# JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

14 December 2006 *

In Joined Cases T-259/02 to T-264/02 and T-271/02,

**Raiffeisen Zentralbank Österreich AG,** established in Vienna (Austria), represented by S. Völcker, lawyer,

applicant in Case T-259/02,

**Bank Austria Creditanstalt AG,** established in Vienna, represented by C. Zschocke and J. Beninca, lawyers,

applicant in Case T-260/02,

**Anteilsverwaltung BAWAG PSK AG,** formerly Bank für Arbeit und Wirtschaft AG, established in Vienna, represented initially by H.-J. Niemeyer and M. von Hinden, then by H.-J. Niemeyer, lawyers,

applicant in Case T-261/02,

* Language of the case: German.

**Raiffeisenlandesbank Niederösterreich-Wien AG,** established in Vienna, represented by H. Wollmann, lawyer,

applicant in Case T-262/02,

**BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG,** formerly Österreichische Postsparkasse AG, established in Vienna, represented initially by H.-J. Niemeyer and M. von Hinden, then by H.-J. Niemeyer, lawyers,

applicant in Case T-263/02,

**Erste Bank der oesterreichischen Sparkassen AG,** established in Vienna, represented initially by W. Kirchhoff, F. Montag, G. Bauer and A. Wegner, then by F. Montag and A. Wegner, lawyers,

applicant in Case T-264/02,

**Österreichische Volksbanken AG**, established in Vienna,

**Niederösterreichische Landesbank-Hypothekenbank AG**, established in St Pölten (Austria),

both represented by R. Roniger, A. Ablasser, R. Bierwagen and F. Neumayr, lawyers,

applicants in Case T-271/02,

v

**Commission of the European Communities,** represented initially by S. Rating, then by A. Bouquet, acting as Agents, and D. Waelbroeck and U. Zinsmeister, lawyers,

defendant,

APPLICATIONS for total or partial annulment of Commission Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.571/D-1: Austrian banks — 'Lombard Club' (OJ 2004 L 56, p. 1) and, in the alternative, for reduction of the fines imposed on the applicants,

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and following the hearing on 11 October 2005,

gives the following

## Judgment

### Background

I — *Subject-matter of the dispute*

1 By Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.571/D-1: Austrian banks — 'Lombard Club') (OJ 2004 L 56, p. 1; 'the contested decision' or 'the decision'), the Commission found that certain undertakings had participated in a series of agreements and concerted practices within the meaning of Article 81(1) EC.

2 In particular, the following eight banks were involved, they being the addressees of the contested decision:

— Erste Bank der oesterreichischen Sparkassen AG ('Erste');

— Raiffeisen Zentralbank Österreich AG ('RZB');

— Bank Austria AG, which became, as from 13 August 2002, Bank Austria Creditanstalt AG ('BA-CA');

— Bank für Arbeit und Wirtschaft AG ('BAWAG');

— Österreichische Postsparkasse AG ('PSK');

— Österreichische Volksbanken AG ('ÖVAG');

— Niederösterreichische Landesbank-Hypothekenbank AG ('NÖ-Hypo');

— Raiffeisenlandesbank Niederösterreich-Wien AG ('RLB').

3 In essence, the Commission criticises the addressees of the contested decision for establishing a system of regular meetings ('the committee meetings' or 'the committees'), to which it refers as the 'Lombard network', in which they covered every conceivable subject and regularly coordinated their conduct with respect to the essential factors of competition in the Austrian market in banking products and services.

4 On the basis of the factual findings and legal assessments made in the contested decision, the Commission imposed fines on the undertakings concerned.

5 The aim of the present actions is not to contest the substance of the facts described in the contested decision. The actions relate essentially only to certain aspects of the legal assessment made of those facts and the amounts of the fines imposed on the applicants.

## II — *The applicants*

6 In Austria, a distinction is drawn between single-tier banks and multi-tier bank groupings, also described as being 'decentralised'. Savings banks and credit unions thus have a two-tier structure, and agricultural credit cooperatives (Raiffeisen banks) have a three-tier structure. In each of these multi-tier structures (hereinafter referred to as 'the savings bank sector', 'the Raiffeisen sector' and 'the credit union sector' and, together, as the 'decentralised sectors'), a central establishment, ordinarily known as a 'lead institution' ('the central establishment' or 'the lead institution'), carries out support and service functions for the banks in the sector. Erste, RZB and ÖVAG are the central establishments for, respectively, the savings bank sector, the Raiffeisen sector and the credit union sector. The complex relations between those establishments and the other members of the structure, and their mutual rights and obligations, are governed by the Bundesgesetz über das Bankwesen (Bankwesengesetz — BWG) (BGBl. 1993, p. 3903 (Law on the banking system)), which was published on 30 July 1993 and entered into force on 1 January 1994.

A — *Erste (Case T-264/02)*

7 Erste is a public limited company and the successor, as from 1993, to a savings bank founded in Vienna in 1819 under the name 'Erste österreichische Spar-Cassa'. In the 1980s, and more so from 1990, the latter had extended its business beyond the boundaries of its original market. Initially, the company was called 'Die Erste Österreichische Spar-Casse-Bank AG' ('EÖ'). In May 1997, it purchased 53% of the shares in GiroCredit Bank der österreichischen Sparkassen AG ('GiroCredit'), which assumed the role of lead institution for the savings banks. From 1994 until the purchase of the shares by the applicant (then named EÖ), most of the shares in GiroCredit were held by the Bank Austria group.

8 GiroCredit remained an independent legal person and continued to act as lead institution for the savings banks until October 1997, when GiroCredit and Erste merged and the name of Erste was changed to 'Erste Bank der oesterreichischen Sparkassen AG'. At the time of the October 1997 merger, Erste resumed the function of lead institution for the approximately 70 savings banks existing in Austria during the period concerned. The conduct of GiroCredit was imputed by the contested decision to Erste.

B — *RZB (Case T-259/02)*

9 RZB is the lead institution of the Raiffeisen sector, the first tier of which comprises about 615 independent local banks and their branches. The eight regional banks (Raiffeisen-Landesbanken) form the second level. The local Raiffeisen banks in the same province (*Land*) are owners of their regional bank. RZB, to which central service tasks are entrusted, is the third tier. RZB is owned as to 80% by the regional banks.

C — *RLB (Case T-262/02)*

10 RLB is one of the regional banks in the Raiffeisen sector. In 1997, it took over Raiffeisenbank Wien AG ('RBW'), of which it was the main shareholder. The latter establishment participated in the committees, and its infringement is imputed to RLB.

D — *BA-CA (Case T-260/02)*

11 BA-CA is a credit establishment deriving from the merger in September 1998 of Bank Austria AG ('BA') and Creditanstalt AG ('CA'). The name of BA-CA was changed to 'Bank Austria Creditanstalt AG' only on 13 August 2002, that is to say after the contested decision was adopted but before the action was brought. The conduct of CA before the merger is imputed to BA-CA.

E — *Anteilsverwaltung BAWAG PSK AG (Case T-261/02) and BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG (Case T-263/02)*

12 Anteilsverwaltung BAWAG PSK AG (the applicant in Case T-261/02; 'AVB') has, since a restructuring in 2005 of the group of companies to which BAWAG and PSK belonged, been the name of BAWAG which, with effect from 1 October 2005, transferred all its banking business to BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG (the applicant in Case T-263/02; 'BAWAG PSK'). Until that date, BAWAG was a credit establishment and, as from December 2000, the main shareholder of PSK. The latter was a credit establishment in the form

of a joint stock company, which in 1997 became the successor to Österreichische Postsparkasse, a legal person governed by public law. PSK had a majority holding in Bank der Österreichischen Postsparkasse AG ('PSK-B'), with which it merged in 1998 and whose conduct is imputed to it by the contested decision. Until the merger of PSK and BAWAG PSK on 1 October 2005, BAWAG and PSK were public limited companies and legally independent banks.

F — *ÖVAG and NÖ-Hypo (Case T-271/02)*

13 ÖVAG is an Austrian credit establishment which, as a commercial bank, provides banking services on a regional scale in the Austrian market, focusing mainly on small and medium-sized enterprises (SMEs) and individuals. From a geographical point of view, its business is limited to Vienna and its environs; during the period covered by the contested decision, it ran 26 branches in Vienna and 2 in Lower Austria. In addition to operating as a commercial bank, ÖVAG acts as lead institution of the Austrian Federation of Credit Unions. Those establishments possess, through a holding company, a majority of the shares in ÖVAG. Moreover, ÖVAG has holdings in smaller undertakings that supply banking and financial services, including in particular NÖ-Hypo.

14 NÖ-Hypo was established in 1888 as a regional farm mortgage bank. Until 1992, it was a legal person governed by public law operating under the auspices of the Province of Lower Austria. In September 1992, it was converted, following an injection of capital, into a company limited by shares. Since 1 January 1997, NÖ-Hypo has formed part of the ÖVAG group. It operates 27 agencies, 20 of which are in Lower Austria and 7 in Vienna. NÖ-Hypo operates primarily in the public sector. From a geographical point of view, NÖ-Hypo's business is limited to the Province of Lower Austria and Vienna.

III — *Administrative procedure*

15 Having become aware in April 1997 of a document which gave grounds for suspecting the existence in the Austrian banking market of agreements or concerted practices contrary to Article 81 EC, the Commission opened a formal investigation procedure. On 30 June 1997, pursuant to Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the Freiheitliche Partei Österreichs, a political party ('the FPÖ'), lodged a complaint against eight Austrian credit establishments suspected of participating in agreements and/or concerted practices restricting competition.

16 On 23 and 24 June 1998, the Commission carried out unannounced inspections at several banks, including most of the addressees of the contested decision. On 21 September 1998, the Commission sent a request for information under Article 11 (2) of Regulation No 17 to numerous credit establishments suspected of having participated in those agreements or concerted practices.

17 Immediately after receiving the request for information, the main banks concerned offered the Commission their 'cooperation' in the investigation of the case, and went so far as to suggest that they would state the facts 'voluntarily' (instead of answering the request for information) and at the same time waive the right to a hearing; in return, the Commission Directorate-General for Competition would cancel its request for information and would impose only a 'moderate' fine. Whilst acknowledging the banks' promptness in offering their cooperation, the Commission declined to make any agreement in that regard.

18 All the addressees subsequently responded to the request for information. In doing so, some expressed the view that they were under no obligation to reply to most of the questions put to them and that they were therefore submitting the relevant documents and answering the relevant questions voluntarily as part of the abovementioned cooperation. The Commission rejected that interpretation of the law as being incorrect.

19 Soon afterwards, the largest banks concerned, including the applicants, with the exception of RLB, transmitted to the Commission a 132-page document described as a 'joint exposition of the facts' in which they set out at length the historical background to their cartel and summarised briefly and assessed from their point of view the content of the individual committee meetings as it appeared from the documents which had been seized and from those which they had been requested to produce. At the same time, they produced 16 binders containing documents, sorted according to committee, with detailed lists of contents. In order that it might assess any added value that the documents submitted with the joint exposition of the facts might represent, the Commission asked the banks to indicate whether any of those documents were not yet known to the Commission, and if so which. The banks, however, considered this to be neither feasible nor necessary.

20 On 13 September 1999, the Commission sent to eight banks a statement of objections dated 11 September 1999. After they had been granted access to the file and had made written submissions, a hearing was held on 18 and 19 January 2000. On 22 November 2000, the Commission sent to the banks a supplementary statement of objections. The undertakings concerned were again granted access to the file and submitted further written observations to the Commission, and a second hearing was held on 27 February 2001.

21 On 11 June 2002, the Commission adopted the contested decision.

## IV — *The contested decision*

### A — *General observations*

22 In Article 1 of the contested decision, the Commission states that the eight banks to which the decision is addressed infringed Article 81(1) EC by taking part in agreements and concerted practices in respect of prices, charges and advertising, with the object of restricting competition on the market in banking products and services in Austria, from 1 January 1995 to 24 June 1998.

23 Article 2 of the contested decision requires the undertakings mentioned in Article 1 immediately to bring to an end the infringement in question in so far as they have not already done so and to refrain in future from repeating any act or conduct which has the same object or effect as that infringement.

24 Article 3 of the contested decision imposes on its addressees the following fines:

— Erste: EUR 37.69 million;

— RZB: EUR 30.38 million;

— BA-CA: EUR 30.38 million;

— BAWAG: EUR 7.59 million;

— PSK: EUR 7.59 million;

— ÖVAG: EUR 7.59 million;

— NÖ-Hypo: EUR 1.52 million;

— RLB: EUR 1.52 million.

B — *Findings concerning the background to the cartel, the various committees, their relationships and the role of the lead institutions*

25 The contested decision states that in Austria there is a long tradition of agreements between banks, mainly about interest rates and charges and fees, based in some measure, until the 1980s, on a statute law, though the latter had been repealed by 1 January 1994, when the Republic of Austria joined the European Economic Area (EEA) and the BWG entered into force.

26 Credit establishments nevertheless continued to conclude agreements, in particular on lending and deposit rates, within the network.

27 The contested decision states, in Title 5, that the agreements were comprehensive as regards their content, highly institutionalised and closely interconnected, and covered the entire Austrian territory. For every banking product there was a separate committee on which the competent employees at the second or third level of management of the banks concerned sat. In practice, this separation as regards content was not strictly adhered to: sometimes, substantively related topics which were covered by more than one committee were dealt with in one and the same committee. Finally, the individual committees were part of an organisational whole.

28 Each month, apart from August, senior representatives of the largest Austrian banks got together as the top-level body (known as the 'Lombard Club'). In addition to matters of general interest that were clearly neutral from a competition point of view, they discussed changes in interest rates, advertising measures, and so forth. At some of these meetings, representatives of the Austrian National Bank ('the OeNB') were present.

29 One level down were the product-based specialist committees. The most important ones, in that regard, were the lending rates committees and the deposit rates committees which, as their names suggest, dealt with lending and deposit interest rates and they were convened either separately or jointly. A constant flow of information took place in particular between those committees and the Lombard Club.

30 Regional committees, which were diverse and numerous, held regular meetings in every province of Austria. In certain provinces, even the hierarchical structure of the Lombard Club and the specialist committees was replicated.

31 During the federal committee meetings on lending and/or deposit rates, bank representatives from Vienna met their opposite numbers from the provinces and their decisions were in principle valid for the whole of Austria.

32 In addition, there were special committees for, inter alia, corporate banking, retail banking business involving the self-employed, mortgage lending and building loans (named 'the Minilombard Committee', 'the Key Account Management Committee', 'the Liberal Professions Lending Rates Committee', 'the Mortgage Committee' and 'the Building Loans Deposit Rates Committee').

33 Lastly, there were meetings, at regular intervals, of a large number of further committees on matters of relevance from a competition point of view: in the Treasurer Committee (Treasurerrunde), federal financing and interest rate questions were discussed; in the various payments transactions committees (in particular the Payment Transactions Committee, the Cross-Border Transactions Committee and the Organising Committee of Austrian Credit Institution Associations), fees and charges for payment transactions were among the matters discussed; in the Export Financing Committee, matters of export financing were discussed, and in the Securities Committee, minimum fees, charges and interest rates were discussed.

34 Of all those special committees, the most noteworthy is the Controller Committee (Controllerrunde), on which the representatives of the controlling departments of the leading Austrian banks sat. It was at meetings of this committee that, for instance, uniform calculation bases and joint proposals for improved earnings were drawn up. The banks thereby increased the mutual transparency of their respective cost and calculation factors.

35 Between all these committees, concerned primarily with lending and deposit rates and with charges and fees, a regular flow of information took place. Discussions in one committee were often held over pending agreement in another. Lastly, the higher rank of the Lombard Club meant that, in controversial cases, its guidance was awaited.

36 With a view to extensive, countrywide implementation of (or for the purpose of coordination with) the agreements concluded in the abovementioned Vienna committee meetings, there was also a regular flow of information to the various regional committees in the provinces and from the latter to the central committees in Vienna. From time to time, regional committees sent representatives to federal committee meetings on lending and/or deposit rates.

37 The Commission states, in the contested decision, that, during the period covered by its investigation (namely from 1 January 1994 to the end of June 1998), at least 300 meetings took place in Vienna alone, quite apart from the numerous regional committee meetings. In terms of working days, this means that, in Vienna alone, a meeting took place every four days. It observes that, even outside that institutionalised network, numerous contacts took place between representatives of the banks concerned — sometimes at the highest level — on interest rates and charges and fees.

38 The Commission draws attention to the particular role played by the lead institutions in the Lombard network as coordinators and representatives of their respective bank groupings, namely, in the case of Erste (previously GiroCredit), the savings bank sector; in the case of RZB, the Raiffeisen sector; and, in the case of ÖVAG, the credit union sector. According to the Commission, that role was directly utilised for the smooth functioning of the Lombard network. First, the lead institutions organised the mutual transfer of information between Vienna and the provinces within the respective bank groupings; second, they represented the

interests of their grouping vis-à-vis the other groupings in the cartel. According to the Commission, they were thus perceived as representatives of their respective groupings by the other participants. The agreements were therefore reached not only between the individual institutions themselves but also between the groupings.

39 The Commission then explains in detail, in Titles 6 to 12 of the contested decision, how the institutionalised and closely interconnected network of numerous, wide-ranging committees led to a situation where the institutions concerned regularly and continuously jointly coordinated their behaviour in the market, particularly with regard to interest rates and bank charges and fees.

C — *The banks' arguments and legal assessment*

40 After observing that the banks concerned did not contest the facts established by the Commission as regards the conduct and content of the committee meetings, in Title 13 of the contested decision the Commission rejects, first, the banks' arguments regarding the specific historical, societal, economic and social aspects of the cartel and, second, their contention, based on an economic report drawn up by Professor von Weizsäcker, that the agreements had not had any influence on the Austrian banking market.

41 Title 14 of the contested decision is concerned with the legal assessment of the cartel. First of all, the Commission rejects the banks' thesis that the special economic context of the banking industry is such that competition law should not be fully applied to that sector.

42 The banks argued that the Commission is not competent to take action on an infringement of Article 53 of the EEA Agreement committed in 1994, in response to which the Commission, whilst contending that that view would thwart the full effectiveness of the EEA Agreement, waived the right to find that Article 53 of the EEA Agreement had been infringed in respect of that year.

43 The Commission characterises the facts surrounding the infringement as complex and of considerable duration, comprising both agreements and concerted practices. It emphasises that the undertakings concerned intended to restrict competition and also states that the concerted practices had concrete effects on the Austrian banking market, despite the fact that the commitments given were not always complied with by the banks.

44 In that title of the contested decision, recitals 438 to 469 give details of the repercussions of the concerted practices on trade between Member States.

45 As regards the fact that the contested decision was addressed only to some of the very large number of banks that took part in the practices at issue, the Commission emphasises that the banks to which the contested decision was addressed were singled out because of the particular frequency of their participation in meetings of the major committees and that, moreover, with the exception of NÖ-Hypo and RLB, they play an important role in the Austrian banking market on account of their size.

