the source of any interference with the effective exercise of the rights of the defence must not be confined to the inter partes stage of the administrative procedure but must extend to the entire procedure and be carried out by reference to its total duration (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 142 above, paragraphs 49 and 50; *Technische Unie* v *Commission*, paragraph 105 above, paragraphs 54 and 55; and Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 118).

146 Similar considerations apply to the question whether and, if so, to what extent, the Commission is required to provide the entity concerned, at the preliminary investigation stage, with certain information concerning the subject-matter and purpose of the investigation, which would enable its defence in the inter partes stage to be effective (*Elf Aquitaine* v *Commission*, paragraph 145 above, paragraph 119).

147 That does not mean, however, that even before the first measure is taken against a given entity, the Commission is under a duty, as a matter of routine, to warn that entity of the mere possibility of measures of inquiry or of proceedings based on EU competition law (see *Elf Aquitaine* v *Commission*, paragraph 145 above, paragraph 120 and the case-law cited).

148 Furthermore, the Court of Justice has already held that the principle of personal liability does not preclude the Commission from penalising the company which has committed an infringement of the competition rules before considering whether the infringement might possibly be imputed to the parent company (Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 82, and *Elf Aquitaine* v *Commission*, paragraph 145 above, paragraph 121).

149 Thus, provided that the entity to which a statement of objections is addressed is put in a position to submit its views effectively during the administrative inter partes procedure as to the reality and relevance of the facts and circumstances alleged by the Commission, the Commission — contrary to the applicant's contention — is not required as a matter of principle to address a measure of investigation to that entity before issuing the statement of objections (*Elf Aquitaine* v *Commission*, paragraph 145 above, paragraph 122).

150 It follows that, contrary to the applicant's suggestion, the Commission was under no obligation to involve it at an earlier stage than it did in the first administrative procedure.

151 In any event, the applicant, which had access to the Commission's file, has not substantiated before the Court its assertion that the Commission already had at its disposal, at the beginning of the procedure, all the information on the applicant's links with Copigraph. Even though it is not for the Court to take the applicant's place in adducing the evidence that the applicant is required to adduce, it must be held that the only evidence produced before the Court that proves, by providing a definite date, that the Commission had at its disposal information concerning the links between Copigraph and the applicant is not a document dating from 1996 or 1997 but Copigraph's response of 10 February 2000 to the request for information of 20 December 1999. That request for information followed directly from the information, provided to the Commission by AWA by letter of 9 December 1999, that it had acquired Copigraph only in November 1998. The Commission therefore sought information directly from Copigraph concerning its activity before that acquisition. In the first paragraph of its reply, Copigraph informed the Commission of its links with the applicant. It was on the basis of that information, supplied in February 2000 and reproduced almost word for word in the first statement of objections, that that statement of objections was sent to the applicant in its capacity as parent company.

152 The Court must reject the argument that the applicant sold Copigraph with its archives and therefore allegedly no longer had the means to defend itself. First, it was for the applicant to ensure, in the circumstances of the sale of Copigraph, to keep in its own books or records or by any other means, such as a right of access to the transferred archives, the information that would enable it to retrace the activities of its subsidiary, in order to have the necessary evidence to be able to defend itself in the event of judicial or administrative actions (see, to that effect, *Hoechst* v *Commission*, paragraph 45 above, paragraph 171). Secondly, to accept that argument would undermine the Commission's very right to pursue a parent company after the sale of its subsidiary.

153 It follows from the foregoing considerations that, if the applicant was, as it claims, effectively unable to defend itself against its involvement, in the second administrative procedure, in its capacity as Copigraph's parent company, its inability was the consequence solely of circumstances imputable to the applicant and not of the passage of time between the end of the infringement and the second statement of objections or of errors on the Commission's part.

154 Furthermore, and for the sake of completeness, it should be noted that the assertion that the applicant was not in a position, at the time of the first administrative procedure, to defend itself with respect to the facts constituting the infringement is not convincing. The applicant does not dispute that it did not put that assertion forward in the action in Case T-109/02. However, if that assertion had had any substance, the applicant would certainly not have failed to rely on it in its action against Decision 2004/337. In addition, in that action the applicant did in fact defend itself with respect to the unlawful acts themselves, since it disputed the duration of the infringement and maintained that Copigraph had played only a 'follow-my-leader' role.

155 In conclusion, the Court must reject the argument that, owing to the passage of time between the end of the infringement and the second statement of objections, the applicant was not in a position to defend itself in the second administrative procedure against its implication in its capacity as Copigraph's parent company.

156 The Court must next examine the applicant's assertion that, so far as the imputation of the infringement to it in its capacity as a direct participant in the infringement is concerned, it was also unable to defend itself owing to the passage of time between the end of the infringement and the second statement of objections.

157 In that context, it should be observed at the outset that the evidence in the second statement of objections on which the Commission relied in the contested decision in order to find the applicant liable in its capacity as a direct participant in the infringement relates exclusively to the participation of the applicant's employees in the meetings of the cartel (see paragraph 376 of the second statement of objections and recital 376 to the contested decision). As is apparent from recital 377 to the contested decision, the Commission's position is not based on the applicant's membership of the Association of European Manufacturers of Carbonless Paper, which was involved in the infringement.

158 The Commission therefore accepted as proof of the applicant's direct involvement in the cartel the fact that two of its employees, Mr V. (the manager of the applicant's paper plant at Thonon-les-Bains and head of the applicant's 'Special papers' division) and his subordinate Mr B. (a sales executive at the applicant's paper plant at Thonon-les-Bains) had attended the meetings of the cartel.