46 As regards, finally, the duration of the infringement, the contested decision indicates that the practices in question fell, as from 1 January 1995, within the scope of Article 81(1) EC and that the Commission considered that no further committee meetings took place after the time of the June 1998 investigations, so that the infringement ended at that time.

D — *The requirement that the infringement be brought to an end and calculation of the fines*

47 Title 16 of the contested decision deals with the 'remedies' adopted by the Commission.

48 First, the Commission requires the undertakings concerned to bring the infringement to an end, in accordance with Article 3 of Regulation No 17.

49 Next, as regards the fines imposed, the Commission observes first of all that the infringement was committed intentionally.

50 The amount of the fines imposed on the addressees of the contested decision (see paragraph 24 above) was calculated on the basis of the methodology set out in the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

51 In that regard, the Commission describes the bank meetings as 'very serious infringements' of Article 81 EC, and states that the relatively limited size of the relevant geographic market does not change that assessment. Next, it divides the participants in the agreements into five categories according to their respective market shares. It attributes to the lead institutions the market shares of the banks in the sector which they lead. For example, the market shares of all the Raiffeisen banks were attributed to RZB which, as a result, was placed in the first of the five categories, for which the starting amount of the fine was set at EUR 25 million.

52 In determining the duration of the infringement, the Commission found that it extended from 1 January 1995 until the end of June 1998. On account of that duration, it increased the starting amount by 35%.

53 The Commission did not give any bank the benefit of mitigating circumstances; it considers, in particular, that the division of roles within the bank meetings is not relevant in that regard.

54 Finally, the Commission granted the addressees of the contested decision, under the Leniency Notice, a reduction of 10% of the fine for not contesting the facts.

**Procedure and forms of order sought**

55 By separate applications lodged at the Registry of the Court of First Instance on 30 August and 2 September 2002, the addressees of the contested decision brought the present actions.

56 After hearing the parties' views, the President of the Second Chamber of the Court of First Instance, by order of 12 September 2005, joined the seven cases for the purposes of the oral procedure and judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

57 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, asked the parties to lodge certain documents and put questions to them. The parties complied with those requests within the appointed period.

58 The Commission requested confidential treatment for certain information contained in the documents produced by it, with regard to the applicants other than BA-CA, on the ground that the latter's business secrets were involved, and it produced non-confidential versions of the documents concerned. Since the confidential data were not relevant to examination of the pleas of BA-CA, but had a bearing on pleas raised by other applicants, the Court decided to place in the file only the non-confidential versions of the documents concerned, so that, under Article 67(3) of the Rules of Procedure, the confidential data could not be taken into consideration.

59 At the hearing on 11 October 2005, the parties presented oral argument and answered questions put to them by the Court. In response to one such question, Erste produced documents concerning its market share. The other parties gave their views on those documents in writing, and the oral procedure was closed on 7 November 2005.

60 RZB (the applicant in Case T-259/02) claims that the Court of First Instance should:

— annul the contested decision in so far as it relates to the applicant;

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

— order the Commission to pay the costs.

61 BA-CA (the applicant in Case T-260/02) claims that the Court of First Instance should:

— annul the contested decision in so far as it relates to the applicant;

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

— order the Commission to pay the costs.

62 AVB (the applicant in Case T-261/02, formerly BAWAG) claims that the Court of First Instance should:

— annul Articles 1 to 3 of the contested decision in so far as they relate to BAWAG;

— in the alternative, reduce the fine imposed on BAWAG to an equitable amount;

— order the Commission to pay the costs.

63 RLB (the applicant in Case T-262/02) claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Articles 3 and 4 of the contested decision in so far as they relate to the applicant;

— order the Commission to pay the costs.

64 BAWAG PSK (the applicant in Case T-263/02, formerly PSK) claims that the Court of First Instance should:

— annul Articles 1 to 3 of the contested decision in so far as they relate to PSK;

— in the alternative, reduce the fine imposed on PSK to an appropriate amount;

— order the Commission to pay the costs.

65 Erste (the applicant in Case T-264/02) claims that the Court of First Instance should:

— annul the contested decision in so far as it relates to the applicant;

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

— in the further alternative, reduce the fine to an appropriate amount;

— order the Commission to pay the costs.

66 ÖVAG and NÖ-Hypo (the applicants in Case T-271/02) claim that the Court of First Instance should:

— annul Article 1 of the contested decision in so far as it relates to them;

— annul the first sentence of Article 2 of the decision, in so far as it relates to them;

— annul Article 3 of the decision, in so far as it relates to them, or, in the alternative, reduce the fine imposed on them by that article;

— in the alternative to the first head of claim, annul the decision to admit the FPÖ as complainant and the decision to forward the statements of objections to it;

— order the Commission to pay the costs.

67 In Case T-259/02, the Commission contends that the Court of First Instance should:

— dismiss the application;

— increase the amount of the fine imposed on RZB to EUR 33.75 million;

— order the applicant to pay the costs.

68 In Cases T-260/02 to T-264/02 and T-271/02, the Commission contends that the Court of First Instance should:

— dismiss the applications;

— order the applicants to pay the costs.

**The effect of a restructuring on BAWAG (Case T-261/02) and PSK (Case T-263/02)**

69 By letter of 16 January 2006, the board of directors of BAWAG and PSK informed the Court of First Instance that, as part of the restructuring of the group of undertakings of which those two credit establishments formed part, BAWAG PSK was thereafter the successor to the two applicants in Cases T-261/02 and T-263/02.

70 It is apparent from the documents annexed to that letter, first, that BAWAG transferred its banking business to BAWAG PSK and changed its name to AVB, and, second, that PSK merged with BAWAG PSK. In its letter of 16 January 2006, the board of directors of BAWAG and PSK stated that BAWAG PSK was the sole successor to BAWAG as regards the latter's banking business.

71 It is true that the Community judicature may take note of a change of name of a party to proceedings. Moreover, an action for annulment brought by the addressee of a measure may be continued by the universal successor in title of that addressee, in particular in the case of the death of a natural person or where a legal person ceases to exist and all its rights and obligations are transferred to another person (see, to that effect, the judgments of the Court of Justice in Case 92/82 *Gutmann* v *Commission* [1983] ECR 3127, paragraph 2, and Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraphs 13 to 18). It must be borne in mind that, in such circumstances, the universal successor in title is necessarily substituted automatically for its predecessor as addressee of the contested measure.

72 Conversely, the Community judicature has no power, either in the context of an action for annulment under Article 230 EC or even in the exercise of its unlimited jurisdiction under Article 229 EC, with regard to penalties, to amend the decision of a Community institution by replacing the addressee thereof by another natural or

legal person when that addressee still exists. That power belongs only to the institution that adopted the measure concerned. Thus, once the competent institution has adopted a decision and, therefore, established the identity of the person to whom the decision is to be addressed, it is not for the Court to substitute another person for the latter (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 47).

73 It must then be considered that an application brought by a person in his capacity of addressee of a measure in order to give effect to his rights in the context of an action for annulment under Article 230 EC and/or of an application for amendment under Article 229 EC cannot be transferred to a third person who is not the addressee thereof. If such a transfer were to be allowed, there would be a discrepancy between the status by virtue of which the action was brought and the status by virtue of which it was purportedly pursued. Moreover, such a transfer would give rise to a discrepancy between the identity of the addressee of the measure and that of the person litigating as addressee (*JFE Engineering and Others* v *Commission*, cited in paragraph 72 above, paragraph 48).

74 It is therefore appropriate to take formal note of the change of name of BAWAG to AVB and of the fact that, following the merger mentioned above, BAWAG PSK became the successor to PSK. On the other hand, it would not be appropriate to replace AVB by BAWAG PSK in Case T-261/02, whatever the effects under Austrian law of the restructuring that has taken place. Consequently, BAWAG (now called AVB) remains the applicant in Case T-261/02, whereas BAWAG PSK has automatically become the applicant in Case T-263/02.

75 Given that the contested decision had been addressed to BAWAG and to PSK and that the latter have made their written and oral submissions to the Court under their former names, those names will be used to refer to those applicants in the remainder of the present judgment.

## Law

### I — *The applications for annulment of the contested decision in its entirety*

#### A — *The pleas alleging infringements of the Rules of Procedure*

##### 1. The final report of the Hearing Officer (Cases T-260/02, T-261/02 and T-263/02)

(a) Arguments of the applicants

76 BA-CA, BAWAG and PSK observe that the copy of the final report of the Hearing Officer sent to the applicants under Article 16(3) of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition procedures (OJ 2001 L 162, p. 21) (the 'Terms of Reference') bears no signature. They consider this to constitute a breach of essential procedural requirements justifying annulment of the contested decision.

77 BAWAG and PSK (Cases T-261/02 and T-263/02) state that the uncertainty as to whether the copy of the final report sent to them was in fact the final version undermined their ability to defend themselves properly against the contested decision.

78 BA-CA (Case T-260/02) contends that the contested decision was adopted by the Commission in an improper manner because the final report of the Hearing Officer

had not been authenticated. Moreover, the word 'draft' appearing on the copies submitted to the Advisory Committee and the Members of the Commission was liable to affect the assessment of the report by those authorities and, therefore, the result of the administrative procedure. Moreover, it suspects that the final report was presented to the Members of the Commission only in the German language, so that the fourth paragraph of Article 6 of the Commission's Rules of Procedure of 29 November 2000 (OJ 2000 L 208, p. 26; 'the Commission Rules of Procedure') was infringed. It requests that the Court of First Instance adopt a measure of organisation of procedure granting it full access to the Commission file.

(b) Findings of the Court

79 The first paragraph of Article 15 of the Terms of Reference provides:

'The Hearing Officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.'

80 According to Article 16 of the Terms of Reference:

'1. The Hearing Officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

2. The final report may be modified by the Hearing Officer in the light of any amendments to the draft decision up to the time the decision is adopted by the Commission.

3. The Commission shall communicate the Hearing Officer's final report, together with the decision, to the addressees of the decision. It shall publish the Hearing Officer's final report in the *Official Journal of the European Communities*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.'

81 As regards, first, the complaint that the final report was not signed, it must be observed that the Commission has produced, as an annex to its defence, three copies of that report (in German), namely:

— the one sent to the addressees of the contested decision;

— the one sent to the Advisory Committee;

— the one sent to the Members of the Commission,

the text of which is identical, whilst only the second one bears a signature. Moreover, the last two copies bear the words 'Entwurf' (draft) and 'Intern' (internal).

82 It is apparent from those documents that the Hearing Officer signed at least one copy of the final report, which shows that the text was definitive and was the one sent to the competent authorities in accordance with the wishes of the Hearing Officer. In those circumstances, the fact that other copies of that report, which were identical to the signed version (with the exception of the removal, in certain cases, of the word 'draft'), were sent to the addressees without having been signed cannot be held to be an infringement of essential procedural requirements, such as to justify annulment of the contested decision.

83 BAWAG's and PSK's complaint that the lack of a signature on the copy of the final report sent to them at the same time as the notification of the contested decision undermined their rights of defence, making it more difficult for them to draw up their defence against that decision, is misconceived. The lack of a signature was not capable of undermining the applicants' rights of defence during the administrative procedure. In so far as the applicants' arguments seek to show that the absence of a signature might have prompted doubts as to whether or not the report was final, so that criticism of that report and, therefore, their defence before the Court of First Instance would be more uncertain, it must be pointed out that such doubts could have been raised in a request for measures of organisation of procedure and that Article 48(2) of the Rules of Procedure enables the parties to defend their rights in relation to the result of such measures by raising new pleas if appropriate.

84 Second, BA-CA's complaint alleging breach of the obligation to authenticate the Hearing Officer's final report must be rejected. The Hearing Officer's final report is not a measure taking one of the forms provided for in Article 14 ECSC, Article 249 EC or Article 161 EAEC, for which authentication is required under the fifth paragraph of Article 18 of the Commission Rules of Procedure.

85 Third, with regard to the word 'draft' appearing on the copies of the final report submitted to the Advisory Committee and the Members of the Commission, it must

be borne in mind that Article 16(2) of the Terms of Reference provides that, before the adoption of the decision, the Hearing Officer's final report may be modified by him in the light of any amendments to the draft decision. It is not therefore illegal for the word 'draft' to appear on the report when it is forwarded to the competent authorities. The fact that such a 'draft' is not replaced by a definitive version if it is not modified cannot render illegal the decision adopted on the basis of it. It cannot be presumed that the Members of the Commission, when dealing with a decision imposing fines, would fail in their obligation, set out in Article 16(1) of the Terms of Reference, to take account of the Hearing Officer's final report, because of the word 'draft' appearing on it.

86 Fourth, it must be pointed out that there is no basis for BA-CA's suspicion that the final report may not have been submitted to the competent authorities in all the required languages. In that regard, the fourth paragraph of Article 6 of the Commission Rules of Procedure provides:

'The agenda and the necessary working documents shall be circulated to the Members of the Commission within the time-limit and in the working languages prescribed by the Commission in accordance with Article 25.'

87 It is well known that the Commission's working documents are as a general rule presented in German, English and French.

88 In response to a measure of organisation of procedure, the Commission has produced the German, English and French versions of the final report, accompanied by notes from the Commission Secretariat-General dated 4 June 2002, showing that those versions were sent to the Members of the Commission. Consequently, BA-CA's complaint is factually unfounded.

89 BA-CA's request for full access to the Commission's administrative file must also be rejected. It follows from the foregoing that such a measure is not necessary to enable it to verify whether the Hearing Officer's final report was in fact presented in the requisite language versions. Moreover, BA-CA has not stated in relation to what other pleas production of the Commission's administrative file might prove necessary.

90 It follows that the complaints made by BA-CA, BAWAG and PSK concerning the Hearing Officer's final report must be rejected.

2. The status granted to the FPÖ political party in the administrative procedure (Cases T-260/02 and T-271/02)

(a) Arguments of the parties

91 BA-CA, ÖVAG and NÖ-Hypo criticise the Commission for improper conduct, first, by admitting the FPÖ as a complainant under Article 3 of Regulation No 17 and, second, for sending non-confidential versions of the statements of objections to that political party. They claim that those decisions infringed Articles 3 and 20 of Regulation No 17 and their rights of defence, first, because, since the FPÖ's complaint was lodged after the Commission opened the procedure, it did not give rise to that procedure; second, because the FPÖ could not show a legitimate interest in submitting an application under Article 3 of Regulation No 17, the fact that it was a bank customer being insufficient in that regard; third, because the oral hearings had already taken place when those two decisions were adopted; and, fourth, because the Commission did not obtain a commitment from the FPÖ to fulfil the obligations incumbent on complainants. In their view, the consequence of those irregularities should be that the contested decision be annulled.

92 BA-CA also alleges that the Commission infringed its rights of defence by failing — despite several requests — to communicate to it, in that connection, a decision that could be contested in legal proceedings, thereby depriving it of the possibility of bringing an action against the transmission of the statements of objections. Moreover, it claims that the Commission infringed the EC Treaty by not doing everything within its power to curtail abuse of the statements of objections by the FPÖ and that it failed to oppose the FPÖ's misuse of the documents forwarded to it and in particular failed to request their return.

93 The Commission is of the opinion that the complaints concerning the transmission of the statements of objections to the FPÖ have no bearing on the subject-matter of these proceedings. It states that the admission of the FPÖ as a complainant had no influence whatsoever on the contested decision and that the decision authorising the transmission of the statements of objections to the FPÖ should have been the subject of a separate procedure, an application ex post facto in the context of the present proceedings no longer being possible, if only by reason of the expiry of limitation periods.

94 In its rejoinder, the Commission adds that the applicants have no standing to bring proceedings under the fourth paragraph of Article 230 EC against the admission of the FPÖ as a complainant and the transmission of the statements of objections because their legal status is not affected by those measures. The Commission also contends that the effect of which they complain and the prejudice they consider themselves to have suffered derive not from acts of the Commission but from the later entirely independent conduct of the FPÖ. The Commission is also of the opinion that it was perfectly entitled to admit the FPÖ as a complainant and, therefore, was required to transmit the statements of objections to it.

(b) Findings of the Court

95 Article 3(1) of Regulation No 17 provides that, if the Commission finds, 'upon application or upon its own initiative', that there is infringement of Article 81 EC or

of Article 82 EC, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end. Under Article 3(2) of Regulation No 17, such an application may be made by a natural or legal person who claims a legitimate interest in that regard. It is apparent, next, from Articles 6 to 8 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the Treaty (OJ 1998 L 354, p. 18) that persons who have made such an application enjoy certain procedural rights, including in particular the right to receive a copy of the non-confidential version of the statement of objections.

96 First, with regard to the question whether the Commission infringed Article 3 of Regulation No 17 by admitting the FPÖ to the procedure, the applicants' view that such an application cannot be validly submitted once an infringement procedure has been commenced on the Commission's own initiative must be rejected. Regulations No 17 and No 2842/98 do not, for the purpose of recognising the standing of a person as an applicant, require that the application derives from the Commission's opening of the infringement proceedings and that the investigation into the infringement complained of has not yet started. If the position were otherwise, persons with a legitimate interest in obtaining a finding of infringement of the competition rules would be prevented from exercising, in the course of the procedure, the procedural rights associated with that status under Articles 6 to 8 of Regulation No 2842/98.

97 Second, it must be observed that the Commission rightly concluded that the FPÖ could validly invoke its status as a recipient of banking services in Austria and the fact of suffering economic damage as a result of anti-competitive practices in order to justify a legitimate interest in submitting an application for a finding by the Commission that those practices constituted an infringement of Articles 81 EC and 82 EC

98 In that regard, there is nothing to prevent an end-purchaser of goods or services from satisfying the requirements for having a legitimate interest within the meaning

of Article 3 of Regulation No 17. The Court of First Instance considers that an end-user who proves that his interests have been, or are liable to be, adversely affected as a result of the restriction of competition in question has a legitimate interest within the meaning of that provision in lodging an application or a complaint with a view to obtaining a finding by the Commission of an infringement of Articles 81 EC and 82 EC.

99 It must be borne in mind in that connection that the rules designed to ensure that competition is not distorted in the internal market are ultimately intended to enhance the well-being of consumers. That aim is apparent in particular from the terms of Article 81 EC. Although the prohibition laid down in paragraph 1 of that provision may be declared inapplicable to agreements that contribute to improving the production or distribution of the goods in question or promoting technical or economic progress, that possibility, provided for in Article 81(3) EC, is in particular subject to the condition that a fair share of the resulting benefit should be reserved to the consumers of those goods. Competition law and policy thus have an undeniable impact on the specific economic interests of end-purchasers of goods or services. The recognition that such customers — who claim to have suffered economic damage as a result of a contract or conduct liable to restrict or distort competition — have a legitimate interest in obtaining a declaration by the Commission that Articles 81 EC and 82 EC have been infringed contributes to attainment of the objectives of competition law.

100 That conclusion cannot be undermined by the fact that, initially, the FPÖ claimed a general interest which it sought to defend as an opposition political party and that it only later contended that, as an end-user of Austrian bank services, it had been economically damaged by the cartel complained of. That first stance could not deprive it of the opportunity to rely subsequently, in order to justify a legitimate interest within the meaning of Regulation No 17, on its status as a customer of the banks against which the procedure had been initiated, and on the economic loss which it allegedly suffered as a result of the agreements in question.

101 Third, the admission of an interested party as a complainant, together with the transmission to that party of the statement of objections, cannot be made subject to the condition that it must occur prior to any oral hearing before the Commission. Regulations No 17 and No 2842/98 do not lay down any specific time-limit within which a third party applicant or complainant showing a legitimate interest must exercise his right to receive the statement of objections and be heard in the context of an infringement procedure. Thus, Articles 7 and 8 of Regulation No 2842/98 merely provide that the Commission is to provide the applicant or complainant with a copy of the objections and set a date by which the applicant or complainant may make known his views in writing, any such person being entitled to express his views orally if he so requests. It follows that the right of an applicant or complainant to receive the statement of objections and to be heard in an administrative procedure for the establishment of an infringement of Articles 81 EC and 82 EC may be exercised at any time during the course of the procedure.

102 As regards, fourth, the arguments concerning the FPÖ's use of the documents made available to it, it must be borne in mind that, under Article 7 of Regulation No 2842/98, that political party, as an applicant, was entitled to receive a non-confidential version of the statements of objections. The Commission cannot, on the basis of mere suspicions concerning possible misuse of such documents, curtail the right to disclosure of the statement of objections provided for in Article 7 of Regulation No 2842/98 in favour of a third-party applicant who validly shows a legitimate interest. Finally, no use which the FPÖ may have made of the documents disclosed to it can be imputed to the Commission and no such use can therefore affect the legality of the contested decision.

103 It follows that the applicants' pleas concerning the admission of the FPÖ to the procedure must be rejected as unfounded, without there being any need for the Court to give a decision on their admissibility.

3. Conclusion

104 The pleas alleging infringement of procedural rules must therefore be rejected in their entirety.

B — *The pleas alleging incorrect appraisal of the agreements*

1. Preliminary observations

105 Without denying the existence of the committee meetings, BAWAG and PSK (Cases T-261/02 and T-263/02) seek annulment of the contested decision in its entirety, alleging infringement of Article 81(1) EC by reason of an incorrect appraisal of the agreements.

106 First, in essence, they challenge the classification of the committee meetings as a single cartel. Without putting forward a separate plea, RLB, ÖVAG and NÖ-Hypo (Cases T-262/02 and T-271/02) challenge that classification as a single cartel in the context of their pleas alleging that the agreements had no cross-border effects and contend that the potential of the committee meetings to affect trade between Member States should be examined separately for each of them. Those arguments will be examined in the context of the present plea.

107 Second, BAWAG and PSK claim that the committee meetings did not result in a high level of concertation between the banks and that the latter engaged in fierce competition. This complaint concerns, essentially, the assessment of the gravity of the infringement and could not, even if it were well founded, lead to annulment of the contested decision in its entirety. It will therefore be examined below, in the context of the claims for reduction of the fine, with the other complaints concerning the gravity of the infringement.

2. The classification of the committee meetings as a single infringement (Cases T-261/02 to T-263/02 and T-271/02)

(a) Arguments of the parties

108 The applicants in these cases maintain that the Commission wrongly considered that the committee meetings amounted to a single overall cartel. They claim above all that the various committees acted independently and that the Lombard Club performed no role of coordination or management as far as they were concerned.

109 RLB (Case T-262/02) does not deny that there were exchanges of information between the committees concerning deposits and lending (Lending and Deposit Rates Committees, the Lombard Club, the Controller Committee) but contends that the Lombard Club never concerned itself with services of a cross-border nature. Moreover, it states that the Commission alleged the existence of an overall agreement for the first time in its defence.

110 The Commission states that the classification of the committee meetings as an overall cartel is justified. As an annex to its rejoinder, it has produced a series of documents from the administrative file to show the close relationship between the committees.

(b) Findings of the Court

111 An infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be

challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 258).

112 In that connection, recital 73 to the contested decision states as follows: 'The object of the agreements at issue was to restrict and distort competition between the undertakings concerned in relation to the matters dealt with by the committees. The agreements and concerted measures were intended ... to improve the banks' earnings. A departure from the cartel agreements, which, in the banks' view, safeguarded "reasonable competition", would, on the other hand, lead to an "erosion of margins".' The Commission thus states at that point, essentially, that there was a comprehensive plan pursuing the aim of eliminating price competition for all bank services covered by the committee meetings. RLB's complaint that the Commission alleged the existence of a single overall cartel for the first time in its defence must therefore be rejected.

113 In order to ascertain whether the Commission was legally entitled to conclude, on the basis of the evidence available to it, that the concertation within the various committees formed part of a comprehensive plan to restrict competition, it is necessary to analyse the passages of the contested decision containing certain findings underpinning its conclusion as to the existence of a single cartel, to which it refers in its rejoinders in Cases T-261/02 to T-263/02 and T-271/02, and the documents on which those findings are based, produced as an annex to those rejoinders.

114 First, to show that the Lombard Club, as the top-level body at the head of all the other committees, dealt with questions falling within the scope of numerous specific committees, the Commission refers to documents concerning the meetings of that body held on 7 June 1995 and 8 May 1996.

115 As regards the first of those meetings, recital 167 to the contested decision cites a 'confidential memo' drawn up by a CA director relating to an informal meeting of 24 May 1995 between the representatives of BA, CA, BAWAG, GiroCredit, RZB and PSK, concerning the matters which were to be examined and settled at the Lombard Club meeting of 7 June 1995. That document demonstrates that the Lombard Club in fact dealt with questions falling within the terms of reference of committees dealing with different matters, including services of a cross-border nature, such as concertation on deposit and lending rates for both retail and corporate business, and on other conditions governing loans, including export financing.

116 As regards the Lombard Club meeting of 8 May 1996, recital 248 to the contested decision refers to three documents, the first of which is a note in the NÖ-Hypo file of 10 May 1996, addressed to, among others, the general managers of that bank, according to which, at the Lombard Club meeting of 8 May 1996, the representatives 'agreed ... basic matters', relating in particular to the house bank margins (Hausbankspanne) for export financing, interest rates and other conditions for various types of loans, the advertising of interest rates and handling fees. The second document refers to 'preparation of a minimum fees proposal for securities business and payments', whereas the third document contains proposals adopted at that Lombard Club meeting. Those documents also confirm that the Lombard Club dealt with and decided on matters within the scope of numerous specific committees. The first two more particularly corroborate the finding that the Lombard Club was regarded as competent to decide on the prices to be set for certain important cross-border transactions, such as export financing, payments and securities business.

117 Second, it is clear from the documents cited by the Commission in recitals 216 and 248 to the contested decision that the Lombard Club took fundamental decisions. Thus, recital 216 to the contested decision refers to a file note on a Vienna committee meeting on deposit transactions and retail lending of 6 February 1996, addressed to the general manager of one of the banks concerned and relating to preparations for the Lombard Club meeting planned for the following day. According to that note, '"appropriate decisions in principle" were expected from the Lombard Club on 7 February [1996]' on certain matters discussed at the committee meeting. Recital 284 to the contested decision cites a file note drawn up by a BAWAG employee concerning a meeting of the 'Deposit Rates Committee' of 25 October 1996, at which a reduction of the interest rates on capital savings accounts was discussed. According to that note, a Federal Deposit Rates Committee meeting was planned for 12 November 1996, so that it would be possible to make 'suitable recommendations ... for the ... Lombard [general managers' meeting] on 13 November 1996'. Those documents clearly indicate that the authors expected that the Lombard Club would take decisions on matters of principle concerning the points discussed at other committee meetings.

118 Third, the Commission established that the Lombard Club performed a role of arbitrator and was approached by the various groups in cases of disciplinary problems, referring in particular, in recital 166 to the contested decision, to a PSK internal memorandum which summarises an 'exchange of experience between banks' of 24 May 1995, according to which it was envisaged that '"interest rate discipline" would ... be the "theme of the Lombard Club meeting in June"' and the participants were of the opinion that better discipline could be expected only 'if compliance with the minimum margins became a "point of honour" for the management board members'. That document shows that the Lombard Club was seen by the members of other committees as the appropriate authority for dealing with problems of 'discipline' regarding compliance with the agreements.

119 Fourth, recital 67 to the contested decision describes the close interlocking of the committees and their decision-making process, stating that the 'common decision-making process went ... through several committee meetings (involving mostly the Vienna [and Federal] Lending and/or Deposit Rates Committee[s], the Minilombard Committee ... and the Lombard Club)'. That finding is based on two documents

relating to a meeting of the Vienna Lending and Deposit Rates Committee of 30 August 1995, from which it appears that the bank representatives discussed their reaction to a reduction in the OeNB's interest rate. A decision concerning savings and loan rates for retail business was envisaged at a later meeting on deposit and lending business on 7 September 1995, whereas the final decision on a possible adjustment of rates for corporate loans was to be taken by the Lombard Club on 13 September 1995, on the basis of a proposal drawn up at a Minilombard meeting of 8 September 1995. It is apparent from those consistent documents that the committee meetings on deposit and lending rates for retail and corporate business formed part of a common plan generally to limit competition by means of interest rates.

120 Fifth, recitals 126, 130 and 237 to the contested decision provide examples of the fact that committees sometimes held joint meetings, that the terms of reference of the groups overlapped and that the committees kept each other informed of their activities. Whilst recital 126 describes a meeting of the Controller Committee held in December 1994, recital 130, on the other hand, refers to a meeting of the Treasurer Committee of early January 1995. The invitation to that committee meeting, according to which short-term lending and deposit interest rates were to be examined, suggested that the participants who did not themselves have direct influence on the determination of their banks' fixed-rate short-term loans should invite 'an appropriate person responsible for key account management' (for example, the relevant member of the Key Account Management Committee) to accompany them. Recital 237 cites a message sent by the Association of Regional Farm Mortgage Banks to its members, informing them of a Minilombard meeting of 23 April 1996 and envisaging a decision-making procedure similar to that described in paragraph 119 above.

121 Those elements, taken together, justify the Commission's conclusion that there was an agreement in principle between all the banks participating in the cartel to eliminate price competition in relation to a wide range of retail and corporate banking services, including 'key accounts'. The fact that the documents cited do not

explicitly refer to all the banking services covered by the various meetings, or to all the committees, does not affect that conclusion.

122 Whilst it is true that the Commission also referred, in this context, to certain documents that are not relevant to its conclusion, because they do not relate to the period of the infringement or do not concern the Vienna Lombard Club (as in the case of the documents cited in recitals 66, 107 and 160 to the contested decision concerning implementation of Lombard Club decisions with regard to the various committee meetings), that fact is not capable of undermining the conclusion that the committees formed part of a comprehensive plan, pursuing a common aim.

123 It is also apparent from the documents analysed in paragraphs 114 to 121 above that the Lombard Club decisions were concerned above all with matters of principle and that they were prepared, in detail, by other committees. That division of tasks readily explains, contrary to RLB's contention, how the general managers of the banks meeting in the Lombard Club were able to run the cartel by meeting only 11 times a year.

124 The view of BAWAG and PSK, which seek to minimise the evidential value of those documents by claiming that the role of the Lombard Club was misperceived and overestimated by the participants in the other meetings, who were in general members of middle management, must also be rejected. Some of the documents analysed above were written by or addressed to general managers of certain banks who personally attended Lombard Club meetings and therefore were perfectly apprised of the role played by it. The Commission cannot therefore be said to have exaggerated the evidential value of those documents.

125 Finally, contrary to BAWAG's and PSK's contention, it is clear from the documents analysed that the references to the management role of the Lombard Club in recitals 304 and 306 to the contested decision are not isolated cases. This is also confirmed by an internal CA memorandum produced by BAWAG and PSK as an annex to their applications, informing the addressees of the matters discussed at a committee meeting on deposit and lending business of 17 April 1996. That memorandum envisages the preparation of a proposal that was first to be the subject of concertation within that committee and then to be discussed and, if necessary, decided upon within the Lombard Club.

126 It follows from the foregoing that the complaints concerning the classification of the committee meetings as a single overall cartel are unfounded.

C — *The choice of the addressees of the contested decision (Case T-271/02)*

1. Arguments of the parties

(a) Arguments of the applicants

127 ÖVAG and NÖ-Hypo are of the opinion that the choice of addressees of the contested decision is illegal as far as they are concerned. They do not challenge the criteria which they consider to have been relied on in making that choice, namely the frequency of participation in the main committee meetings and the size of each establishment in the Austrian banking market. They claim, however, that the application of those criteria is illegal because it is not supported by a sufficient statement of reasons, is based on incorrect factual findings and does not observe the

principle of equal treatment. ÖVAG and NÖ-Hypo submit that the contested decision does not state for what reason and according to what criteria the Vienna committees and the Federal Lending and/or Deposit Rates Committees, including the Retail Lending Rates Committee and the Liberal Professions Committee, the Minilombard and the Controller Committees, were chosen as 'the most important'.

128 They also criticise the Commission for failing to take a position, in the contested decision, on their argument that the committees' decision-making process was determined by a 'narrower circle' of large banks, to which they did not belong and which, in their view, was the most important of the committees.

129 ÖVAG and NÖ-Hypo acknowledge having participated in some of the committees described in the decision as the 'most important', but they contend that the frequency of their participation in such committees was low and much lower not only than that of most of the other banks to which the decision was addressed but also than that of certain banks to which the decision was not addressed.

130 They state that the contested decision refers on several occasions to the participation of the banks CA, BA, RZB, Erste or GiroCredit, PSK and (less often) BAWAG in a 'narrower banking circle' within which representatives of the largest Austrian banks met, in particular in order to prepare for Lombard Club meetings. They claim that the concertation process properly so called was decided on by that 'smaller circle', to which they did not belong. According to ÖVAG and NÖ-Hypo, the addressees of the contested decision would have been completely different if the Commission had correctly qualified as 'main committees' the Lombard Club and, in particular, the meetings of the 'narrower circle', in which all the decisions were prepared.

131 ÖVAG and NÖ-Hypo also consider that their inclusion within the scope of the contested decision is not justified by the criterion of the size of the banks and that the Commission infringed the principle of equal treatment by choosing them as addressees of the contested decision.

(b) Arguments of the Commission

132 The Commission states that the size of the establishments in the Austrian market was not used as a criterion and that the addressees of the contested decision were chosen solely by reference to the frequency of their participation in the main committees. It rejects the view that ÖVAG and NÖ-Hypo participated in the committee meetings much less often than most of the other addressees of the contested decision.

133 The Commission considers that it was not required to take account, for the purposes of its decision, of the existence of a smaller banking circle. It states that the only factor which determined the selection of ÖVAG and NÖ-Hypo as addressees of the decision was their frequent participation in the main committee meetings, together with the other banks, and the fact that within those meetings they reached agreement on the interest rates and conditions to be applied. In its rejoinder, it adds that, although certain members of the Lombard Club may have engaged in concerted action and exchanged information in advance, those individual instances of concertation served, however, only to prepare for concerted practices within the various committees.

2. Findings of the Court

(a) The criteria applied by the Commission and the size of the establishments

134 It must be observed, first of all, that the view put forward by ÖVAG and NÖ-Hypo that the size of the undertakings was adopted as a criterion to identify the addressees of the contested decision derives from a misinterpretation of recital 470 to the contested decision, which states in particular as follows:

'The addressees of this Decision have been singled out because of the particular frequency of their participation in meetings of the major committees: the Vienna and Federal Lending and/or Deposit Rates Committees (including the Consumer Lending and Liberal Professions Lending Rates Committees), the Minilombard Committee and the Controller Committee. In addition, with the exception of NÖ-Hypo and RBW (as from July 1997 RLB), they play an important role in the Austrian banking market because of their size.'

135 The last sentence of that recital does not refer to a criterion applied by the Commission but indicates the result, in terms of the size of the undertakings in question, of applying the only criterion used, which is that of frequent participation in the main committees.

136 Consequently, the applicants' complaints concerning the application of the alleged criterion of the size of the undertakings are unfounded.

137 If ÖVAG and NÖ-Hypo also thereby seek to claim that the Commission should have used the size of the undertakings as a criterion for choosing addressees, such a thesis cannot be accepted.

138 According to settled case-law, the fact that a trader who was in a position similar to that of an applicant was not found by the Commission to have committed any infringement cannot in any event constitute a ground for setting aside the finding of an infringement by that applicant, provided that it was properly established (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 146).

139 It follows from that case-law that the Commission is entitled to address to each undertaking against which an infringement is found a decision recording that infringement and imposing a penalty on it. Arguments based on a comparison of the situation of the addressee of such a decision with the situation of other undertakings (whether or not addressees of the same decision) cannot in any circumstances call in question the legality of the decision in so far as it finds and penalises a duly established infringement. Such arguments are not therefore relevant to the choice of ÖVAG and NÖ-Hypo as addressees of the decision.

(b) The identification of the main committees

The statement of reasons

140 Recital 470 to the contested decision, cited in paragraph 134 above, describes as 'the major committees' the Vienna and Federal Lending and/or Deposit Rates Committee (including the Consumer Lending and Liberal Professions Lending Rates Committees), the Minilombard Committee and the Controller Committee.

141 The various committees are described in recital 51 to the contested decision, which indicates clearly, in relation to most of them, why particular importance is attached to them. Admittedly, the importance of the Minilombard Committee is not specifically mentioned in that recital. However, as the Commission correctly points out, it goes without saying that a committee devoted to interest rates on loans granted to commercial customers is particularly important. That importance should be evident to the banks to which the contested decision is addressed.

142 Since the Commission had set out the reasons for which it had described certain committees as particularly important, it was not required to explain in addition why it did not attribute the same importance to other committees.

143 Therefore, the complaint alleging an inadequate statement of reasons to support the choice of the 'major committees' is unfounded.

The assessment of the importance of the committees and the 'smaller banking circle'

144 Faced with a network of agreements as complex as the one in this case, the Commission enjoyed a discretion in determining which of the various concerted practices it considered as particularly significant, and that choice can only be subject to limited review by the Court. In that connection, the Commission was entitled, without committing a manifest error, to attribute greater importance to the committees of broad scope than to regional or specialised concerted practices, the former being liable to influence the latter. The fact that those committees, described

as particularly important by the Commission, involved banks established in Vienna rather than those in other cities or regions is not such as to undermine the conclusion that the choice made by the Commission was legitimate.

145 Nor did the Commission exceed the bounds of its discretion by refusing to include among the most important committees a 'smaller banking circle', in which the largest banks engaged in concertation with the committees. Moreover, ÖVAG and NÖ-Hypo cannot rely on the situation of other undertakings that participated in the infringement to challenge their own inclusion among the addressees of the contested decision.