159 It should be noted that neither those two individuals' status as employees of the applicant nor the reality of their participation in the meetings of the cartel is disputed by the applicant in its action. The present action does not include, whether in the application or in the reply, any plea or argument alleging an error on the Commission's part in that regard. At most, the applicant relied at the hearing on a statement of Mr B. confirming that he had held a post with the applicant only from February 1995. It must be held, however, that that fresh assertion, which is submitted out of time without valid reason, is inadmissible under Article 48(2) of the Rules of Procedure of the Court. Nor is that assertion supported by any probative material taken from the applicant's staff records, whereas it is contradicted by Copigraph's response of 10 February 2000 to the request for information of 20 December 1999, according to which Mr B. was a sales executive with the applicant from 1994.

160 The applicant therefore, in essence, merely relies on a breach of its rights of defence based on the fact that it was only in the second statement of objections that the Commission claimed that those two individuals had acted as representatives of the applicant. However, since those two employees had left the Bolloré group and since the applicant no longer had any links with any activities which they might carry out, it was much too late to obtain their testimony, or to undertake research in the archives, in relation to that new assertion on the part of the Commission.

161 The applicant infers that the passage of time between the end of the infringement and the second statement of objections deprived it of the opportunity to defend itself with respect to its direct involvement in the infringement, as alleged in the second statement of objections.

162 In order to illustrate its position, the applicant produces a list of information and documents which, it claims, it would have requested from those two employees or sought in its archives for the purposes of its defence if the allegation that it was a direct participant in the infringement had been made in good time.

163 The novel nature of the Commission's objections to which the applicant draws attention must at least be placed in context.

164 It is clearly correct that it was only in the second statement of objections that the Commission properly imputed the infringement to the applicant in its capacity as a direct participant.

165 However, and although Decision 2004/337 was annulled for breach of the applicant's rights of defence, the fact none the less remains that, in terms of fact, the applicant was aware, at that time, that the Commission also found that the applicant had participated in the infringement in its capacity as a direct participant, owing to the participation of Mr V. and Mr B., employees of the applicant, in the meetings of the cartel. The applicant was therefore informed of the Commission's position not in 2009, but in 2001.

166 In view of that circumstance, the applicant cannot find any support in the words of the Commission's defence in Case T-109/02 for its claim that, in essence, the imputation to the applicant of the infringement in its capacity as a direct participant constituted in 2009 a new objection against the applicant. Indeed, whatever arguments may have been developed by the Commission before this Court in Case T-109/02, it is indisputable that the imputation of the infringement to the applicant as a direct participant in the infringement is indeed to be found in Decision 2004/337. It was for that reason, in particular, moreover, that the applicant brought the action in Case T-109/02 and that both this Court, in *Bolloré*, paragraph 10 above, and the Court of Justice, in *PAK*, paragraph 13 above, could not but confirm that fact.

167 Nor, for the same reasons, can the applicant find any support in the fact that the Commission's hearing officer, in a letter of 13 January 2010, stated that the second statement of objections contained 'a completely new objection relating to facts dating back more than 15 years'. It should be observed, moreover, placing that letter in its context, that the hearing officer was merely replying to a request from the applicant for further time to respond to the second statement of objections, in which the applicant itself claimed that this was a 'completely new' objection and that the facts dated back more than 15 years. In addition, and in order to remove any uncertainty with respect to the position of the hearing officer, it should be noted that the latter, in his final report, expressly stated that 'the objection of [the applicant's] direct involvement [had] been notified to it with [Decision 2004/337]'.

168 Last, and in addition to the foregoing considerations, it should be noted that, at the time of the first statement of objections, the factual matters consisting in Mr V.'s and Mr B.'s participation in the meetings of the cartel had already been highlighted by the Commission in order to find the existence of the infringement, then alleged against Copigraph and against the applicant in its capacity as Copigraph's parent company. In other words, at the time of the first statement of objections, the applicant, although then regarded solely in its capacity as Copigraph's parent company, was made aware by the Commission of those factual matters.

169 In the light of the considerations set out at paragraphs 163 to 168 above, it must be held that none of the factual matters which serve as the basis, in the second statement of objections, for the imputation of the infringement to the applicant in its capacity as a direct participant constituted, in 2009, a new element, still less a new element in respect of which the applicant was deprived of the opportunity to defend itself owing to the passage of time between the end of the infringement and the second statement of objections.

170 That conclusion is not undermined by the applicant's argument by which, for the purposes of establishing a breach of its rights of defence owing to the passage of time, it produces in the reply a list of information and documents which, it claims, it would have requested from those two employees or sought in its archives for the purposes of its defence if the allegation that it was a direct participant in the infringement had been made in good time.

171 That argument is, as is apparent, moreover, from the document produced by the applicant, based on the argument that the Commission is taking issue with the applicant for a personal infringement 'separate' from that which the applicant is found to have committed in its capacity as Copigraph's

parent company, namely a separate personal infringement consisting in involvement on a materially different basis, as regards the facts, from Copigraph's involvement in the infringement, for which the applicant therefore needed to gather specific evidence for the purposes of its defence.

172 In the present case, however, it should be observed that that argument, which the applicant puts forward repeatedly in the action, does not correspond to the reality of the facts.

173 It is clear from both the second statement of objections and the contested decision that the Commission is not taking issue with the applicant for any separate infringement, or for any involvement in the infringement that is on a materially different basis from Copigraph's involvement.

174 The infringement which the applicant is found to have committed, both in its capacity as Copigraph's parent company and in its capacity as a direct participant in the infringement, is one and the same infringement, consisting in 'participation in a series of agreements and concerted practices in the carbonless paper sector' (Article 1 of the contested decision; see also paragraph 338, *in fine*, of the second statement of objections).

175 As for the factual elements from which the Commission infers that the applicant was also involved in the cartel as a direct participant, they are the same factual elements — long known — as those which allowed Copigraph's involvement in the cartel to be identified, namely the participation of Mr V. and Mr B., employees of the applicant, in the anti-competitive meetings (see, in the case of Copigraph, paragraphs 282 to 294 of the second statement of objections and recitals 287 to 298 to the contested decision; see, in the applicant's case, paragraph 376 of the second statement of objections and recital 376 to the contested decision, also the tables concerning the meetings, set out in Annexes I and II to those two documents).

176 That reality of a single infringement, based on the same factual elements, cannot, no matter what the applicant might claim, be undermined by certain formulations in the defence (paragraph 46). The Commission, moreover, clearly confirms elsewhere in the defence (paragraph 61) and in the rejoinder (paragraph 26) that there was a single infringement and that the applicant is, at most, found to have participated in that infringement in two capacities.

177 The applicant's alleged inability to contact witnesses or to have access to archives, if only in order to contest those factual elements — which the applicant does not however challenge before the Court, other than in a belated and unconvincing fashion — therefore appears to be largely irrelevant.

178 As for the claim that Mr V.'s and Mr B.'s testimony would none the less have made it possible to establish that the applicant was not directly involved in the infringement, it should be observed that that claim lacks credibility.

179 In view of the fact, which is not seriously disputed, that those two individuals were employees of the applicant and that, at least in Mr V.'s case, his capacity as the applicant's representative was identified at the inaugural session of the cartel on 23 January 1992 (see the third sentence of recital 376 to the contested decision), the applicant's claim is based ultimately on the hypothesis — which is unrealistic given the economic unit formed by the applicant and Copigraph — that its employees would have been able, at the meetings of the cartel, to be involved in the cartel on behalf of Copigraph and at the same time to distance themselves publicly and convincingly from the cartel on behalf of the applicant.

180 The lack of credibility of the claim that testimony of the applicant's former employees would have been of use to the defence is further corroborated by the applicant's conduct. It is significant to note that although the applicant was aware as early as 20 December 2001 that the Commission regarded it as being directly involved in the infringement, and although it could then very easily have obtained the testimony of Mr B. — who was then still an employee of the applicant — it did not do so.

181 That failure to act on the part of the applicant, and then the fact that Mr B.'s testimony, strangely, appears to be indispensable only after he has left the group, although the applicant had many years in which to obtain it, corroborates the fact that that testimony would be of no use for the applicant's defence.

182 Last, and in any event, it should be observed that the applicant has produced no evidence to show that it was in fact impossible, in 2009, to obtain information from its former employees (see, for similar findings, *Technische Unie* v *Commission*, paragraph 128 above, paragraph 64). In particular, the applicant produces no evidence of any effort made to re-establish contact with its former employees and to request their testimony. At most, at the hearing, the applicant vaguely and, in any event, belatedly in the light of the requirements of Article 48 of the Rules of Procedure, referred, in Mr B.'s case, to sickness followed by death. It follows that the assertion that the applicant no longer had access to its former employees in 2009 is simply not proved.

183 As for the reference to the applicant's archives, it should be observed that, even disregarding the fact that the applicant could have made the necessary arrangements as early as 2001, if a parent company must keep records that will enable it to defend itself when it is implicated in its capacity as a parent company forming an economic unit with its subsidiary (see paragraph 152 above), that applies a fortiori where its own conduct and its own archives are concerned. The applicant's argument that it was too late to look in its own archives must be rejected.

184 In the light of the considerations set out at paragraphs 156 to 183 above, the Court rejects the applicant's argument that, owing to the passage of time between the end of the infringement and the second statement of objections, it was deprived of the opportunity to defend itself in the second administrative procedure in its capacity as a direct participant in the infringement. In the particular circumstances of the present case, namely, in particular, (i) the applicant's actual knowledge, in 2001, of the Commission's objections against it; (ii) the absence, in 2009, of any new objection by comparison with those made in 2001; (iii) the identical nature of and failure to contest — other than in a belated and unconvincing fashion — the factual elements forming the basis of the applicant's involvement as a direct participant; (iv) the applicant's failure to act over many years, and then the absence of any evidence of any effort on its part to make contact with its former employees in 2009; and (v), the fact that the applicant cannot legitimately claim that it was no longer able to have proper access to its own archives, the Court considers that the applicant has not proved a breach of the rights of the defence owing to the passage of time, so far as the implication of the applicant in its capacity as a direct participant is concerned.

185 In view of all of the foregoing considerations, from which it follows that the Commission did not fail to comply with the 'reasonable time' requirement and that, irrespective of the length of the procedure in the present case, a breach of the applicant's rights of defence owing to the passage of time between the end of the infringement and the second statement of objections has not been established, the present plea should be rejected.

Second plea, alleging breach of the rules on limitation

186 The applicant claims that it follows from the rules on limitation that the Commission's power to impose a penalty was time-barred for the events in which Copigraph is a direct participant, for those in which the applicant is an indirect participant as Copigraph's parent company and, last, for those in which the applicant is a direct participant. In Copigraph's case, the last action to interrupt the running of time was taken when the first statement of objections was issued, as Copigraph did not bring an action against Decision 2004/337. As regards the applicant in its capacity as parent company, the limitation period had also expired, since the applicant's liability in that capacity is ancillary to Copigraph's liability. As regards the applicant as a direct participant, no action of the initial procedure interrupted the limitation period, which therefore expired. The Commission has therefore failed to understand the judgment in Case T-405/06 *ArcelorMittal Luxembourg and Others* v *Commission* [2009] ECR II-771, paragraphs 143 to 145.

187 The Commission rejects the 'artificial distinction' which the applicant draws between an infringement found to have been committed by Copigraph and a different infringement found to have been committed by the applicant as parent company. In fact, the applicant — Copigraph's parent company — and Copigraph form one and the same undertaking and each of them is deemed to have committed the same infringement.

188 Limitation is objective in nature and must be determined with regard to the applicant, the only addressee of the contested decision. The question of an alleged limitation period with respect to Copigraph is therefore irrelevant. Apart from the fact that the reference to *ArcelorMittal Luxembourg and Others* v *Commission*, paragraph 186 above, is incorrect, the fact that Copigraph did not bring an action against Decision 2004/337 is irrelevant.