(c) The frequency of ÖVAG's and NÖ-Hypo's participation in the major committees

146 As regards the frequency of the participation of ÖVAG and NÖ-Hypo in the committees, it is apparent from a table produced by the Commission as an annex to its defence, the content of which is not contested, that those two establishments participated in all the main committees. Admittedly, NÖ-Hypo's participation in the Minilombard Committee (3 meetings out of 21) and the Controller Committee (1 meeting out of 40) appears to be of little significance. On the other hand, NÖ-Hypo participated in 14 meetings of the federal committees out of a total of 15, and in 32 of the Vienna committees out of a total of 50. As regards ÖVAG, it is apparent from that table that it was present at all the federal committee meetings, at 42 Vienna committee meetings out of a total of 50, at 17 Minilombard meetings out of a total of 21, and at 14 meetings of the Controller Committee out of a total of 40. The complaint that the Commission disregarded the frequency of participation of ÖVAG and NÖ-Hypo in the major committee meetings must therefore be rejected.

(d) Conclusion

147 It follows from the foregoing considerations that the complaints made by ÖVAG and NÖ-Hypo regarding the choice of addressees of the contested decision must be rejected.

D — *The use as evidence of documents dating back to 1994 (Case T-271/02)*

1. Arguments of the parties

148 ÖVAG and NÖ-Hypo criticise the Commission for failing in its obligation to state reasons by basing certain important findings on documents pre-dating the period for which the infringement was established. They also claim that the use of those documents had an impact on the decision on fines.

149 The Commission acknowledges having referred to documents dating from 1994 to describe the general background to the cartel. It nevertheless contends that its findings concerning the infringements are based on documents dating from 1995.

2. Findings of the Court

150 The obligation to state reasons cannot be breached by the use of documents pre-dating the period covered by the contested decision. It is legitimate for the Commission to describe, in a decision imposing fines, the wider context of the unlawful conduct.

151 Moreover, ÖVAG and NÖ-Hypo state that they do not contest the content of the statement of objections. Nor do they contest the accuracy of the specific findings contained in the contested decision by alleging that they are not based on evidence dating from the relevant period

152 In those circumstances, the reference in the contested decision to documents predating the period in respect of which the infringement was found cannot affect the validity of the contested decision.

E — *The pleas alleging that the committees had no impact on trade*

1. Preliminary observations

153 All the applicants claim that the Lombard Club committees are not caught by the prohibition contained in Article 81(1) EC because they were not capable of affecting trade between Member States.

154 In the contested decision, the Commission assessed the capability of the committees as a whole to affect trade between Member States in general. The result of that comprehensive examination, set out in recitals 442, 451 and 469 to the contested decision, may be summarised as follows:

— the network created by the Lombard Club comprised a large number of closely interlinked committees and covered the whole of Austria;

— it involved almost all Austrian credit establishments;

— it concerned the full range of banking products and services on offer in Austria;

— the anti-competitive aim of the committees is not disputed;

— the cartel modified the conditions of competition throughout Austria;

— it was thus liable to have an impact, on the demand side, on the conduct of undertakings and consumers with direct or indirect links to cross-border trade;

— it was also liable to influence decisions of foreign banks to enter the market;

— it was therefore liable appreciably to affect trade between Member States.

That conclusion is illustrated, in recitals 454 to 465, by a series of examples concerning, first, the demand side, and, second, the supply side.

155 The applicants challenge that appraisal. First, they put forward certain general considerations concerning the interpretation of the criterion of cross-border trade and its application to the present case, contending in particular that the capability of the various committees to affect trade between Member States should have been examined separately for each of them. Second, they contest the examples of potential effects on trade between Member States provided by the Commission in recitals 454 to 465 to the contested decision. Third, RLB refers to the special circumstances of RBW.

2. The interpretation of the criterion of capability of affecting trade between Member States and its application to this case

(a) Arguments of the parties

156 The applicants claim that the Lombard Club agreements amounted to a purely national cartel, since only Austrian credit establishments participated in it and it was concerned only with the provision of services on the Austrian national market, or indeed regional or local markets.

157 RLB invokes the principle of subsidiarity enshrined in Article 5 EC, which in its view militates against a broad interpretation of the condition in Article 81(1) EC concerning inter-State effects. It observes that the aim of maintaining undistorted competition may conflict with other objectives of economic policy, such as that of monetary stability, the resolution of these conflicts being, ultimately, an issue of a political nature. It states that, until 1986 at least, the Commission regarded agreements between banks relating solely to interest rates and authorised or approved by the national authorities as a legitimate instrument of monetary policy of

the Member States. Referring to the participation of the OeNB in the committees in question, RLB claims that it is not for the Commission to impose its present view of the relationship between competition policy and monetary policy in place of the view of the Austrian banking supervisory authority in a case whose effects are not felt beyond Austrian territory.

158 All the applicants maintain that the likelihood of the various committees affecting trade between Member States must be appraised separately for each of them. In support of their view that there is no link between the committees such as to justify an overall assessment of their effects, they contend, first, that the classification of the committees as a single overall cartel is incorrect and, second, that the banking services with which the committees were concerned fall within different markets. RZB, ÖVAG and NÖ-Hypo state that if none of the agreements, considered individually, is capable of producing inter-State effects, the cross-border nature of the agreements as a whole cannot be inferred from an overall examination. BAWAG, RLB, PSK and Erste contend that no such overall effect of the agreements can be inferred from the cross-border nature of the services covered by a number of committees. Finally, RLB is of the opinion that a separate examination is necessary regarding the multilateral interbank rates dealt with in the committees concerning payments, because agreements on such matters may qualify for an exemption under Article 81(3) EC.

159 The applicants consider that it cannot be stated in general terms that a cartel covering all the territory of a Member State is liable, by its very nature, appreciably to affect trade between the Member States. They infer from the case-law (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135) and the Commission's previous practice (Commission Decision 1999/687/EC of 8 September 1999 relating to a proceeding under Article 81 of the EC Treaty (IV/34.010 — Nederlandse Vereniging van Banken (1991 GSA Agreement), IV/33.793 — Nederlandse Postorderbond, IV/34.234 — Verenigde Nederlandse Uitgeversbedrijven and IV/34.888 — Nederlandse Organisatie van Tijdschriften Uitgevers/Nederlandse Christelijke Radio Vereniging) (OJ 1999 L 271, p. 28; 'the Netherlands Banks decision II')) that that applies more particularly to agreements between credit establishments. In their view, additional circumstances (lacking in this case) are

required, alongside territorial extent, before a 'national' cartel can be found to be of a cross-border nature. According to some of the applicants, it is necessary in that regard for the cartel to have effects involving partitioning of the market.

160 The applicants state, in that connection, that no measure designed to keep foreign competitors out of the Austrian market was either taken or considered. First, they claim that such measures were not necessary, because the banking services covered by the more important agreements (savings deposits and loans to individuals and small undertakings) were of little interest to foreign banks. In their view, that was the case, first, because the barriers to access to the market were high (in particular, the customers' preference for local banks, language problems and the need to have a substantial network of agencies), second, because the provision of such services does not generate attractive profits and, third, because the market in those services in Austria was saturated. They also submit that foreign banks were present in the Austrian market.

161 The Commission contests those arguments

(b) Findings of the Court

The principles governing appraisal of the capability of affecting trade between Member States

162 The aim of the condition relating to effects on trade between Member States contained in Article 81(1) EC is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement

or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand, conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order (Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17).

163 According to settled case-law, in order for an agreement between undertakings to be able to affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, in a manner which might harm the attainment of the objectives of a single market between States (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22). The effect on intra-Community trade is therefore normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54; *Bagnasco and Others*, cited in paragraph 159 above, paragraph 47; and Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 27).

164 It is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable. A restriction of competition is liable to affect trade between Member States when it is likely to divert trade patterns from the course which they would otherwise have followed (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 172). Therefore, the argument put forward by certain of the applicants in this case, to the effect that only the effects of partitioning of the markets may be taken into consideration in concluding that a cartel is capable of affecting trade between Member States, must be rejected.

165 That broad interpretation of the criterion of the capability of affecting trade between Member States is not contrary to the principle of subsidiarity invoked by RLB. As the Commission has rightly pointed out, the Treaty provides that any conflicts between maintaining undistorted competition and other legitimate objectives of economic policy are to be resolved by the application of Article 81(3) EC. That provision may therefore be regarded as a special provision giving effect to the principle of subsidiarity in the sphere of cartels. That principle cannot therefore be invoked in order to restrict the scope of Article 81 EC (see, to that effect, Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 197).

166 Next, it must be emphasised that the capability of a cartel to affect trade between Member States, that is to say its potential effect, is sufficient for it to fall within the scope of Article 81 EC and that it is not necessary to demonstrate an actual effect on trade (*Bagnasco and Others*, cited in paragraph 159 above, paragraph 48, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19). The fact that in this case a past infringement was examined after the event is not such as to change that criterion, a potential effect on trade also being sufficient in such a case. Consequently, the arguments put forward by Erste, ÖVAG and NÖ-Hypo to the effect that the absence of any effect of the agreements on the market should have been taken into consideration as indicating that they could not affect trade between Member States must be rejected.

167 It is nevertheless necessary for the potential effect of the cartel on inter-State trade to be appreciable, or, in other words, that it be not insignificant (Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 to 17; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, *'FETTCSA'*, paragraph 207).

Overall examination of the cross-border effect of the committees

168 As regards the question whether in this case the Commission was entitled to make an overall assessment of that potential impact for all the concerted practices taking place within the Lombard network committees, it is clear from the case-law that the effect on trade between Member States of agreements between which a direct link exists and which form an integral part of a whole must be examined together, whereas agreements between which there is no direct link and which concern separate activities must be examined separately (Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraphs 126, 142 and 143).

169 Contrary to the contentions of ÖVAG and NÖ-Hypo, the question whether there are uniform contractual arrangements relating to straightforward products of the same kind and of which the importance for inter-State trade is clear is not decisive.

170 A link justifying and necessitating an overall examination of the capability of affecting trade between Member States exists in particular between agreements or other types of conduct amounting to a single infringement. As is apparent from paragraphs 111 to 125 of this judgment, the Commission was legally entitled to conclude that the concerted practices within the various Lombard Club committees were part of a single infringement in that they were elements of an overall plan designed to distort competition.

171 The applicants cannot deduce from the fact that, in *Bagnasco and Others*, cited in paragraph 159 above, the Court of Justice carried out a separate examination of the clauses relating to two separate banking operations, contained in standard banking conditions applied by the members of the Association of Italian Banks, that a general rule exists, prohibiting an overall examination of the capability of the agreements at issue in this case to affect trade between Member States. In the *Bagnasco and Others*

case, the Court was called on to give a preliminary ruling on the compatibility of those clauses with Article 85 of the EC Treaty (now Article 81 EC). It found that, in the case of one of the operations concerned, the standard banking conditions did not have the object or effect of restricting competition, whereas the clauses relating to the other operation were not liable to affect trade between Member States. In that case, the question of an overall examination of the cross-border effects of the banking conditions, of which those clauses formed part, did not therefore arise.

172 As regards the argument put forward by BA-CA, BAWAG, PSK, Erste, ÖVAG and NÖ-Hypo that the Commission disregarded the fact that the various banking products with which the committees were concerned fell within separate markets, and that their capability of affecting trade between Member States should be examined separately in relation to each of those markets, it must be borne in mind, first, that the definition of the relevant market differs according to whether Article 81 EC or Article 82 EC is to be applied. In the context of the application of Article 81 EC, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. That is why, for the purposes of Article 81(1) EC, the objections to the definition of the market adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition. Thus, the objection to the definition of the relevant market is of no consequence provided that the Commission has rightly concluded, on the basis of the documents referred to in the contested decision, that the agreement in question distorted competition and was liable to have an appreciable effect on trade between Member States (Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 27). In this case, the complaint concerning definition of the markets is an objection to the method adopted by the Commission in assessing the effect on trade, so that it cannot be rejected, from the outset, as being of no consequence.

173 According to the case-law, the relevant market comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37).

174 In the present case, the various banking services covered by the agreements cannot be substituted for each other. However, most customers of universal banks call for a set of banking services, such as deposits, loans and payment operations, and competition between those banks is liable to relate to all those services. A narrow definition of the relevant market would therefore be artificial in that business sector. Moreover, a separate examination would not make it possible fully to appreciate the effects of agreements which, although relating to products or services and customers (retail or corporate) that are different, nevertheless fall within the same business sector. The effect on trade between Member States may be indirect, and the market on which it is liable to arise is not necessarily the same as the market for the products or services of which the prices are fixed by the cartel (Case 123/83 *BNIC* [1985] ECR 391, paragraph 29, and *Ahlström Osakeyhtiö and Others* v *Commission*, cited in paragraph 138 above, paragraph 142). As the Commission rightly pointed out in recitals 456 to 459 to the contested decision, the fixing of prices for a wide range of retail and corporate banking services is liable, as a whole, to have repercussions on other markets.

175 Consequently, the Commission was not required to examine separately the markets for the various banking products covered by the committees in assessing the effects on trade between Member States in this case (see, by analogy, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraphs 76 to 83, in which the relevant market was taken to be the construction market in the Netherlands).

176 Next, there is no basis for the argument put forward by RLB that the capability of affecting trade between Member States of the agreements on interbank rates dealt with by the committees on international payments must be examined separately from the other agreements, because those agreements might qualify for an exemption under Article 81(3) EC. First, RLB does not claim that any exemption was requested for such agreements. Next, it is clear from Case 193/83 *Windsurfing International* v *Commission* [1986] ECR 611, paragraphs 96 and 97, that the fact that certain clauses of an agreement do not have the object or effect of restricting competition does not preclude an overall examination of the agreement. With greater reason, that applies where certain agreements within a single cartel might qualify for an exemption.

177 It follows that the Commission may take account of the potential cumulative effect of all the committees in order to determine whether the cartel as a whole is capable of affecting trade between Member States (*VGB and Others* v *Commission*, cited in paragraph 168 above, paragraph 140). On the other hand, the question whether each of the committees in isolation is capable of affecting trade between Member States is not relevant (see, by analogy, *Windsurfing International* v *Commission*, cited in paragraph 176 above, paragraph 96). It also follows that it is unnecessary to establish that any one or other of the various committees, in isolation, is liable to affect trade between Member States for it to be found that the cartel as a whole is capable of so doing.

178 Therefore, the capability of the committees to affect inter-State trade does not presuppose that any particular concerted practice involved services of a cross-border nature. The argument that the Commission cannot, on the basis of an overall examination, infer that the cartel had a cross-border effect deriving from the cross-border effect of a number of committees of very little importance, as compared with the agreements as a whole, is therefore irrelevant.

The capability of a cartel covering the entire territory of a Member State to affect trade between Member States

179 It is not disputed that the overall cartel found by the Commission in this case covered the whole of Austrian territory.

180 According to settled case-law of the Court of Justice and of the Court of First Instance, an agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29; *Remia and Others* v *Commission*, cited in paragraph 163 above, paragraph 22; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 48; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 95; see also Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 179). Moreover, it has been held that a State measure approving a scale of lawyers' fees, covering the whole territory of a Member State, was capable of affecting trade between Member States within the meaning of Article 81(1) EC (see, to that effect, Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 33).

181 It follows from that case-law that there is, at least, a strong presumption that a practice restrictive of competition applied throughout the territory of a Member State is liable to contribute to compartmentalisation of the markets and to affect intra-Community trade. That presumption can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

182 In that connection, with regard to the banking sector, it is clear from *Bagnasco and Others*, cited in paragraph 159 above, paragraphs 51 to 53, that there may be agreements covering the entire territory of a Member State which do not have an appreciable effect on trade between Member States. Moreover, the Commission took a similar approach in the Netherlands Banks decision II (cited in paragraph 159 above, recital 61).

183 The complex infringement at issue in the present case differs, however, from the agreements covered by the judgment and the decision mentioned in the foregoing paragraph which each concerned a specific banking operation (on the one hand, a general guarantee for the granting of a loan on current account and, on the other, acceptance giros). The concerted practices within the Lombard network involved not only almost all the credit establishments in Austria but also a wide range of banking products and services, in particular deposits and loans and, therefore, they were capable of changing the conditions of competition throughout that Member State.

184 In those circumstances, the argument that the members of the cartel did not take measures to exclude foreign competitors from the market provides no basis for concluding that there was no cross-border effect.

185 The Lombard network may have contributed to maintenance of the barriers to access to the market described by the applicants (see paragraph 160 above), in that it facilitated retention of structures in the Austrian banking market, the inefficiency of which was admitted by BA-CA itself, and of the corresponding habits on the part of customers.

186 Therefore, the applicants have not rebutted the presumption that, considered as a whole, the cartel, which operated throughout Austria, had the effect of compartmentalising markets and was liable to affect inter-State trade.

(c) Conclusion

187 Since the Commission legitimately inferred in this case that, because it covered the entire territory of a Member State, the overall cartel was liable to affect trade between the Member States, the applicants' complaints concerning the examples given in the contested decision are unfounded.

3. The particular case of RLB (Case T-262/02)

(a) Arguments of the parties

188 RLB observes that RBW, whose conduct is imputed to it, did not participate in most of the committees and that those in which it did participate had no connection with cross-border operations. It is of the opinion that RBW cannot be criticised for participating in a cartel that covered without distinction the whole range of banking products and that the capability of trade between Member States being affected must therefore be examined separately for the committees in which RBW participated.

(b) Findings of the Court

189 In order to establish the participation of an undertaking in a single agreement, the Commission must prove that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in

pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Aalborg Portland and Others* v *Commission*, cited in paragraph 111 above, paragraph 83; Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 87; and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 145).

190 RLB admits that RBW participated in the committees on deposit and lending rates both at federal level and in Vienna, that is to say in the most important committees dealing with lending and deposit conditions (see paragraphs 140 and 144 above). The Commission found, in recital 51(b) to the contested decision, that those committees maintained particularly close relations with the Lombard Club, which RLB does not contest.

191 RBW could not therefore have been unaware that the committees in which it participated formed part of a wider set of agreements and that its participation in the concerted practices on deposit and lending conditions contributed to the pursuit of the cartel's objectives as a whole. Given that the committees on lending and deposit rates were particularly important for the cartel as a whole, RBW, by reason of its participation in those committees, was aware of the most significant types of actual conduct planned or put into effect by the other banks in pursuit of the objectives of the cartel, namely coordination of the conditions for deposits and lending.

192 RLB places particular emphasis on RBW's absence from the committees dealing with cross-border operations. However, the fact that an undertaking has not taken part in all aspects of a cartel or that it has played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 189 above, paragraph 90, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 111 above, paragraph 86).

193 Similarly, neither the fact that RBW was not familiar with the detail of the concerted practices taking place within numerous committees in which it did not participate nor the fact that it was unaware of the existence of certain committees, such as those concerning cross-border operations, if their existence is established, can detract from the Commission's finding that it participated in the cartel as a whole. Because of its participation in the Federal Lending Rates and Deposit Rates Committees, RBW could not have been unaware of the general scope and the essential characteristics of the cartel as a whole.