189 As regards the alleged limitation in favour of the applicant as parent company, the applicant's reasoning is based on the flawed premiss that the liability of the parent company is 'ancillary' to that of the subsidiary.

190 As regards the alleged limitation in favour of the applicant as a direct participant in the infringement, the Commission disputes the applicant's argument that no interruption of limitation occurred on the ground that the first statement of objections referred to the applicant's liability only in its capacity as parent company. The actions that interrupted the running of time, which included that first statement of objections, apply as against all the undertakings that participated in the infringement and therefore as against the applicant. Even on the assumption, for the sake of argument, that it was not the same undertaking that was implicated, it could not be denied that the applicant participated in the infringement within the meaning of the case-law.

191 By the present plea, the applicant claims, in essence, that the Commission's power to impose penalties on it in its capacity as Copigraph's parent company was time barred, since its liability in that capacity is ancillary to the liability of its subsidiary and the limitation period had expired so far as concerns the subsidiary. The applicant also claims that the limitation period had also expired so far as the applicant was concerned in its capacity as a direct participant in the infringement, since during the limitation period the Commission had not taken any action interrupting the running of time with respect to the applicant in that capacity.

192 As a preliminary point, it should be observed that the argument which the applicant bases on the ancillary nature of its liability by comparison with that of Copigraph and on the fact that the limitation period had expired in favour of Copigraph must be rejected as irrelevant.

193 It should be borne in mind that in the case — as here — of an economic unit between a parent company and its subsidiary, the parent company is regarded, in the same way as the subsidiary, as having directly participated in the infringement. It is deemed to have itself committed the infringement (see the case-law cited at paragraphs 38 to 41 and 52 above and, in particular, *Metsä-Serla and Others* v *Commission*, paragraph 40 above, paragraph 34).

194 Accordingly, the fact that the subsidiary may no longer be capable of being penalised for the infringement found, whether because the subsidiary has ceased to exist or — as the applicant claims in the present case — because the limitation period has expired in favour of that subsidiary, has no effect on the question whether the parent company, which is itself deemed to have committed the infringement owing to the economic unity with its subsidiary, may be penalised. Admittedly, there would be no liability of the parent company if it were shown that there had been no infringement, but that liability cannot cease to exist because the penalty against the subsidiary is time-barred. The effect of the limitation period provided for in Article 25 of Regulation No 1/2003 is not to cause an infringement to cease to exist, but only to enable those that benefit from it to avoid penalties.

195 It follows from those preliminary considerations that, contrary to the applicant's assertion, there is no need to examine whether the limitation period had expired with respect to Copigraph.

196 The only relevant question is whether the limitation period had expired with respect to the applicant, which, moreover, is the sole addressee of the contested decision.

197 In that regard, it should be borne in mind that, according to Article 25(3) of Regulation No 1/2003, any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement is to interrupt the limitation period for the imposition of fines or periodic penalty payments and that the limitation period is to be interrupted with effect from the date on which the action is notified 'to at least one undertaking or association of undertakings which has participated in the infringement'.

198 The purpose of Article 25(3) of Regulation No 1/2003 is therefore to define the specific actions taken by the Commission that interrupt the limitation period.

199 That provision expressly limits that definition to action taken for the purpose of the investigation or proceedings which are notified to (at least) one undertaking which has participated in the infringement, that is to say, in the final analysis, to an undertaking identified as such in the decision imposing sanctions in respect of the infringement.

200 Thus this Court, in *ArcelorMittal Luxembourg and Others* v *Commission*, paragraph 186 above (paragraph 143), stated that '[t]he expression "undertaking which has participated in the infringement" within the meaning of [Article 25(3) of Regulation No 1/2003] must be understood to mean any undertaking identified as such in a Commission decision imposing sanctions in respect of an infringement'.

201 As for Article 25(4) of Regulation No 1/2003, it provides that the interruption of the limitation period is to apply for 'all' the undertakings or associations of undertakings which have participated in the infringement.

202 The purpose of Article 25(4) of Regulation No 1/2003 is therefore to define the specific undertakings affected by an interruption of the limitation period.

203 The word 'all' used in that provision is designed to emphasise that what matters is the objective participation of the undertaking concerned in the infringement, independently, therefore, of the capacity in which that undertaking participated in the infringement, or whether that undertaking was known to the Commission before the statement of objections, or whether or not it was the addressee of an act interrupting the limitation period before that statement of objections, or whether in the past it had obtained the annulment of a first decision of the Commission imposing sanctions on it.

204 It was in that sense that this Court, in *ArcelorMittal Luxembourg and Others* v *Commission*, paragraph 186 above (paragraph 145), stated, with respect to the undertakings to which the interruption of the limitation period applies, that the expression 'which has participated in the infringement' implies an objective fact, namely participation in the infringement, which is distinguished from a subjective and contingent element such as the identification of such an undertaking during the administrative procedure (*ArcelorMittal Luxembourg and Others* v *Commission*, paragraph 186 above, paragraph 145).

205 It follows from the foregoing considerations as to the meaning and scope of Article 25(3) and (4) of Regulation No 1/2003 that where an undertaking has participated in the infringement, that is to say, in the final analysis, where that undertaking is identified as such in the contested decision, the interruption of the limitation period as a result of the notification of an action taken for the purposes of the investigation or the proceedings to at least one undertaking also identified as having participated in the infringement, (whether it be that undertaking or a different undertaking) takes effect as against that undertaking.

206 In the present case, it should be stated not only that the applicant has been identified in the contested decision as having participated in the infringement, but also that all the pleas in the present action designed to call the legality of that finding into question have been rejected.

207 It follows that, no matter what it may maintain, the applicant is indeed an undertaking that participated in the infringement for the purposes of Article 25(4) of Regulation No 1/2003. The circumstance put forward by the applicant that it was not implicated as a direct participant in the infringement until the second statement of objections, that is to say, more than five years after the end of the infringement, is wholly irrelevant and is the result of a misunderstanding of the mechanism of Article 25(3) and (4) of Regulation No 1/2003.

208 Furthermore, it should be observed that it is common ground that actions taken for the purposes of the investigation or proceedings were notified to 'at least one undertaking having participated in the infringement', whether the actions taken for the purposes of the investigation by the Commission in 1997 and 1999 (see paragraphs 2 and 5 above), the first statement of objections of 26 July 2000, or the second statement of objections of 15 September 2009.

209 It follows that, no matter what the applicant may maintain, the limitation period had been interrupted with respect to it by those different actions. The applicant's argument that this Court held in *ArcelorMittal Luxembourg and Others* v *Commission* (paragraph 186 above) that actions for the purpose of the investigation taken against third parties did not interrupt the limitation period with respect to undertakings whose identity was known to the Commission and of whose participation it could not fail to be aware on the basis of the documents in its possession is the result of a misunderstanding both of the mechanism of Article 25(3) and (4) of Regulation No 1/2003 and of the terms of the judgment in question (see paragraph 204 above).

210 As for the claim that, as Decision 2004/337 had been annulled, the Commission could not rely on that decision in order to demonstrate that the applicant had been identified as having participated in the infringement 'in a decision of the Commission imposing penalties with respect to an infringement', it must be considered that that claim too misunderstands the mechanism of the limitation period. The applicant is identified as having participated in the infringement in the contested decision, which means that the actions taken for the purposes of the investigation and proceedings referred to at paragraph 208 above effectively interrupted the limitation period with respect to the applicant.

211 Last, as regards the suggestion that this Court and the Court of Justice made a 'change in favour of an effective application of the rules on limitation' when they held that the suspension of the limitation period for having brought an action did not take effect erga omnes, but only against the applicants (*ArcelorMittal Luxembourg and Others* v *Commission*, paragraph 186 above, paragraph 158, and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, paragraph 41 above, paragraphs 141 to 149), it should be observed that the approach adopted by the EU Courts in those judgments concerns, in any event, only cases involving the suspension of the limitation period (Article 25(6) of Regulation No 1/2003). It therefore does not mean that the interruption of the limitation period (Article 25(3) and (4) of that regulation) does not apply to all the parties that participated in the infringement. Furthermore, in *ArcelorMittal Luxembourg and Others* v *Commission*, paragraph 186 above, this Court clearly distinguished the rules governing the interruption of the limitation period, for which the erga omnes effect is 'expressly provided for' in Article 25(4) of Regulation No 1/2003, from the rules governing the suspension of the limitation period, for which the question was 'not resolved' (first sentence of paragraph 153 of the judgment).

212 In conclusion, it must be considered that the limitation period, which had begun to run in September 1995, was interrupted with respect to the applicants by the various actions referred to at paragraph 208 above and, in particular, by the first statement of objections (of 26 July 2000).

213 Having thus begun to run afresh from zero as from that first statement of objections, the limitation period was suspended, under Article 25(6) of Regulation No 1/2003, from 11 April 2002 (the date on which the applicant brought its action before this Court in Case T-109/02) until 3 September 2009 (the date of the judgment in *PAK*, paragraph 13 above), then ran again until it was interrupted by the second statement of objections, of 15 September 2009. The limitation period therefore ran, between 26 July 2000 and 15 September 2009, after deduction of the period during which it was suspended, for one year and nine months.

214 Following the second statement of objections (15 September 2009), the limitation period began to run afresh from zero again, until the Commission adopted the contested decision, on 23 June 2010, or nine months later.

215 It follows from those elements that the contested decision was adopted within the limitation period of five years provided for in Article 25(1)(b) of Regulation No 1/2003.

216 The period of 10 years provided for in the second sentence of Article 25(5) of that regulation was also observed, since, after deduction of the period when it was suspended during the judicial proceedings (11 April 2002 until 3 September 2009), the period between the end of the infringement (September 1995) and the contested decision (June 2010) is seven years and four months.

217 In view of the foregoing considerations, from which it is clear that the limitation period did not expire with respect to the applicant, the present plea must be rejected.

Fifth plea, alleging breach of the Guidelines, of the principle that penalties must be applied only to the offender and the principle of proportionality, and of the obligation to state reasons

First part, relating to the refusal to reduce the amount of the fine to take account of the factual and legal context of the present procedure

218 The applicant maintains that the following three elements, relating, first, to the fact that it was unable to exercise its rights of defence; second, to the fact that Copigraph belonged to it for only a short time, as it has withdrawn from the market; and, third, to the fact that Copigraph was a 'small player' which was found to have played only a passive part in the cartel, and did so under constraint, ought to have justified a significant reduction of the amount of the fine. There was an even more pressing need for a reduction of the amount of the fine if the amount of the fine imposed on the applicant was compared with the amount of the fine imposed on AWA, the market leader and the ringleader of the cartel.

219 The Commission contends that the three abovementioned elements have already been rejected, or have no effect, or have been taken into account. As for the comparison which the applicant draws with AWA, it is, in the light of the criteria taken into account by the Commission, 'simplistic and misleading'.

220 It should be borne in mind, by way of a preliminary point, that according to consistent case-law, the Commission has a discretion when determining the amount of each fine (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 268). Its discretion must, however, be exercised in compliance with EU law, which includes not only the provisions of the Treaty but also the general principles of law (Case T-450/05 *Peugeot and Peugeot Nederland* v *Commission* [2009] ECR II-2533, paragraph 273). It should also be observed that that discretion is subject to review by the EU Courts, which must exercise their review of legality and the unlimited jurisdiction conferred on them by Article 31 of Regulation No 1/2003, on the basis - apart from any public policy considerations - of the pleas raised by the applicant and the evidence adduced by it in support of those pleas (see, to that effect, Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraphs 62 to 64, and Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraphs 129 to 131).