194 The Commission therefore rightly concluded that RBW had participated in the cartel as a whole and not only in certain isolated agreements. It follows that it was right to conclude that RBW's conduct was caught by Article 81 EC.

195 Moreover, as is apparent from paragraph 178 above, the fact that the cartel as a whole related to, among other things, certain cross-border operations is not decisive for the purpose of concluding that it was capable of affecting trade between Member States, the agreements on lending and deposit conditions which were at the centre of the cartel and in which RBW participated being far more important in that regard.

196 It must also be stated that, since the Commission has established to the requisite legal standard that the infringement of Article 81(1) EC in which an undertaking participated was apt to affect trade between Member States, it is not necessary for it to demonstrate that the individual participation of that undertaking affected trade between Member States (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 305).

197 Therefore, RLB's complaint concerning the limited participation of RBW in the committees must be rejected.

II — *The claims for annulment of Article 2 of the contested decision (Cases T-259/02, T-264/02 and T-271/02)*

A — *Arguments of the applicants*

198 RZB, Erste, ÖVAG and NÖ-Hypo seek annulment of the order to bring the infringement to an end, addressed to the banks in Article 2 of the contested decision. In their view, that order is unlawful because it is accepted that the banks had already brought the infringement to an end by the date of the investigations, in June 1998.

B — *Findings of the Court*

199 The Commission enjoys a wide discretion when deciding whether it is necessary, in carrying out its task of ensuring compliance with the competition rules, to adopt measures under Article 3(1) of Regulation No 17. Therefore, the existence of a lingering doubt as to the actual cessation of an infringement is sufficient for it to be able legally to order the undertakings to bring the infringement to an end.

200 The claims made by RZB, Erste, ÖVAG and NÖ-Hypo that Article 2 of the contested decision should be annulled are therefore unfounded.

III — *The claims for annulment of Article 3 of the contested decision*

A — *Lack of fault (Cases T-261/02 to T-264/02 and T-271/02)*

1. Arguments of the parties

201 BAWAG, RLB, PSK, Erste, ÖVAG and NÖ-Hypo are of the opinion that the Commission infringed Article 15(2) of Regulation No 17 by imposing a fine on them, because the infringement of Article 81 EC alleged against them, if substantiated, was not committed either intentionally or negligently. They maintain above all that no fault can be attributed to them regarding the capability of the agreements to affect trade between Member States.

202 BAWAG, PSK, Erste, ÖVAG and NÖ-Hypo claim that the matters indicated in recitals 29 to 50 to the contested decision do not show that the Austrian banks were aware of the incompatibility of the committees with Article 81 EC. BAWAG, PSK, ÖVAG and NÖ-Hypo also invoke the Austrian law applicable to cartels at that time, according to which 'behavioural cartels' (Verhaltenskartelle), being agreements that are not binding on the parties, were lawful in Austria until 1 January 2000, unless they had been prohibited by a court of competent jurisdiction. ÖVAG and NÖ-Hypo also refer to the public nature of the committees and the participation therein of the public authorities.

203 RLB submits that the question of fault depends not on knowledge of the prohibition of the cartels but on knowledge of the facts which render that prohibition applicable to the case in question, and that such knowledge was lacking in the case of RBW (whose conduct is attributed to it), because of the latter's geographically limited activities. At the hearing, it stated that only one person participated in the

committees on behalf of RBW and that, at the time of the infringement, RBW did not have an internal legal department. BAWAG, ÖVAG and NÖ-Hypo also emphasise the regional nature of their activities and the minor role of cross-border transactions in that context.

204 The Commission contests those arguments.

2. Findings of the Court

205 According to settled case-law, it is not necessary for an undertaking to have been aware that it was infringing the competition rules for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that its conduct had as its object the restriction of competition in the common market (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157; *SPO and Others* v *Commission*, cited in paragraph 175 above, paragraph 356; and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, '*Mayr-Melnhof*', paragraph 375).

206 In that regard, whether or not the applicants were aware of the interpretation of the cross-border criterion adopted by the Commission or the case-law is not decisive; what is important is whether they knew of the circumstances specifically giving rise to the capability of the cartel to affect trade between Member States or, at least, whether they could not have been unaware of them.

207 All the applicants knew, through their participation in the main committees, that the Lombard Club network covered the whole territory of Austria and a very wide range of important banking services, in particular loans and deposits. They were therefore aware of the essential facts giving rise in this case to an effect on trade between Member States.

208 On the other hand, as observed in paragraph 178 above, the fact that certain agreements, of minor importance compared with the cartel as a whole, were concerned with cross-border operations is neither essential nor, of itself, sufficient for a finding that the cartel as a whole was capable of affecting trade between Member States. Nor is it decisive whether all the banks were apprised of the fact that the agreements related, among other things, to cross-border operations.

209 It is not therefore appropriate in the present context to ascertain to what extent the applicants were aware of the incompatibility of their conduct with Article 81 EC. Similarly, the fact that under Austrian law certain cartels were not automatically prohibited but could be prohibited, in response to an application, by a court of competent jurisdiction (if it were assumed that the Lombard Club agreements formed part of those arrangements) has no impact on the intentional nature of the infringement of Article 81 EC (see, to that effect, *Mayr-Melnhof*, cited in paragraph 205 above, paragraphs 373 to 376). Finally, the arguments based on the public nature of the meetings and the participation therein of the national authorities does not affect either the intention to restrict competition or the knowledge of the circumstances giving rise to the capability of the agreement to affect trade between Member States.

210 As regards, more particularly, Case T-262/02, RBW's participation in more than 80% of the Vienna committees and more than 90% of the Federal Lending Rates and Deposit Rates Committees shows that its representative could not have been unaware that the concerted practices concerning those operations were not limited

to Vienna but covered a large part or even the whole of Austria. Therefore, regardless of whether the RBW executives were kept informed of the concerted practices within the Lombard network concerning other banking operations, it must be stated that RBW was aware of the essential facts giving rise to the effect of the cartel in which it participated on trade between Member States.

211 Therefore, the complaint that the infringement was not committed intentionally must be rejected. The applicants' arguments purporting to show the lack of any negligence are therefore irrelevant.

B — *The possibility of an exemption for the agreements (Cases T-262/02 and T-271/02)*

1. Arguments of the parties

212 RLB, ÖVAG and NÖ-Hypo claim that the Commission does not usually impose fines where the agreements in question are capable of being granted an exemption under Article 81(3) EC. They are of the opinion that the agreements in question fall within that case. RLB refers to Article 4(2)(1) of Regulation No 17 which, in its view, implies that there is a presumption of legality and would have enabled the Commission, in this case, to grant a retroactive exemption. ÖVAG and NÖ-Hypo claim in particular that the agreements in question were designed to offer Austrian consumers the whole range of best-quality banking services at affordable prices and that some of them, concerning the determination of interbank commissions might have qualified for an exemption.

2. Findings of the Court

213 This plea cannot be upheld, given that the agreements in question were not notified. Notification is not a mere formality imposed on undertakings but an indispensable condition for obtaining certain benefits. Under the terms of Article 15(5)(a) of Regulation No 17, no fine may be imposed in respect of acts taking place after notification, provided they fall within the limits of the activity described in the notification. That advantage enjoyed by an undertaking which notifies an agreement or a concerted practice is the counterpart of the risk incurred by the undertaking in itself reporting the agreement or concerted practice. That undertaking in fact takes the risk not only of having the agreement or practice found to be in breach of Article 81(1) EC and of having the application of paragraph 3 refused but also of being punished by a fine for acts prior to notification. A fortiori, an undertaking which did not wish to run that risk cannot claim, on being fined for an infringement in respect of an agreement which was not notified, that there was a hypothetical possibility that notification might have led to an exemption (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, *'MDF'*, paragraph 93).

214 In any event, the applicants have not demonstrated that the network of agreements in this case fulfilled the conditions for the grant of an exemption.

C — *Conclusion*

215 The pleas seeking annulment of Article 3 of the contested decision are therefore unfounded.

## IV — *The claims for reduction of the fines imposed*

### A — *Preliminary observations*

216 Under Article 15(2) of Regulation No 17, the Commission imposed fines on all the applicants. It is apparent from recitals 502 to 542 to the contested decision that — even though the contested decision does not refer explicitly thereto, save in recital 529 concerning mitigating circumstances and, in relation to an argument put forward by the banks, in footnote 519 — the Commission decided to calculate the amount of the fines in accordance with the methodology set out in the Guidelines. Moreover, the Commission reduced those amounts by 10% in accordance with the Leniency Notice.

#### 1. The applicability of the Guidelines and the Leniency Notice

##### (a) The alleged breach of the principle of non-retroactivity (Case T-264/02)

217 Erste takes exception to the method followed in calculating the fines on the ground that the Commission, by applying guidelines adopted after the cessation of the infringement and by having again made its practice more stringent during autumn 2001, breached the principle of non-retroactivity upheld by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 49 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

218 As held by the Court in its judgment in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraphs 202 to 232, that plea must be rejected, given that the Guidelines and, in particular, the new method of calculating fines which they incorporate, even if it is accepted they had an aggravating effect on the level of fines imposed, were reasonably foreseeable by undertakings such as the applicants when the infringements in question were committed.

(b) The relevance of the Guidelines and the Leniency Notice to judicial review of the contested decision

219 The Guidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria that the Commission intends applying when exercising the discretion conferred on it by Article 15(2) of Regulation No 17 for the purpose of setting fines.

220 In setting out in the Guidelines the method which it proposed to apply when calculating fines imposed under Article 15(2) of Regulation No 17, the Commission remained within the legal framework laid down by that provision and did not exceed the discretion conferred on it by the legislature (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraph 252).

221 Although rules of that kind designed to produce external effects cannot be classified as rules of law by which the administration is bound in all cases, they nevertheless set out rules of conduct that indicate the practice to be followed and from which the administration cannot depart, in a particular case, without giving reasons that are compatible with the principle of equal treatment.

222 By adopting such rules of conduct and announcing, by publishing them, that it will henceforth apply them to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules if it wishes to avoid a finding, if it be the case, that it is in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations.

223 Even though the Guidelines do not therefore constitute the legal basis of the contested decision — which is based on Articles 3 and 15(2) of Regulation No 17 — they none the less determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraphs 209 to 213).

224 The limitation which the Commission has imposed on its discretion by adopting the Guidelines is not, however, incompatible with the retention of a considerable degree of discretion (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 246, 274 and 275). The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15 of Regulation No 17, as interpreted by the Court of Justice (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraph 267).

225 Like the Guidelines, the Leniency Notice has created legitimate expectations on which undertakings rely, so that the Commission is obliged to comply with it when assessing the latter's cooperation for the purpose of setting the fine (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 360).

226 It therefore falls to the Court of First Instance, in reviewing the legality of the contested decision, to verify whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and the Leniency Notice and, to the extent to which it establishes any departure therefrom, to verify whether that departure is legally justified and supported by a statement of reasons to the requisite legal standard.

227 However, the Commission's discretion and the self-imposed limits on it do not prejudge the exercise, by the Community judicature, of its unlimited jurisdiction.

2. The applicants' complaints

228 With the exception of RLB (Case T-262/02), all the applicants contest the amount of their fines. First, they claim that it was wrong to classify the infringement as 'very serious' (see Section B below). Second, several applicants contest the legality of dividing the addressees of the contested decision into categories and determining the starting amounts by reference to their market shares (see Section C below). Third, RZB (Case T-259/02), BAWAG (Case T-261/02) and PSK (Case T-263/02) criticise the assessment of the duration of the infringement (see Section D below). Fourth, the applicants claim various mitigating circumstances (see Section E below). Fifth, they claim that the Commission failed to observe the Leniency Notice (see Section F below). Sixth, and finally, ÖVAG and NÖ-Hypo (Case T-271/02) claim that their fine should be reduced on account of the breach of certain procedural rules (see Section G below).

229 The arguments put forward by the applicants in contesting the assessment of the gravity of the infringement and those relating to mitigating circumstances overlap to

some extent, and the way in which those arguments are arranged and the pleas set out display certain differences from one case to another.

230 In order to decide on the appropriate framework for consideration of those arguments, a reference to the scheme of the Guidelines is necessary.

231 Whilst Article 15(2) of Regulation No 17 mentions only the two criteria of the gravity and the duration of the infringement, the Guidelines first provide for assessment of the gravity of the infringement as such, on the basis of which a 'general starting amount' may be set. Second, gravity is analysed in relation to the characteristics of the undertaking concerned, in particular its size and its position in the relevant market, which may give rise to the application of a weighting to the starting amount, the classification of undertakings into categories and the setting of a 'specific starting amount' (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, '*ADM*', paragraphs 45 to 47). Third, the duration of the infringement is taken into account in determining the basic amount and, fourth, the Guidelines provide for aggravating or mitigating circumstances to be taken into account to assess, in particular, the relative gravity of the participation of each of the undertakings concerned in the infringement (*ADM*, paragraph 260).

232 Thus, the assessment of the gravity of the infringement as such depends in particular on the capability of the unlawful conduct to undermine the objectives of the Treaty (*MDF*, cited in paragraph 213 above, paragraph 107), regardless of the contribution made by each undertaking and its individual culpability, whereas the aggravating or mitigating circumstances relate, as demonstrated by the examples given in the Guidelines, to the reprehensible nature of the individual conduct of the undertaking concerned.

233 A distinction must therefore be drawn between, first, the factors liable to influence the potential capability of the infringement adversely to affect undistorted competition and the other objectives of the Treaty, which will be analysed in the context of the assessment of the gravity of the infringement, and, second, the factors relating to the individual conduct of the addressees of the contested decision, which will be examined in the context of mitigating circumstances. Certain matters relied on by the applicants will nevertheless have to be examined in the light of both those aspects.

B — *The classification of the infringement as 'very serious'*

1. General considerations on the assessment of gravity

234 With regard to the assessment of the gravity of infringements as such, the Guidelines state as follows:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.'

235 First, the applicants claim that the infringement cannot, by its nature, be classified as very serious and criticise the Commission for failing to take account of the historical context of the cartel. Second, they maintain that the agreements had no actual impact on the market. Third, they refer to the smallness of the relevant geographic

market. Fourth, RZB considers that the selective character of the action taken by the Commission means that the infringement cannot be classified as 'very serious'.

236 Before those complaints are examined, it is necessary to set out a number of preliminary considerations concerning the relationship between the three aspects of the assessment of the gravity of the infringement which are to be taken into account under the Guidelines.

237 First, the fact that, in the Guidelines, the Commission set out its approach to assessment of the gravity of an infringement does not prevent it from assessing infringements as a whole by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines.

238 According to the case-law of the Court of Justice, in fixing the amount of fines regard must be had to the duration of the infringement and to all the factors capable of affecting the assessment of the gravity of the infringement (*MDF*, cited in paragraph 213 above, paragraph 129). The gravity of infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraphs 240 and 241).

239 In that connection, it is in particular the assessment of the nature of the infringement which enables account to be taken of various relevant factors, which the Guidelines could not list exhaustively and which include the potential impact (as opposed to the actual and measurable impact) of the infringement on the market.

240 Next, it should be observed that the three abovementioned aspects of the assessment of the gravity of the infringement do not carry the same weight in the context of an overall examination. The nature of the infringement plays a major role, in particular, in characterising 'very serious' infringements. In that regard, it is clear from the description of very serious infringements given in the Guidelines that agreements or concerted practices designed in particular, as in this case, to set prices may, on the basis of their nature alone, be classified as 'very serious', without there being any need to characterise such conduct by reference to a particular impact or geographic area. That conclusion is corroborated by the fact that, whilst the description of serious infringements expressly mentions their impact on the market and their effects on extensive areas of the common market, that of very serious infringements, on the other hand, does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area (Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 178).

241 Moreover, there is an interdependence between the three criteria in that a high degree of seriousness in the light of one or other of the criteria may offset the lesser gravity of the infringement in other respects.

2. The nature and context of the infringement

(a) Arguments of the parties

242 First, with regard to the nature of the infringement, BAWAG, PSK and Erste (Cases T-261/02, T-263/02, T-264/02) maintain that, according to Commission decision-making practice, horizontal agreements on prices are typically classified as 'very serious' infringements when they are accompanied by other restrictions, such as partitioning of the markets. BAWAG and PSK claim that the fact that the cartel covered numerous banking products is not relevant to the assessment of its gravity because gravity depends on the damage caused by the cartel and not its extent. In

their view, the participation of all the large Austrian banks in the infringement is likewise not sufficient to warrant the classification of very serious, in so far as the participation of undertakings representing almost all the European market would be required for that to be the case.

243 The banks also state that the infringement attributed to them was not a traditional, secret cartel, created for anti-competitive purposes and designed to yield monopolistic profits and adversely affect consumers. According to ÖVAG and NÖ-Hypo, the true nature of the committees was closer to a (possibly illegal) information exchange than a typical cartel pure and simple.

244 Next, with regard to the context of the infringement, the applicants first criticise the Commission for ignoring the fact that the origin of the agreements was legal, in that they were created by the State for the purposes of economic orientation, in accordance, according to RZB, ÖVAG and NÖ-Hypo, with the Austrian tradition that the State, in order to achieve its objectives in the public interest, relies on cooperation both between undertakings and with the social partners. The applicants consider that it is necessary to draw a distinction between the situation of undertakings which create a secret and institutionalised cartel for anti-competitive purposes and their own situation, characterised by the fact that they simply failed to abandon in due time a practice which was previously legal. RZB and Erste refer to the particular features of the banking market, in particular the State's interest in ensuring stability in that sector, which are the reason for extensive intervention by the public authorities and mitigate the gravity of the infringement. BAWAG and PSK also state that the agreements were a unique historical phenomenon which is not likely to be repeated, so that a heavy fine is not necessary in this case to ensure a deterrent effect.

245 Second, BA-CA, ÖVAG and NÖ-Hypo claim that, even after the accession of Austria to the Community, cartels of the kind represented by the committees were not prohibited by Austrian competition law, which favoured non-binding 'behavioural cartels'.

246 Third, the applicants refer to the influence of the State authorities, in particular the OeNB, the Wirtschaftskammer (Austrian Chamber of the Economy) and the Ministry of Finance, within the committees. They emphasise that the State authorities participated actively in the committees, expressing disfavour in particular concerning the fierce competition between banks. BA-CA claims that the role of the OeNB was much more important than is indicated in recital 374 to the contested decision and that the OeNB brought pressure to bear on the banks to modify their trading conditions.

247 Fourth, the applicants consider that the institutionalised nature of the cartel is accounted for by the legal origin of the meetings and therefore adds nothing to the gravity of the infringement. BAWAG and PSK also observe that the meetings were to a considerable extent devoted to matters that were neutral as regards competition law.