221 In accordance with settled case-law, the gravity of an infringement is to be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines (*Dansk Rørindustri and Others* v *Commission*, paragraph 33 above, paragraph 241, and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 43).

222 In the present case, it is clear from the contested decision that the Commission determined the amount of the fine imposed on the applicant in accordance with the general method which it laid down for itself in the Guidelines, which state, in Section 1, that '[t]he basic amount of the fine will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'.

223 As regards the argument that the amount of the fine should be reduced in consideration of the fact that the applicant was unable to defend itself owing to the passage of time between the end of the infringement and the second statement of objections, it must, in the light of the findings made in the context of the examination of the fourth ground of annulment, be rejected as unfounded.

224 As regards the argument that the amount of the fine should be reduced in consideration of the fact that Copigraph belonged for only a short time to the applicant, which withdrew from the market, it must also be rejected, since it is common ground that the applicant was Copigraph's parent company throughout the infringement period. The fact that the applicant sold Copigraph and withdrew from the market after the end of the infringement cannot justify a reduction of the amount of the fine.

225 As regards the argument that Copigraph was a 'small player' on the market, it must be observed that that was taken into consideration by the Commission when it set the amount of the fine. Such a circumstance is reflected in Copigraph's turnover, which was taken into account for the purpose of establishing the basic amount of the fine set to reflect the gravity of the infringement (see recitals 434 to 437 to the contested decision).

226 As for the fact that Copigraph was found by the Commission to have played only a passive role in the cartel, and to have done so under constraint, it must be observed that, on the contrary, the Commission considered that Copigraph and the applicant, like all the other members of the cartel, were active members (recital 455 to the contested decision) and that, so far as participation under constraint is concerned, it was for the undertakings concerned to inform the Commission of the unlawful conduct and threats of their competitors, in order to put an end to them (recital 456 to the contested decision).

227 As regards, last, the fact that the fine imposed on the applicant is comparable, as a percentage of turnover on the market, to that imposed on the ringleader, AWA, it is sufficient to observe that that is a purely fortuitous circumstance.

228 Both the fine imposed on the applicant (EUR 21.26 million, or 35.43% of the applicant's turnover on the relevant market) and the fine imposed on AWA (EUR 141.75 million, or 37.26% of AWA's turnover on the relevant market) are merely the results of the application by the Commission, in the particular case of each of those two undertakings, of the method set out in the Guidelines, according to the principle that penalties must be specific to the offender (see, as regards the applicant, recitals 414 to 479 to the contested decision and, more particularly, recitals 436, 442, 443, 450 to 453, 461, 468, 473 and 479; see, as regards AWA, recitals 369 to 461 to Decision 2004/337 and, more particularly, recitals 409, 412, 415 to 417, 424, 432, 433, 448, 452 and 461).

229 It follows from the foregoing considerations that the present part of the fifth plea must be rejected.

Second part, relating to the refusal to reduce the amount of the fine to take account of the crisis in the carbonless paper sector

230 The applicant claims that a cartel formed in order to maximise profits in a thriving sector cannot be treated with the same severity as a cartel formed in order to deal with an inexorable decline in the sector. The Commission's practice provides examples in that regard and that need has been recalled at national and international levels.

231 In the present case, the decline on the market was pointed out and was also noted by the Commission, but the latter refused, without stating reasons, to take it into account, even though the decline in the sector continued.

232 The Commission contends that it took the economic situation in the sector into account. It observes that the comparison drawn with previous decisions is irrelevant. Furthermore, the crisis actually affected the sector only after the end of the infringement, which, far from constituting an attenuating circumstance, supports the conclusion that the cartel merely artificially prolonged an irreversibly damaged situation. According to the case-law, moreover, the Commission is not required to regard the poor financial health of a sector as an attenuating circumstance. The fact that the sector continued to decline after Decision 2004/337 is irrelevant.

233 As regards the present part of the fifth plea, it should be observed that the applicant cannot use the alleged crisis in the carbonless paper sector as a basis on which to take issue with the Commission for not having recognised the existence of an attenuating circumstance for the purpose of setting the fine.

234 As the Commission expressly stated at recital 460 to the contested decision, and as follows from consistent case-law, the Commission is not required to treat the poor financial health of the sector in question as an attenuating circumstance and the fact that in previous cases it took account of the economic situation in the sector as an attenuating circumstance does not mean that it must necessarily continue to follow that practice (Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 510; *Prym and Prym Consumer* v *Commission*, paragraph 45 above, paragraph 208; and Case T-11/05 *Wieland-Werke and Others* v *Commission*, not published in the ECR, paragraph 227).

235 As the Commission correctly stated (recital 460 to the contested decision), as a general rule cartels come into being when a sector experiences difficulties. If the applicant's reasoning were followed, the fine would have to be reduced as a matter of course in virtually every case (see, for similar reasoning, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 234 above, paragraph 510; *Prym and Prym Consumer* v *Commission*, paragraph 45 above, paragraph 207; and *Wieland-Werke and Others* v *Commission*, paragraph 234 above, paragraph 227).

236 It follows that the present part of the plea must be rejected.

Third part, alleging breach of the obligation to state reasons with respect to the parameters for the calculation of the amount of the fine

237 The applicant claims that none of the 65 recitals to the contested decision devoted to corrective measures reveals in what proportion its personal involvement in the infringement was taken into account in the calculation of the amount of the fine.

238 The Commission claims that this criticism is irrelevant, as the infringement in which the applicant is found to have been personally involved is the same as that in respect of which it is found to have been liable for the acts of its subsidiary. As one infringement is found to have been committed by the same undertaking, there is no need, for the purposes of setting the fine, to draw a distinction between the two capacities in which the applicant is penalised.

239 It should be observed that the present part of the plea rests on the premiss, which has already been rejected (see paragraphs 173 to 176 above), that the applicant, in its capacity as a direct participant in the infringement, is found to have participated in a separate infringement from that in which it is found to have participated as Copigraph's parent company.

240 As observed above, the infringement in which the applicant participated, in its capacity as a direct participant and in its capacity as Copigraph's parent company, is the same infringement. At most, the infringement was imputed to the applicant in those two different capacities.

241 As this was, therefore, the same infringement found to have been committed by the same undertaking, there was no need for the Commission, for the purposes of setting the fine, to distinguish between the two capacities in which the applicant was implicated.

242 It should be added that, in his Opinion in *PAK*, paragraph 13 above ([2009] ECR I-7191, at I-7196, point 103), Advocate General Bot observed that the fact that in Decision 2004/337 the applicant was held liable for the infringement as a direct participant in the infringement as well had no impact on the amount of the fine, since that amount was determined on the basis of turnover on the carbonless paper market, which was realised solely by its subsidiary Copigraph. The same applies in the contested decision.

243 It follows from the foregoing considerations that there was no need, for the purposes of setting the fine, to distinguish between the capacities in which the applicant had been held liable for the infringement.

244 The present part of the plea, alleging breach of the obligation to state reasons, must therefore be rejected.

245 As no part of the present plea is well founded, it must be rejected.

Sixth plea, alleging breach of the Leniency Notice and of the principles of proportionality and equal treatment

246 The applicant maintains that the supplementary reduction of 5% of the amount of the fine granted in the contested decision, in addition to the reduction of 20% of the amount of the fine already granted in Decision 2004/337, is wholly inadequate.

247 In its response to the second statement of objections, the applicant requested a further reduction of the amount of the fine under point D.2 of the Leniency Notice. The applicant decided, since it was unable to defend itself on that point, not to contest Copigraph's participation in the cartel throughout the infringement period established by the Commission, from January 1992 until September 1995. In doing so, the applicant acknowledged that Copigraph had participated in the infringement for an additional period of 25 months, when Copigraph had acknowledged having participated in the infringement for a period of only 21 months. The applicant observes that for non-contestation of the facts for an even longer period, the Commission granted it a reduction of the amount of the fine that was 75% less than the reduction of the amount of the fine already granted.

248 The applicant also takes issue with the grounds on which the Commission limited the additional reduction to 5%, namely that the non-contestation did not prevent the applicant from raising all manner of arguments disputing the Commission's powers, which did not make the Commission's tasks easier. The applicant maintains that in doing so it was merely legitimately relying on its rights of defence and on the rules on limitation. The Commission's errors with respect to the applicant deprived the applicant of the opportunity to defend itself and also to cooperate beyond not contesting the facts, as it is now unable to contact the witnesses and have access to the archives. That situation, in the applicant's submission, constitutes unequal treatment of the applicant by comparison with the other undertakings.

249 The Commission contends that the applicant's detailed arguments and their supporting figures make no sense. The reduction was granted mainly for cooperation before the statement of objections was issued. A reduction for cooperation is not proportionate to the acknowledged or uncontested duration of an infringement. What is rewarded by a reduction of the fine is the fact of making the Commission's task easier.

250 The applicant's non-contestation of the facts followed the second statement of objections, whereas this Court's rejection, in *Bolloré*, paragraph 10 above, of the parties' pleas relating to the duration of the infringement confirmed, in practice, the Commission's findings on that point. In reality, therefore, the applicant no longer had any choice other than not to contest the duration of the infringement. In addition, the applicant's suggestion that it waived the right to contest the infringement because it was no longer in a position to defend itself shows that it did not adopt that approach after the second statement of objections with the aim of cooperating with the Commission.

251 It is not surprising that the Commission should take into account the fact that the applicant raised numerous arguments which did not make the Commission's task easier.

252 Last, the applicant benefited from the cooperation, before the statement of objections, of its former subsidiary, which is favourable to it in the light of the Commission's practice of not allowing a former parent company to benefit from the cooperation of its former subsidiary. If the Court were to decide that the applicant ought not to have been granted the additional reduction of 5%, the Commission would have no objection to the applicant's fine being increased.

253 It should be borne in mind that, according to the case-law, the reduction of fines in cases where the undertakings which participated in infringements of EU competition law have offered cooperation has its basis in the fact that such cooperation makes the Commission's task easier (*BPB de Eendracht* v *Commission*, paragraph 85 above, paragraph 325; Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363; and Case T-374/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 330).

254 A reduction of the amount of the fine on the basis of the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part. It is clear from the very concept of cooperation, as described in the wording of the Leniency Notice, and in particular in the introduction and at Section D, paragraph 1, of that notice, that it is only where the conduct of the undertaking concerned shows such a spirit of cooperation that a reduction may be granted on the basis of that notice (*Dansk Rørindustri and Others* v *Commission*, paragraph 33 above, paragraphs 395 and 396, and *Degussa* v *Commission*, paragraph 78 above, paragraph 383).

255 It should be borne in mind that in the present case the 20% reduction of the amount of the fine granted under the first indent of Section D, paragraph 2, of the Leniency Notice was based on the fact that Copigraph sent the Commission, before the first statement of objections, documents and information relating to the period September 1993 to May 1995 which helped to confirm the existence of the infringement during that period (see recitals 70, 446, 449 and 452 to Decision 2004/337 and recitals 463 to 466 to the contested decision).

256 The additional 5% reduction of the amount of the fine granted in the contested decision is based on the fact that the applicant stated, in its response to the second statement of objections (paragraph 118 of that response), that it no longer contested the facts for the period January 1992 to September 1993 exclusive (recital 471 to the contested decision).

257 As regards the argument that, for the applicant's non-contestation of the facts relating to a longer period (25 months according to the applicant) than the infringement period not contested by Copigraph (21 months according to the applicant), the Commission granted the applicant an additional reduction of the amount of the fine (5%) that was 75% lower than the 20% reduction granted in Decision 2004/337, it must be rejected, quite independently of the fact that the applicant's non-contestation of the facts related to a period of only 20 months and not 25 months.