248 Fifth, Erste refers to the recent accession of Austria to the European Union.

(b) Findings of the Court

249 As regards, first, the nature of the infringement, the Commission rightly emphasised, in recital 506 to the contested decision and in footnote 514, that horizontal price agreements constitute very serious infringements, even in the absence of other restrictions on competition such as partitioning of the market (*ADM*, cited in paragraph 231 above, paragraphs 117 to 126; see also *SPO and Others* v *Commission*, cited in paragraph 175 above, paragraph 377).

250 In this case, the 'very serious' nature of the infringement is exacerbated in particular, as rightly pointed out in recital 506 to the contested decision, by the importance of

the banking sector to the economy as a whole and by the breadth of the agreements, which covered a wide range of important banking products and involved the participation of the vast majority of the economic operators in the relevant market, including the largest undertakings. The gravity of an infringement by reason of its nature depends above all on the danger that it represents to undistorted competition. In that regard, the breadth of a price agreement, as regards both the products concerned and the undertakings involved, plays a decisive role. In any event, the applicants' view that only infringements involving the participation of almost all the undertakings in the European market may be classified as very serious is unfounded (see also paragraphs 307 and 313 below regarding the importance of the extent of the relevant geographic market).

251 The view put forward by the banks that the cartel had no anti-competitive aim conflicts with the very nature of the agreements, whose purpose was to restrict or indeed eliminate price competition. The same applies to the submission by ÖVAG and NÖ-Hypo that the infringement should be classified as an information exchange rather than a price cartel.

252 As regards the argument that the cartel was not secret, it must be pointed out that the contested decision does not rely on the secrecy of the agreements to justify the classification of the infringement as very serious (see recitals 505 to 514). Admittedly, the Commission refers, in its defence pleadings, to the Leniency Notice, Section A.1 of which states that '[s]ecret cartels between enterprises aimed at fixing prices ... are among the most serious restrictions of competition'. However, that reference forms part of an argument to demonstrate the 'very serious' nature of horizontal price agreements, which is clearly apparent from the reference that follows to the Guidelines, which make it clear that the category of very serious infringements essentially comprises 'horizontal restrictions such as price cartels', without mentioning the secret nature or otherwise of those infringements. It follows that the arguments concerning the lack of secrecy of the agreements are not relevant to the Commission's assessment of the gravity of the infringement. In any event, although the secret nature of a cartel is a factor liable to exacerbate its gravity, it is not an indispensable condition for an infringement to be classified as 'very serious'.

253 The applicants' complaints concerning the classification of the cartel as very serious by reason of its nature must therefore be rejected.

254 It must also be observed that a horizontal price cartel as extensive as the one found by the Commission in this case, relating to such an important economic sector, cannot normally escape the classification of very serious infringement, whatever its context. In any event, the circumstances invoked by the applicants in this case are not such as to affect the validity of the Commission's assessment of the gravity of the infringement.

255 As regards the historical context of the cartel, the Commission correctly observes, first, that the legal bases on which the committees were initially founded had been repealed no later than the time of Austria's accession to the EEA. During the period covered by the contested decision, there was no provision of national law that could compel banks to engage in concerted practices or restrict their freedom of action in the market. As to the 'Austrian traditions' referred to by certain applicants, it must be pointed out that the political preferences and traditions of Member States may sometimes conflict with the fundamental objective of undistorted competition embodied in Article 3(g) EC. Therefore, the fact that a cartel has been created and maintained with State support does not affect its potential to detract from the objectives of the Treaty.

256 The argument that a heavy fine is not necessary because of the one-off nature of the agreements is not relevant in the present context. The deterrent nature of fines is certainly one of the many factors that must be taken into account in assessing the gravity of an infringement within the meaning of Article 15 of Regulation No 17 (*MDF*, cited in paragraph 213 above, paragraph 120). However, as stated in paragraph 231 above, the Guidelines draw a distinction between different aspects of gravity within the meaning of Article 15(2) of Regulation No 17 and provide for the deterrent effect to be taken into account together with that of the 'intrinsic' gravity

of the infringement. That distinction is justified by the fact that it adds transparency to the process by which the Commission sets fines. Therefore, considerations relating to the deterrent nature of fines cannot be validly relied on to contest the assessment of the intrinsic gravity of an infringement.

257 As regards, second, the arguments to the effect that Austrian law tolerated 'behavioural cartels' (Verhaltenskartelle) even after Austria's accession to the Communities and throughout the duration of the infringement, the Commission rightly emphasised that that fact does not affect the existence of an infringement of Article 81 EC and likewise cannot influence the assessment of the gravity of that infringement. According to the description of Austrian law given in particular by BA-CA, ÖVAG and NÖ-Hypo, the privileged position until 2000 of 'behavioural cartels' was linked to their non-binding character. On the other hand, Article 81 EC prohibits concerted practices in the same way as agreements and the Guidelines likewise draw no distinction, for the purpose of assessing gravity, between binding agreements and 'gentlemen's agreements'.

258 Third, with regard to the participation of the State authorities in the committees, referred to by the applicants, it must be borne in mind first of all that the Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 81 EC to 89 EC (Case 13/77 *INNO* [1977] ECR 2115, paragraph 33). Whilst it is true that undertakings cannot be penalised for anti-competitive conduct if it has been imposed by a national law incompatible with those provisions or by irresistible pressure brought to bear upon them by the national authorities, the position is different where such a law or such conduct is limited to encouraging or facilitating autonomous anti-competitive conduct by undertakings (see, by analogy, Case C-198/01 *CIF* [2003] ECR I-8055, paragraphs 52 to 56, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 65).

259 In that connection, it is undisputed that the conduct of the national authorities in question in this case did not have the effect of compelling the banks to engage in anti-competitive conduct. It is true that a note produced by BAWAG and PSK refers to a 'call by the OeNB to the banks to reduce their unreasonable price competition for deposits and lending'. It does not however appear that it was compulsory for the banks to comply with that call. The examples of alleged pressure exercised by the OeNB on banks, referred to by BA-CA, show that the OeNB exhorted the banks to lower interest rates but give no indication that they were invited to engage in concertation on that matter and still less that the banks had been exposed to irresistible pressure to that effect. That involvement does not therefore affect the liability of the applicants for their illegal conduct.

260 Neither does it affect the intrinsic gravity of the infringement. The State authorities' intervention in the committees, as described by the applicants, cannot in any way reduce the potential of the price cartel in question in this case to detract from the objectives of the Treaty. On the contrary, such approval or tolerance of unlawful conduct by the public authorities is liable to reinforce the effects of the illegal agreements.

261 It must also be pointed out that the question whether the conduct of the national authorities may nevertheless be taken into consideration as a mitigating circumstance (see, to that effect, *CIF*, cited in paragraph 258 above, paragraph 57) will be examined below in paragraphs 504 and 505.

262 As regards, fourth, the institutionalised character of the cartel, it is legitimate for the Commission to take account of the fact that a cartel was operated in the form of a system of regular institutionalised meetings (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraphs 104 and 194). Admittedly, the Lombard network was created at a time when the agreements were not illegal. The fact nevertheless remains that the banks used that pre-existing structure for their unlawful

concertation and may thereby have made a considerable contribution to the operation and effectiveness of the overall cartel. The fact that the meetings also dealt with other subjects, that were neutral from the standpoint of competition law, does not diminish the extent to which undistorted competition was jeopardised by such a well-organised system of concertation.

263 Finally, the Republic of Austria's recent accession to the European Union at the material time has no influence on the intrinsic gravity of the infringement.

264 Consequently, the circumstances invoked by the applicants cannot affect the validity of the finding, in recital 506 to the contested decision, that, by their nature, the Lombard network agreements constitute a very serious infringement.

3. The specific impact of the infringement on the market

265 The applicants object to the classification of the infringement as very serious on the ground that the Commission has not demonstrated appreciable effects of the cartel on the market. They claim, first, that such an effect must be demonstrated to justify the classification of the infringement as very serious; second, that the considerations set out in the contested decision concerning the impact of the cartel are insufficient for that purpose; and, third, that the economic report by Professor von Weizsäcker produced by them during the administrative procedure demonstrated the lack of any such impact.

(a) The contested decision

266 In its analysis of the gravity of the infringement, the Commission observes, in recital 508 to the contested decision:

'The implementation and impact of the cartel may be taken into account, amongst a number of aspects, in cases where the practices at issue are not aimed directly at the restriction of competition, and consequently are caught by Article 81[EC] only as a result of their practical effects.'

267 It then states that the banks concerned participated regularly and frequently in numerous committee meetings and that the documents for the period in question which have been gathered clearly show the manner in which the banks implemented the agreements concluded in the committee meetings or in which they took account of the information they obtained on those occasions from their competitors in order to take their own decisions. For matters of detail, the Commission refers to recitals 430 to 437 to the contested decision, which, for the purpose of establishing the infringement, give a description of the implementation of the cartel decisions.

268 The Commission infers from this, in recital 510 to the contested decision, that those overall agreements, which lasted several years, had an impact on the market. It adds that the fact that the cartel members had to accept failures or sometimes even mutually acknowledged the failure of their efforts does not mean that their agreements could not have had effects on the market. It states, finally, that the report drawn up on behalf of the banks likewise did not prove that the cartel had no effects.

(b) The classification of BA-CA's arguments

269 BA-CA, which puts forward only the last two complaints mentioned in paragraph 265 above, claims that its plea is not directed against the classification of the infringement as very serious but alleges a breach of the obligation to state reasons. It submits that economic effects may be taken into account, in determination of the fine, only where they have actually been established and are supported by a statement of reasons and that the Commission bears the onus of proof in that regard.

270 By arguing thus, BA-CA essentially criticises the Commission for not having proved the impact of the infringement on the market. That complaint concerns not the statement of the reasons on which the contested decision is based but rather the classification of the infringement as very serious. The obligation to state reasons is an essential procedural requirement which must be distinguished from the merits of the reasons given, which concern the substantive legality of the contested measure (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35). Therefore, it will be necessary to examine BA-CA's complaints at the same time as those concerning the merits of the assessment of the gravity of the infringement contained in the contested decision, raised by the other applicants.

(c) Arguments of the parties

271 First, the banks submit that, under the Guidelines and the case-law, it is necessary to take account of the specific impact of an infringement on the market in order to determine its gravity. BAWAG also states that the principle of proportionality requires that particularly harmful agreements should attract more severe sanctions than those which have had little or no effect.

272 The applicants claim that the burden of proof of a practical impact of the cartel on the market falls upon the Commission. They submit that the considerations set out in the contested decision regarding the implementation of the agreements are not sufficient to demonstrate any such impact. RZB, BAWAG, PSK and Erste maintain that it is necessary, in order to provide such proof, to demonstrate, by means of an economic study, that the interest rates and commissions charged in Austria during the relevant period differed significantly from those which would have been applied in the absence of any infringement.

273 Second, the applicants criticise the reasoning of the contested decision. Without challenging the Commission's factual findings regarding the implementation of the agreements, BA-CA, BAWAG, PSK and Erste submit that the examples provided are not representative, that the file contains numerous examples of non-compliance with the agreements and that the banks secretly engaged in intense competition. BA-CA and BAWAG state that their own conduct in particular falls within that case. According to BAWAG and PSK, the documents in which the banks expressed their views on the implementation of and compliance with the agreements contain only subjective assessments of individual bank employees and do not therefore provide a reliable basis for judging their actual economic effects.

274 BA-CA and Erste claim that the agreements could not in any event be complied with in the marketplace because they concerned only the 'official' rates displayed at counters, whereas the rates actually offered to customers depend on other parameters, in particular the scale of the transaction, the customer's solvency and the authority granted to employees to depart from the official rate.

275 BA-CA and Erste draw attention to the importance of the key lending rates for the evolution of the rates applied by the banks. In their view, the economic necessity of following changes in those rates means that there is no causal link between the results of the committee meetings and the rates set by the banks.

276 RZB, BAWAG, PSK and Erste, finally, consider that the Commission cannot link the existence of effects to the frequency of the committee meetings. They add that those meetings concerned numerous matters which were neutral as regards competition and fulfilled a social function.

277 Third, the applicants criticise the Commission for not taking account of the findings of Professor von Weizsäcker's report, produced by them. They submit that that report showed, by statistical methods, that neither the prices charged by banks nor their income exceeded, on average, those which would have been achieved in the absence of the agreements. They consider that the objections made against that report in the contested decision are unfounded. RZB, ÖVAG and NÖ-Hypo maintain that the conclusions of the report can only be refuted by another scientifically valid study. The applicants note that the Commission declined, in the contested decision, to rely on the counter-report which it had had drawn up, because of its technical weaknesses.

278 The Commission considers that a cartel may be classified as a very serious infringement by reason of its anti-competitive object, even if it has no effect on the market. However, it considers that in this case the impact of the cartel was established.

279 It states that a cartel does not produce effects only from the time at which it is proved that prices would have evolved differently in the context of free competition, but rather from the time when the agreements are implemented. It observes that the documents seized by it, which date from the relevant time, clearly show how the banks implemented the agreements concluded at the committee meetings and how, when taking their own decisions, they took account of the information they obtained there from their competitors. In its view, it is incontestable that the cartel had effects at that level, even though, in certain cases, the banks were unable to reach an agreement or did not comply with the agreements.

280 The Commission is therefore of the opinion that the report produced by the banks is not decisive as regards determining the gravity of the infringement. It adds that the report did not convincingly prove that the cartel had no effects on price development.

(d) Findings of the Court

281 As a preliminary point, it must be stated that the contested decision took account of the actual impact of the cartel on the market when assessing the gravity of the infringement. Although the Commission states, in recitals 429 and 508, that it is not necessary to take account of the actual effects where the anti-competitive object of a cartel is established, recitals 509 and 510 and also recitals 430 to 436 nevertheless find that there were effects, in this case, deriving in particular from the implementation of the agreements, even though it is conceded in recital 436 that it is not possible to quantify them precisely.

282 It is thus not relevant to establish, in this case, whether the Guidelines make the classification of a cartel as 'very serious' subject to proof of an actual impact on the market. Given that the Commission enjoys a discretion regarding assessment of the gravity of infringements, the legality of that assessment depends on the merits of the findings on which it is actually based, and not on the question whether all the matters which the Commission took into account were necessary for that purpose.

283 It is therefore appropriate to consider, first, the question whether the Commission is entitled to conclude, from the implementation of a cartel, that the cartel had an actual impact on the market, second, whether it was right to find that there was such implementation in this case and, third, whether in that context it disregarded the relevance and probative value of the report produced by the banks.

284 First of all, it must be borne in mind that, in assessing the actual impact of an infringement on the market, it is incumbent on the Commission to take as a reference the competition which would normally have prevailed if there had been no infringement (see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 619 and 620; *Mayr-Melnhof*, cited in paragraph 205 above, paragraph 235; Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645; and *ADM*, cited in paragraph 231 above, paragraph 150).

285 First, in the case of a price cartel, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices, for example by announcing them to customers, instructing their employees to use them as a basis for negotiation and monitoring their application by their competitors and their own sales departments. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers' room for negotiation (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 340 and 341, and 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 743 to 745).

286 On the other hand, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel. In that regard, the view that only the fact that the level of transaction prices would have been different in the absence of collusion may be taken into account in determining the gravity of the infringement cannot be upheld (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 53 and 62). Moreover, it would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic

models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved (Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, at I-9858, point 109).

287 In order to assess the gravity of the infringement, it is decisive to ascertain that the cartel members did all they could to give concrete effect to their intentions. What then happened at the level of the market prices actually obtained was liable to be influenced by other factors outside the control of the members of the cartel. The members of the cartel cannot therefore benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine (Opinion of Advocate General Mischo in *Mo och Domsjö* v *Commission*, cited in paragraph 286 above, points 102 to 109).

288 It was therefore legitimate for the Commission to rely on the implementation of the cartel in concluding that there was an impact on the market.

289 As regards, second, the merits of the findings relied on by the Commission in drawing that conclusion in this case, it must be observed, first, that the applicants do not object to the examples of implementation of the Lombard network agreements provided in the contested decision.

290 As regards, next, the argument that those examples are not representative because the file also contains numerous instances of non-compliance with the agreements and of competition between the banks, it must be observed that the fact that the agreements were not always complied with by the cartel members is not sufficient to rule out an effect on the market.

291 In that regard, the examples mentioned by BA-CA, BAWAG, PSK and Erste do not show that the conclusion that the cartel was implemented is incorrect.

292 BA-CA refers to several passages of the contested decision (recitals 149, 172, 199, 229, 264, 283 and 299 et seq.) that mention cases in which specific agreements were not observed by certain banks. Those examples show, first, that the Commission did not disregard the fact that the implementation of the agreements was not complete. However, they certainly do not confirm BA-CA's thesis that there were only 'isolated attempts to give effect' to the agreements. Thus, recital 149 notes that PSK was reproached by the other banks for not complying with the agreement on the rate for a certain savings product, recital 172 describes the other banks' reaction to a reduction in the lending rate made by BAWAG 'without prior notice', and recital 199 refers to a lack of discipline for which Erste was held to be 'the culprit' by the other banks. It is clear from those examples that banks which individually departed from the agreements were exposed to criticism from the other members of the cartel which, it seems, complied with them. Although, in a committee meeting described in recital 229, a matter considered was 'preferential measures started by some institutions' contrary to the agreements, the participants nevertheless found that the banks had 'stuck essentially to the agreements' reached a month earlier. Similarly, recital 264 describes discussions at which Erste complained of the application of rates not conforming to the agreements by several competitors, whilst the latter, although conceding that 'the measures were slower to take effect' within their establishments, stated that everything was running to plan. Finally, recital 283 speaks of a rebuke envisaged by the Lombard Club concerning the lack of discipline on rates, whereas recitals 299 to 301 describe infringements of certain agreements and the banks' efforts to counter them. Those passages as a whole do not in any way support BA-CA's view that non-compliance with the agreements was the rule and their implementation by the banks the exception.

293 BAWAG and PSK cite 28 documents in the Commission file dealing with non-compliance with the agreements and the existence of competition between the

banks, whilst Erste submits a list of 85 references, concerning 74 documents, 22 of which are the same as the documents relied on by BAWAG and PSK.

294 However, those documents are not incompatible with the Commission's conclusion. For example, the three banks rely on the minutes of a committee meeting on deposit transactions of 27 September 1995, from which BAWAG and PSK cite an extract, to the effect that 'the RBW representative observed that ... the conditions and due dates agreed at the committee meeting ... were not complied with'. That passage is directly preceded by the following: 'In that context, the representatives of certain establishments complain that, on the due dates for reducing rates envisaged at the committee meeting, the [rates of certain specific savings contracts] were not automatically reduced equally. Volksbank, CA-BV, [RBW], NÖ-Hypo, PSK and Erste adjusted their conditions in that regard. [BA] and BAWAG will not do so until the end of September.' In the same document, addressed to the chief executive of BAWAG, it is also stated that another bank had complained that, in a survey, it was found that higher interest rates than agreed for a new deposit could be obtained from BAWAG and PSK. The document goes on: 'This involves our agencies [details of addresses]. Appropriate measures have been taken through our branches department.' That document thus provides examples both of non-compliance with the agreements on certain matters and of their implementation regarding others, and the rebuke addressed by a bank to agencies which did not comply with the agreements.