258 It should be observed that the reduction of the amount of the fine under the Leniency Notice is established not by reference to the duration of the infringement acknowledged or not contested, but by reference to whether the cooperation did in fact make the Commission's task easier. Not contesting the facts after the Commission already has sufficient material to establish the facts in question does not make its task easier (see, to that effect, *Erste Group Bank and Others* v *Commission*, paragraph 148 above, paragraphs 288 to 290).

259 In that regard, it should be emphasised that the initial 20% reduction of the fine had been granted for Copigraph's cooperation with the Commission before the first statement of objections. As the Commission has observed, active cooperation consisting, as in Copigraph's case, in providing information going beyond a mere response to the requests for information does more to make the Commission's work easier than does a mere non-contestation of the facts after the statement of objections.

260 Furthermore, in the present case, the applicant's non-contestation of the facts for the period January 1992 to September 1993 occurred not only after the first statement of objections but even after this Court, in *Bolloré*, paragraph 10 above, had examined and rejected all the pleas raised by the various applicants relating to the duration of the infringement (see paragraphs 244 to 371 of that judgment). In that judgment, the Court endorsed the Commission's position with respect to the anti-competitive

object of the meetings in which the various undertakings to which Decision 2004/337 was addressed — including Copigraph — had participated. In doing so, the judgment in *Bolloré*, paragraph 10 above, although it was set aside with respect to the applicant for breach of the rights of the defence, none the less confirmed, in practice, the Commission's finding as to the duration of the infringement. In *PAK*, paragraph 13 above (see, in particular, paragraphs 77 to 81 and 97 to 99), the Court of Justice rejected the pleas relating to the duration of the infringement.

261 In those circumstances, the Commission was correct to take the view that the fact that the applicant, in its response to the second statement of objections, had not disputed Copigraph's participation in the infringement during the period January 1992 to September 1993 had not really made its task easier (recital 472 to the contested decision).

262 As that finding can in itself justify the decision not to grant the applicant any additional reduction of the fine, it cannot be claimed that the additional 5% reduction none the less granted by the Commission, for the reasons stated at recital 473 to the contested decision, was manifestly inadequate.

263 It follows from the foregoing considerations that the present plea must be rejected, no matter how the applicant may criticise the reasons stated by the Commission at recital 473 to the contested decision for none the less granting an additional reduction of 5% (see paragraph 248 above).

264 As regards those criticisms, it must however be observed that the statement at recital 473 to the contested decision that the fact that the applicant 'no longer contests the facts did not prevent it from raising all manner of arguments to challenge the Commission's powers, which certainly did not make the Commission's task easier' is not surprising, contrary to the applicant's contention.

265 The Commission merely stated, in essence, that the applicant's non-contestation of the facts did not originate in a real desire to cooperate with the Commission and therefore to make its task easier, but that that non-contestation was indissociably linked with the applicant's argument that it was allegedly deprived, by the Commission's fault, of the opportunity to defend itself. Thus the applicant's non-contestation of the facts did not in reality originate in the genuine spirit of cooperation required in order to obtain a reduction of the amount of the fine (see the case-law cited at paragraph 254 above).

266 The Commission therefore did not make any criticism of the applicant as regards its means of defence, nor did it deny the applicant the right to put forward the arguments which it wished to put forward. It merely stated that the applicant must assume the consequences of its choices of defence.

267 As for the argument that the applicant was deprived, by the Commission's error, of the opportunity not only to defend itself but also to cooperate beyond not contesting the facts, with the consequence that the applicant was treated in the same way as the other undertakings concerned, it must be rejected. It has already been held, when the Court considered the fourth plea, that the Commission was not responsible for the applicant's alleged inability to defend itself in the second administrative procedure. In addition, and as stated at paragraph 154 above, that alleged inability is contradicted by the fact that in the action in Case T-109/02 the applicant contested the duration of the infringement.

268 It follows from the foregoing considerations that the present plea must be rejected.

269 As none of the pleas put forward by the applicant in support of its claims, both for annulment and for variation, is well founded, the action must be dismissed in its entirety.

Costs

270 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Bolloré to bear its own costs and to pay the costs incurred by the European Commission.**

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 27 June 2012.

[Signatures]

Table of contents

Facts of the case 1

Procedure and forms of order sought by the parties 4

Law 4

First plea: infringement of Articles 6 and 7 of the ECHR and of Articles 41, 47 and 49 of the Charter .. 5

First part: breach of the principle that offences and penalties must have a proper basis in law and the principle of legal certainty referred to in Articles 6 and 7 of the ECHR and Articles 47 and 49 of the Charter, and of the principle that penalties must be applied only to the offender, recognised by the Member States of the European Union..... 5

Second part of the first plea, alleging that the conditions in which the applicant was heard infringed the right to a fair hearing referred to in Article 6 of the ECHR and Articles 41 and 47 of the Charter, and also the requirement of impartiality 8

Third plea, alleging breach of the principle of equal treatment 11

Fourth plea, alleging breach of the 'reasonable time' requirement and inability to provide a defence owing to the passage of time between the end of the infringement and the second statement of objections 12

Second plea, alleging breach of the rules on limitation 23

Fifth plea, alleging breach of the Guidelines, of the principle that penalties must be applied only to the offender and the principle of proportionality, and of the obligation to state reasons 27

First part, relating to the refusal to reduce the amount of the fine to take account of the factual and legal context of the present procedure 27

Second part, relating to the refusal to reduce the amount of the fine to take account of the crisis in the carbonless paper sector 28

Third part, alleging breach of the obligation to state reasons with respect to the parameters for the calculation of the amount of the fine 29

Sixth plea, alleging breach of the Leniency Notice and of the principles of proportionality and equal treatment 30

Costs 32