295 In view of the numerous uncontested examples of implementation of the agreements mentioned in the contested decision, the fact that in certain cases the agreements were not respected by one or more banks, that the banks did not succeed in maintaining the agreed level of rates or increase their profitability or that there was competition between them regarding certain products is not sufficient to undermine the finding that the agreements were implemented and had effects on the market.

296 In that context, the arguments of BA-CA and BAWAG concerning their own conduct cannot be accepted. The conduct which an undertaking claims to have adopted is not relevant to the assessment of the impact of a cartel on the market and only the effects resulting from the whole infringement are to be taken into account (*Commission* v *Anic Partecipazioni*, cited in paragraph 189 above, paragraphs 150 and 152, and *Hercules Chemicals* v *Commission*, cited in paragraph 285 above, paragraph 342).

297 The banks' argument that the interest rates actually applied to customers often departed from the 'official' rates agreed at the committee meetings and displayed at the counters, because of the specific characteristics of individual transactions and the authority of bank employees to depart from those rates, within certain limits, is not relevant. The 'official' rates displayed by the banks represent the starting point for negotiations with individual customers and, accordingly, influence the result arrived at.

298 As regards the argument of BAWAG and PSK that the documents in which the banks themselves assess the specific application of their agreements are not probative because they contain only subjective assessments by bank employees, it must be observed that the reliability of documents in which members of a cartel express an opinion as to its 'success' must be assessed on a case-by-case basis (*Cascades* v *Commission*, cited in paragraph 262 above, paragraph 186, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 285 above, paragraphs 746 and 747). Doubts as to the probative value of such statements may in particular be justified where they refer to impressions which are not founded on concrete factors and opposite positions have been taken by other members of the cartel in respect of the same periods. However, the latter are not automatically more credible than the former. In this case, the Commission observes that the banks assessed the practical application of the agreements on the basis of regular checks at other banks (recital 433 to the contested decision), and that fact is not contested. In those circumstances, the Commission was entitled to rely, inter alia, on the

documents in which the cartel members expressed their views, at the material time, on the implementation of the cartel, inferring, in reaching that conclusion, that the cartel had an impact on the market.

299 Next, it must be observed that the importance of the key lending rates as regards the rates applied by the banks is not contested by the Commission, which rightly criticises the banks for having coordinated their reaction to the evolution of the key lending rates. The effect of the agreements, deriving in this case from their implementation, and the fact that the rates applied by the banks followed the key lending rates, so that it is difficult to measure the actual impact of the agreements, are not in themselves sufficient to undermine the validity of the Commission's reasoning.

300 Finally, whilst it is true that the Commission cannot infer solely from the number and frequency of the committee meetings that the latter had an impact on the market (*ADM*, cited in paragraph 231 above, paragraph 159), the reference to that frequency in the contested decision is merely a secondary facet of the Commission's reasoning on which the legality of the assessment of the gravity of the infringement cannot depend.

301 It follows that the finding that the cartel was implemented has not been undermined by the arguments of the parties.

302 Third, the report produced by the banks does not demonstrate that the Commission made any error in inferring that the implementation of the agreements gave rise to an actual impact on the market. First, it must be observed that the expert found, on the basis of a comparison between the Austrian banking market and the German banking market, that the commercial conditions enjoyed by bank customers in

Austria were not less favourable than those applied in the German market and that the Austrian banks' profitability was lower than that of the German banks. Second, the expert observed, on the basis of two inquiries relating to representative banking products, that no measurable influence of the target rates set by the agreements on the average rates actually applied by the banks could be detected.

303 The expert thus limited the subject-matter of his study to an examination of certain specific questions, and his analysis did not concern all the potential effects of the agreements on the market. The report cannot therefore demonstrate the absence of any actual impact of the cartel on the market.

304 First, the Commission was thus entitled to consider, without falling into error, that the comparison with the market of another Member State is not capable of demonstrating what conditions would have been applied in the Austrian market in the absence of the agreements and that it cannot be inferred from the data concerning the banks' profitability that the cartel had no effect.

305 Second, the fact that the report did not measure, in statistical terms, a significant impact of the cartel on average prices does not prove that the agreements had no effect on the determination of the transaction prices applied to customers, which could be taken into consideration for the purpose of assessing the gravity of the infringement.

306 It follows that the complaints concerning the impact of the infringement on the market must be rejected in their entirety.

4. The extent of the relevant geographic market

(a) Arguments of the parties

307 With the exception of BA-CA (Case T-260/02) and RLB (Case T-262/02), all the applicants are of the opinion that the classification of the infringement as 'very serious', despite the limited size of the relevant geographic market, is contrary to the Guidelines, to the Commission's previous decisions and to the principle of proportionality. Moreover, RZB, BAWAG and PSK (Cases T-259/02, T-261/02 and T-263/02) consider that the reasoning of the contested decision is not sufficient in that regard. RZB states, however, that it does not intend to plead the inadequacy of the reasoning and requests that the Court examine the substance of the contested decision.

(b) Findings of the Court

308 According to recital 511 to the contested decision:

'In view of the special circumstances of the present case and the context of the infringement, the comparatively limited size of the territory of Austria does not prevent the infringement being considered a very serious one.'

309 Read in conjunction with recitals 506 to 510 to the contested decision, concerning the nature of the infringement and the implementation and effects of the cartel, that succinct statement of reasons is sufficiently clear to enable the banks to understand

the reasons that prompted the Commission to consider that, despite the limited extent of the market, the infringement should be classified as 'very serious'.

310 As regards the well-foundedness of that assessment, first, recital 511 shows that the Commission did not disregard the limited extent of the relevant geographic market or fail to take it into consideration.

311 Second, the extent of the geographic market is only one of the three criteria which, according to the Guidelines, are relevant to overall assessment of the gravity of the infringement. Among those interdependent criteria, the nature of the infringement plays a major role (see paragraphs 240 and 241 above). On the other hand, the size of the geographic market is not an autonomous criterion in the sense that only infringements affecting most of the Member States would be classifiable as 'very serious'. Neither the Treaty, nor Regulation No 17, nor the Guidelines, nor the case-law support the conclusion that only geographically very extensive restrictions may be considered as such (Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 87). Therefore, the argument of BAWAG and PSK that only infringements involving the participation of almost all undertakings in the European market can be classified as very serious (see paragraphs 242 and 250 above) must be rejected.

312 Third, the entire territory of a Member State, even if relatively 'small' in comparison with the other Member States, in any event constitutes a substantial part of the common market (*Michelin* v *Commission*, cited in paragraph 173 above, paragraph 28, as regards the Netherlands market, and *Brasserie nationale and Others* v *Commission*, cited in paragraph 240 above, paragraph 177, as regards the Luxembourg market). In that context, BAWAG's argument that the agreements in which it participated extended only to Vienna and the eastern part of Austria

must be rejected, given that it is necessary to assess the gravity of the infringement as a whole, which does not depend on the actual conduct of a specific undertaking (see, to that effect, *Hercules Chemicals* v *Commission*, cited in paragraph 285 above, paragraph 342). It is uncontested that the overall cartel covers the whole of Austria.

313 Therefore the limited size of the relevant geographic market does not preclude the classification as 'very serious' of the infringement found in this case.

5. The selective nature of the proceedings taken (Case T-259/02)

314 RZB also claims that the classification of the infringement as 'very serious' is incompatible with the Commission's decision to institute proceedings against only some of the undertakings that participated in the infringement.

315 That argument cannot be upheld. Since the Commission legitimately adopted as a criterion for choosing the addressees of the decision their frequent participation in the most important committee meetings (see paragraphs 134 to 145 above), the fact that it did not take proceedings against all the members of the cartel does not prevent it from classifying as 'very serious' the price-cartel infringement at issue in this case.

6. Conclusion as to the gravity of the infringement

316 For the reasons given above, all the applicants' complaints concerning the classification of the infringement as 'very serious' in the contested decision must be rejected.

C — *The division of the addressees of the contested decision into categories and the setting of the starting amounts*

317 As is apparent from recitals 519 and 520 to the contested decision, the Commission divided the addressees of the contested decision into five categories, by reference to the available data concerning their market shares, for which it set initial amounts of EUR 25, 12.5, 6.25, 3.13 and 1.25 million respectively. In its defence, the Commission explained that the guide values for market shares for the first four categories of undertaking were approximately 22%, 11%, 5.5% and 2.75%, whilst the fifth category (to which it refers as the 'catch-up category') comprises banks with a market share of less than 1%.

318 The applicants put forward a number of complaints concerning various aspects of the determination of their market shares, the division into categories and the setting of starting amounts. First, Erste (Case T-264/02) submits that it is illegal for the Commission to have imputed to it the infringement of a bank (GiroCredit) with which it merged but which, previously, formed part of the BA-CA group (see below, paragraph 319 et seq.). Second, RZB (Case T-259/02), Erste and ÖVAG (Case T-271/02) object to the Commission's attributing to them as central establishments for the decentralised sectors, namely those of the Raiffeisen banks, the savings banks and the credit unions, the market shares of their respective sectors for the purpose of division into categories (see paragraph 337 et seq. below). Third, several applicants criticise the Commission for breaching the obligation to state reasons regarding the division into categories and the setting of starting amounts (see paragraph 410 et seq. below). Fourth, BAWAG, PSK and NÖ-Hypo (Cases T-261/02, T-263/02 and T-271/02) allege a breach of the principle of equal treatment (see paragraphs 418 to 431 below), and, fifth, PSK, Erste and ÖVAG claim that the Commission's findings regarding their market shares are incorrect (see paragraph 432 et seq. below).

1. The attribution of GiroCredit's infringement to Erste (Case T-264/02)

(a) The facts on which this plea is based and the contested decision

319 Erste (under its former name EÖ) purchased in May 1997 53% of the shares in GiroCredit, which was the lead institution for the savings banks. From 1994 until the purchase of the shares by EÖ, the majority of GiroCredit's shares were held by the Bank Austria group (see paragraphs 7 and 11 above). In October 1997, GiroCredit and EÖ merged and the name EÖ was changed to Erste.

320 In recitals 475 to 481 to the contested decision, the Commission considered whether the responsibility for the infringement committed by GiroCredit should be imputed to Erste or to BA. It considered that it could not conclude that GiroCredit's commercial policy had been influenced by BA before the takeover by Erste. It therefore concluded that GiroCredit itself was responsible for the infringement and that that liability was transferred to Erste following the merger.

(b) Arguments of the parties

321 Erste is of the opinion that GiroCredit's unlawful conduct during the period prior to its purchase should be imputed to BA and not to itself. It submits, on the basis of documentary evidence which it produces, that the conditions under which liability for the conduct of a subsidiary may be attributed to the parent company were fulfilled in the relationship between BA and GiroCredit.

322 The Commission contends that it has not been established that the conditions for imputing GiroCredit's infringement to BA are satisfied. It considers that, in any event, it may choose to impose the penalty either on the parent company or on the subsidiary, even where the conditions for attributing the conduct of the subsidiary to the parent company are fulfilled.

(c) Findings of the Court

323 In connection with the present plea, it is appropriate, first, to examine whether the conditions in which the purchaser of an undertaking is responsible for the infringements committed by the latter prior to the purchase are fulfilled in this case and, second, to consider the impact on the responsibility of the purchaser of the fact that the undertaking purchased was previously controlled by another parent company.

324 According to settled case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (*Cascades* v *Commission*, cited in paragraph 286 above, paragraph 78). While the legal person managing the undertaking at the time of the infringement exists, responsibility for the undertaking's infringement follows that legal person, even though the assets and personnel which contributed to the commission of the infringement have been transferred to third persons after the period of the infringement (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 63, confirmed by the judgment of the Court of Justice in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 25).

325 On the other hand, where, between the infringement and the time when the undertaking in question must answer for it, the person responsible for the operation

of that undertaking has ceased in law to exist, it is necessary, first, to establish the combination of physical and human elements which contributed to the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that, because of the disappearance of the person responsible for its operation when the infringement was committed, the undertaking may evade liability for it (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 285 above, paragraph 953).

326 When the undertaking in question ceases to exist, upon being merged with a purchaser, the latter takes on its assets and liabilities for infringements of Community law (Opinion of Advocate General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, at I-9928, point 75). In such cases, the liability for the infringement committed by the undertaking taken over may be attributed to the purchaser (see, by analogy, *Commission* v *Anic Partecipazioni*, cited in paragraph 189 above, paragraph 145).

327 In this case, the legal person responsible for the operation of GiroCredit's banking business before its merger with EÖ was GiroCredit Bank der österreichischen Sparkassen AG. Having been taken over by EÖ in 1997, that legal person ceased to exist in October 1997 as a result of its merger with EÖ, now Erste.

328 In accordance with the principles set out above, Erste must therefore answer for the infringement committed by GiroCredit prior to the latter's purchase by EÖ.

329 Next, it is appropriate to consider whether such liability of a purchaser must be rejected in a case where the liability for an infringement committed by an undertaking before it was taken over may be imputed to an earlier parent company.

330 In that regard, it must be borne in mind that, according to settled case-law, the conduct of a subsidiary with a separate legal personality may be imputed to the parent company, in particular where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133; Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27; and Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 96; and *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 285 above, paragraph 960) or where the parent company, which is capable of having a decisive influence on the commercial policy of its subsidiary, is aware of and approves of the latter's participation in the cartel (Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraphs 41, 42, 45, 47 and 48, confirmed by the judgment of the Court of Justice in Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 73).

331 That possibility of imposing a penalty on the parent company for its subsidiary's unlawful conduct does not in itself, however, mean that the subsidiary itself will be penalised. An undertaking — that is to say an economic unit comprising personal, tangible and intangible elements (Case 19/61 *Mannesmann* v *High Authority* [1962] ECR 357, 371) — is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management as provided for in the undertaking's articles of association (management board, management committee, chairman, manager, and so on) even though the financial consequences of the fine are ultimately borne by its owners. That rule would not be observed if the Commission, faced with unlawful conduct on the part of an undertaking, were always required to ascertain who is the owner exercising a decisive influence on the undertaking and were allowed to impose a sanction only on that owner (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, *'Tokai I'*, paragraphs 279 to 281). Since the power to penalise the parent company for the conduct of a subsidiary thus has no bearing on the legality of a decision addressed only to the subsidiary that participated in the infringement, the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period.

332 That choice is also available to the Commission where there are successive changes in the economic control of the subsidiary. Although, in such a case, the Commission may impute the conduct of a subsidiary to the former parent company for the period prior to the transfer and thereafter to the new parent company (see, to that effect, *KNP BT* v *Commission*, cited in paragraph 330 above, paragraph 73), it is not required to do so and may choose to penalise only the subsidiary for its own conduct.

333 Admittedly, given the nature of the infringements in question and the degree of severity of the ensuing penalties, responsibility for committing those infringements is personal in nature (*Commission* v *Anic Partecipazioni*, cited in paragraph 189 above, paragraph 78) and a person, whether natural or legal, must be penalised only for acts imputed to it individually (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, *'KTS'*, paragraph 63, and *ADM*, cited in paragraph 231 above, paragraph 261). In accordance with that principle, the Commission may not impute to the purchaser of a company liability for the latter's conduct prior to the purchase, such liability having to be imputed to the company itself provided that the company still exists (see, to that effect, *KNP BT* v *Commission*, cited in paragraph 330 above, paragraph 72, and *Cascades* v *Commission*, cited in paragraph 286 above, paragraphs 77 to 80).

334 On the other hand, it is not incompatible with that principle to impute responsibility to a subsidiary for its own conduct even if that means, where the subsidiary has lost its legal personality prior to the infringement, that the penalty is imposed on the purchaser, who is unconnected with the infringement.

335 Provided that the Commission has established an undertaking's participation in a cartel, it is entitled to impose a fine on the natural or legal person managing it, or indeed, if the latter no longer exists, on the successor to the latter, without being required to ascertain whether the undertaking acted autonomously or in accordance

with the instructions of a parent company. Otherwise, the Commission's inquiries would be made considerably more laborious by the need to verify, in each case where there were successive controllers of an undertaking, to what extent the latter's acts could be imputed to the former parent company.

336 It follows, without there being any need to verify whether GiroCredit's conduct could have been imputed to BA, that the Commission did not in any way act illegally by imputing that conduct to Erste, as the successor to GiroCredit.

2. The attribution of the market shares of the banks in the 'decentralised sectors' to the central establishments (Cases T-259/02, T-264/02 and T-271/02)

337 RZB, Erste and ÖVAG are of the opinion that the classification of them is illegal because the Commission attributed to them, as the lead institutions of the decentralised sectors comprising the Raiffeisen banks, savings banks and credit unions, the market share of the entire sectors concerned.

(a) Contested decision

338 The contested decision justifies the attribution to the central establishments of the market shares of their respective sectors by the following considerations:

'(515) The infringement is thus to be classified as a very serious one; within that category, the scale of the fines to be imposed makes it possible to

differentiate between offenders so as to take account of their effective economic capacity. At the same time it allows a fine to be set at a level which ensures that it has a sufficiently dissuasive effect. A differentiated approach of this kind is especially desirable here, because there is a wide variation in the size of the undertakings or groupings that took part in the infringement.

(516) In this case account has to be taken of the special features of the Austrian market. It would be quite unrealistic to confine the importance of Erste, RZB and ÖVAG in the network, and their effective capacity to restrict competition at the expense of consumers, to the volume of their own individual business as commercial banks.

(517) The documents in the case make it impressively clear that these undertakings, in line with their role as leaders of their respective groupings, made an essential contribution to the effectiveness of the network throughout Austria via intensive flows of information within those groupings. They did not represent their own interests only, but those of their groupings as well, and were regarded as representatives of their groupings by the other parties to the cartel. The agreements were not just between the individual institutions but between the groupings as a whole.

(518) To ignore the groupings behind the institutions that headed them, that is to say the savings banks grouping, the agricultural credit cooperative grouping [Raiffeisen banks] and the credit union grouping, would result in the fines being set at a level which did not do justice to the facts, which was out of touch with reality, and which had no dissuasive effect. The dissuasive effect will be sufficient only if in future the lead institutions refrain from engaging in cartel conduct as representatives of their groupings.'

(b) Arguments of the parties

Arguments of the applicants

339 First, the applicants claim that the Commission infringed their rights of defence and the obligation to state reasons. Second, they assert that the Commission disregarded, from the legal point of view, the conditions under which it is permissible to attribute the market shares of one undertaking to another for the purposes of calculating the fine. Third, the applicants contest the factual findings which the Commission relied on to justify the allocation of the market shares and its assessment of those facts.

— The rights of the defence and the statement of reasons

340 Erste criticises the Commission for breaching its rights of defence because the statement of objections made no mention of the Commission's intention to attribute to the central establishments the market shares of their groupings. Moreover, Erste and ÖVAG claim that neither the alleged transmission of information to the decentralised banks nor the alleged representation thereof by the lead institutions was mentioned in the statement of objections.

341 Moreover, Erste is of the opinion that the Commission infringed its obligation to state reasons regarding the attribution of market shares.

— The conditions for attributing market shares

342 RZB and Erste state that the attribution to the central establishments of the market shares of the banks belonging to their sectors amounts to attributing to them the conduct of all those banks. They state that there is no legal basis for doing so and to do so is contrary to the personal nature of liability for infringements of competition law, given that the sectors in question cannot be regarded as economic units. RZB and Erste consider that the Commission is thereby trying to go back on its decision to take proceedings selectively against certain undertakings that participated in the infringement and to penalise the conduct of banks belonging to the three abovementioned sectors without giving them an opportunity to defend themselves.

343 RZB adds that the Commission's approach is not consistent because it imposed a fine on RLB, which also belongs to the Raiffeisen grouping. Similarly, Erste maintains, in the context of its plea alleging incorrect determination of the market shares of the savings bank grouping (see paragraph 440 below), that EÖ's market share was taken into consideration twice, since an individual fine was imposed on it and it was one of the decentralised banks in the savings bank grouping before its merger with the central establishment GiroCredit as a result of which Erste came into being (see paragraph 319 above). Erste adds that the imputation of the conduct of the savings banks to the central establishment leads to unfair results, given that it is not entitled in law or in fact to apportion liability for the fine between legally independent savings banks.

344 According to the applicants, neither the 'effective capacity' of the undertakings to harm consumers nor the necessity for the fine to be sufficiently dissuasive is such as to justify that attribution. In that context, ÖVAG and Erste criticise the Commission for not complying with the principle of equal treatment as between the large centralised banks and the decentralised sectors. ÖVAG adds that the Commission, by attributing the market shares of the sectors to the lead institutions, wrongly

assimilated the latter to the large commercial banks with a network of agencies bound by instructions from head office. Moreover, it criticises the Commission for wrongly failing to take account of a transmission of information similar to that for which the decentralised sectors were criticised between BA-CA and certain banks in which the latter has substantial holdings.

345 RZB and Erste also refer to the rules applicable to associations of undertakings which in this case, in their view, preclude the attribution of market shares of the sectors to the lead institutions. First, they refer to the judgment of the Court of First Instance in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 254, which, in their view, excludes the possibility of attributing the economic power of the sectors to the lead institutions because the latter are not associations of undertakings but rather undertakings. Second, they claim that the attribution of the market shares of the decentralised banks to the lead institutions is not permissible because the latter have no possibility of binding the banks in their sector, whereas, according to the case-law, the capacity of an association to bind its members is a condition for the attribution of the latter's market shares. Third, they assert that the allocation of market shares to the lead institutions is incompatible with the subsidiary nature of the liability of associations of undertakings provided for in Section 5(c) of the Guidelines. According to the applicants, it was quite possible, in the present case, to commence infringement proceedings against the decentralised banks and impose appropriate penalties on them.

— The factual findings and the assessment thereof

346 First, the applicants criticise the Commission for disregarding the legal and economic independence of the decentralised banks, emphasising that they are not able to give instructions to the establishments within their sectors. They draw attention in particular, in their answers to the questions put to them by the Court, to the absence of any 'factual' power to influence the competitive behaviour of the decentralised banks.

347 RZB explains in that regard that the Raiffeisen sector has a 'bottom-up' structure whereby the local Raiffeisen banks (or 'primary' banks) are cooperative members of the regional banks (or 'secondary' banks, known as 'Raiffeisen-Landesbanken'), the latter in turn holding more than 80% of the shares in RZB. According to RZB, RZB and the Raiffeisen-Landesbanken only provide certain 'service functions' vis-à-vis banks at the primary or secondary level. It states that it has no holding in the capital of the latter and is thereby distinguished from the lead institutions of the other decentralised sectors. RZB claims that it is at most an instrument of the primary banks and Raiffeisen-Landesbanken and that the latter, conversely, are not subject to instructions from RZB. In its view, the organisation of the sector into cooperatives makes it impossible to attribute the conduct of the primary banks to RZB, and the fact that in certain partial areas they present the same external appearance cannot change that situation in any way. RZB states that the absence of hierarchical structures was the cause of the well-known 'lack of discipline' in the Raiffeisen sector when it came to implementing the recommendations of the banks' meetings, about which the other banks complained regularly. In its view, the Raiffeisen structure is inherently such that the individual Raiffeisen banks, jealous of their own autonomy, provided RZB only with incomplete information on the envisaged conditions or even announced in advance that they would determine their conditions 'themselves'.

348 Erste describes first of all the interests it holds in the capital of certain savings banks. It is of the opinion that there was no possibility, in view of the limited size of such interests, that the savings bank constituted an economic unit which could justify attribution of the conduct of the savings banks to the central establishment. Next, it states that the legislative provisions concerning the savings bank sector and the statutes of the central establishment are designed to allow or facilitate the carrying-on of banking business for small credit establishments in the decentralised sector, and relate to functions that those establishments cannot take on alone by reason of their smallness and their lack of resources. It then undertakes a detailed analysis of those provisions, from which it infers that they confer on the central establishment no influence on the commercial conduct of the savings banks. Erste criticises the Commission for having 'two weights and two measures' because the rights and obligations on which it bases the attribution of the regional savings banks to GiroCredit existed until October 1997 in clearly larger proportions between

GiroCredit and BA, which, moreover, had a majority holding in the capital of GiroCredit. Erste emphasises that, notwithstanding that fact, the Commission did not impute the conduct of GiroCredit to BA. Erste maintains that, from the factual point of view also, the commercial conduct of the savings banks was independent of the lead institution. In that regard, it observes, first, that the burden of proving that Erste/GiroCredit actually controlled the commercial conduct of the savings banks is borne by the Commission, which produced no such proof in the decision. Nevertheless, it makes the following points to demonstrate the independence of the savings banks' commercial conduct:

— the independence of the savings banks vis-à-vis the lead institution was guaranteed by the Austrian Law on savings banks and by the Law on public limited companies;

— although the lead institution was entitled to exercise a dominant influence on the conduct of the savings banks, special provisions in Article 30 of the BWG had to be applied, and that did not take place;

— the savings banks were better placed than the lead institution to draw up their banking conditions by reference to the regional and local situation;

— each savings bank followed its own commercial policy and the banking conditions established by the savings banks for their commercial relations with customers were different;

— above all, the regional savings banks competed with each other and with the subsidiaries of the lead institution in numerous local markets during the period concerned.

349 Second, as regards the exchanges of information between the lead institutions and the decentralised banks, RZB admits that such an exchange took place within its sector but it denies that the internal information and representation mechanisms were specially set up in order to implement the agreements. It states that the Raiffeisen sector infrastructure already existed when the infringements commenced and merely reflected the three-level structure of that sector. RZB is of the opinion that the transmission of information by RZB for the purpose of implementing the agreements at local level was certainly not of decisive importance because there were direct 'horizontal' contacts at local level and the Raiffeisen-Landesbanken could themselves obtain information regarding the agreements. Erste and ÖVAG maintain, on the other hand, that no transfer of information between the central establishment and the decentralised establishments has been proved in the case either of the savings banks or of the credit unions.

350 Third, RZB and Erste contest the findings contained in particular in recitals 61 and 517 to the contested decision to the effect that they were 'representatives' of their sectors and/or were regarded as such by the other banks.

351 RZB states it had no power to bind the whole sector at the meetings of the banks concerned, a fact which was entirely clear to the other participants in the meetings. It adds that it had no interest in ensuring that the whole Raiffeisen sector applied the agreements, given that, by reason of the structure of the sector, it would not have benefited from any gain allegedly deriving from the prohibited cartels.

352 Erste states, on the basis of a detailed analysis of the documents cited in the contested decision, in particular in recital 62, that those documents do not prove the allegation that it (or indeed GiroCredit before the merger) acted as representative of the whole savings bank sector at the committee meetings. In its reply, it adds that the Commission likewise cannot infer from the notification made in October 1999 of a draft agreement concluded within the savings banks sector, in which it was

stated that the lead institution is required 'to uphold the interests of the savings banks', that it defended the interests of the latter in the committee meetings. It stated, at the hearing, that the savings banks sector underwent profound changes between 1997 and 1999 in that a closer relationship developed between the establishments and there were changes in the way they were presented in the market. Moreover, it contests the allegation made, in its view, in recital 61 to the contested decision that agreements on business conditions also existed within the group.

353 Fourth, Erste claims that the Commission cannot invoke the alleged influence of the Vienna committees on the regional committees to justify the attribution in question. It states that the contested decision disregards the fact that, although Erste/GiroCredit was present in the *Länder*, it was present through its own branches and not through the independent regional savings banks. Erste does not deny that itself or GiroCredit participated in the committee meetings at regional locations where it had branches. It emphasises that that does not mean that it attempted to bring influence to bear on the regional savings banks, which took part in those committee meetings independently of their lead institution, and states that it treated the regional savings banks at the committee meetings in exactly the same way as the other banks present.

Arguments of the Commission

354 The Commission states in particular that a distinction must be drawn between the attribution of the illegal conduct of one undertaking to another undertaking and the division of undertakings into categories for the purpose of determining the starting amount of the fine and it states that it penalised each of the lead institutions only for its own conduct, namely its contribution to the operation of the cartel throughout Austrian territory by means of the transmission of information intended for or originating from establishments within its sector. According to the Commission, the

arguments concerning the lack of an economic unit and of rules applicable to associations of undertakings are therefore not relevant. It considers that it had good reason to take account of the market shares, in the light of the Guidelines, because it was necessary to take account of the effective capacity of the lead institutions to cause damage to competition. Finally, it claims that the lead institutions form, with their groupings, units carrying on a joint economic activity, in a similar way to economic units.

(c) Findings of the Court

Preliminary observations

355 As a preliminary point, it is appropriate to bear in mind that the attribution to the central establishments of the market shares of the banks in their sectors relates to the division of the addressees of the contested decision into categories. By using its power in that regard, provided for in the sixth paragraph of Section 1A of the Guidelines, the Commission sought to take account of the effective capacity of those establishments to distort competition and the specific weight, and therefore the real impact on competition, of their unlawful conduct.

356 In that connection, the applicants' view that the contested decision, by attributing the market shares of the banks in their sectors to the lead institutions, imputed to them the unlawful conduct of the latter, must be rejected. The contested decision does not base the allocation of market shares on specific findings relating to the actual participation of the decentralised banks in the infringement. As is apparent from recitals 516 to 518, in the first place the Commission relied on an examination of the particular features of the Austrian banking market which, in its view, is characterised by the fact that the importance of the central establishments within

their networks and their effective capacity to distort competition are greater than would appear to be the case having regard to their respective activities as commercial banks. Second, the Commission referred to the role played by the lead institutions, on the one hand, within those sectors regarding implementation of the agreements, in particular through exchanges of information, and, on the other, as representatives of the sectors within the cartel. By so doing, the Commission penalised the lead institutions for their own conduct, the gravity of which was determined on the basis of the nature of the infringement committed — namely horizontal price agreements — account also being taken of the fact that the banking sector offers services which are of very great importance in both the retail and corporate sectors, that is to say for the economy as a whole (recitals 506 and 507 to the contested decision).

357 All the applicants' complaints based on the incorrect premiss that the Commission attributed to them unlawful conduct engaged in by the banks in their sectors must therefore be rejected.

358 Moreover, it is undisputed that the fines imposed by the Commission on the lead institutions do not exceed the ceiling of 10% of their turnover, laid down in Article 15(1) of Regulation No 17. It is also common ground that the Commission did not classify the lead institutions as associations of undertakings. Therefore, the conditions which the case-law imposes for the allocation of the turnover of the members of an association of undertakings to that association for the purpose of determining that ceiling are not relevant in this case. Similarly, the Court must reject all the other complaints concerning failure to observe the conditions applicable to the way the turnover of members of an association of undertakings should be factored into the determination of a fine imposed on that association.

359 Next, it must be observed, as all the parties confirmed in the answers they gave to the questions put to them by the Court, that account must be taken, for the purpose of classifying undertakings into categories in accordance with the sixth paragraph of Section 1A of the Guidelines, of the objective or structural characteristics of the undertakings and the situation in the relevant market.

360 Those objective factors include not only the size and power of an undertaking in the market, as reflected by the undertaking's market share or turnover, but also its links with other undertakings where such links are capable of influencing the structure of the market. As the Commission rightly observed in recitals 516 and 518 to the contested decision, the effective capacity of an undertaking to cause significant damage and the real impact of the infringement committed by it must be assessed against the background of the economic reality. It is therefore legitimate for the Commission, under the Guidelines, to take account of such relationships in order to determine the effective economic capacity of the members of a cartel to cause damage and the specific weight of their infringement.

361 It must be made clear in that connection that the structure of the market can be influenced not only where links between undertakings confer on one of them a power of management or complete control of the competitive conduct of other operators, as in the case of economic units. An undertaking's power in the market may also increase, beyond its own market share, where it maintains stable relationships with other undertakings in which it is capable of informally exercising de facto influence on their conduct. The same applies where the links between undertakings have the effect of reducing or eliminating competition between them (see, by analogy, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 99 to 103). The fact that such links are not of such a nature as to justify the finding that the undertakings concerned form part of a single economic entity does not mean that the Commission must disregard them and assess the market situation as if those links did not exist.

362 On the other hand, the specific conduct of the various members of a cartel or the degree of their individual culpability is not decisive, as such, for the purpose of division into categories. The conduct of an undertaking may, it is true, give some indication of the nature of its relations with other undertakings. The existence of specific types of conduct, such as the organisation of exchanges of information with the latter or the explicit adoption of positions at cartel meetings designed to defend their interests or require them to observe anti-competitive agreements, is not, however, either necessary or in itself sufficient to justify taking into consideration

the market share of the latter undertakings when the power in the market of the first undertaking is assessed. In the absence of stable relationships with the undertakings with which information is exchanged or whose interests are represented, such conduct is not decisive for the purpose of classifying undertakings into categories, whereas, if appropriate, account may be taken of it when aggravating and mitigating circumstances are appraised, under Sections 2 and 3 of the Guidelines.

363 The reasoning on which the Commission based the allocation of market shares (see paragraph 356 above) must be interpreted in the light of the foregoing considerations.

364 In that regard, it is necessary to construe the reference, made in recitals 516 and 517 to the contested decision, to the role of the lead institutions as representatives of their sectors and the statement that there were agreements between the groups as referring essentially to elements inherent in the status of lead institution, such as the influence which the latter could bring to bear on the members of the group by virtue of its role, and not to acts specifically carried out by the applicants. That is borne out by recital 58 to the contested decision, according to which:

'At this point the special part played in the network by the lead institutions Erste (ex-GiroCredit), RZB and ÖVAG must be examined. Their historical, well-practised role as coordinator and representative of their respective bank groupings on the Austrian banking market was directly utilised for the smooth functioning of the Lombard network. Firstly, they organised the mutual transfer of information between Vienna and the provinces within the respective bank groupings, and secondly they represented the interests of their grouping vis-à-vis the other groupings in the cartel.'

365 The Commission also relied on objective factors relating to the structure of the market, stating that there are 'special links' which confer on the savings bank network a 'group-like structure' (footnote 21) and that the local Raiffeisen banks, despite not being subject to directions from RZB or the regional banks, 'present ... a restricted competitive relationship with one another' (footnote 23).

366 Against that background, the reference to certain behavioural aspects forms part of the description of the lead institutions' role. The exchanges of information referred to in the contested decision indicate the role of the lead institutions and their position within the groupings whereas the concept of 'representation' does not refer solely to particular conduct but may be construed also in a structural sense.

367 When examining the pleas of the central establishments challenging the legality of the contested decision regarding its allocation to them of the market shares of the banks in their sectors, the Court must take account of the foregoing considerations and of the discretion enjoyed by the Commission in determining the amount of the fines (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59) and exercise judicial review that is limited to verifying observance of the procedural rules and the obligation to state reasons, the material accuracy of the facts, and the absence of errors in law, of manifest errors of assessment and of misuse of powers. In addition to that examination of legality, it is incumbent on the Court to consider whether it should exercise its unlimited jurisdiction regarding the fine imposed on the central establishments.

368 First, it is therefore necessary to consider whether the contested decision respected the rights of the defence, which are procedural rules, and whether it adequately states the reasons relied on for the allocation to the central establishments of the market shares of the decentralised banks. Second, the legality of the reasoning which prompted the Commission to make that allocation will be examined in the light of the personal nature of liability for infringements of competition law. Third, it will be

necessary to examine the applicants' complaints regarding failure to observe the Guidelines, breach of the principle of equal treatment and the incompatibility of the Commission's approach with the judgment in *SCK and FNK* v *Commission*, cited in paragraph 345 above. Fourth and lastly, the examination will consider the applicants' complaints concerning the material accuracy of the factual findings on which the Commission relied and the question whether, in view of the role of the central establishments, the allocation made by the Commission was justified.

The rights of the defence and the statement of reasons

369 The Court must first reject the complaint that the Commission breached the applicants' rights of defence by failing to mention, in the statement of objections, its intention to attribute the market shares of the decentralised sectors to the central establishments. As far as the calculation of the amount of the fines is concerned, it is sufficient, according to settled case-law, for the Commission to indicate expressly, in its statement of objections, that it is going to consider whether it is appropriate to impose fines on the undertakings concerned and to indicate the main factual and legal criteria capable of attracting a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed 'intentionally or negligently' (*MDF*, cited in paragraph 213 above, paragraph 21). On the other hand, the Commission is not obliged, when indicating the elements of fact and of law on which it is to base its calculation of the fines, to explain the way in which it would use each of those elements in determining the level of the fine. Moreover, the undertakings have an additional guarantee, as regards the setting of the amount of the fine, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (*LR AF 1998* v *Commission*, cited in paragraph 225 above, paragraphs 199, 200 and 206). In this case, the Commission indicated in the statement of objections that RZB, Erste and ÖVAG were lead institutions of their respective sectors. That indication was sufficient to respect the applicants' rights of defence in that regard.

370 It follows that the complaints put forward by Erste and ÖVAG that the statement of objections did not contain sufficient information regarding the transmission of information within their sectors and regarding the representation of the decentralised banks by those central establishments must also be rejected. The reference to those matters in the contested decision forms part of the analysis of the effective capacity of the lead institutions to distort competition, for the purpose of classification into categories. In that context, they provide guidance illustrating the role played by the lead institutions, a role mentioned in the statement of objections. On the other hand, those matters have no separate influence on the assessment of the gravity of the infringement which, as already observed, was determined on the basis of the nature of the infringement, having regard to the importance of the banking sector for the economy as a whole (see, to that effect, *Scandinavian Airlines System* v *Commission*, cited in paragraph 311 above, paragraphs 158 and 159). Therefore, the Commission was not obliged to make any reference to them in the statement of objections.

371 As regards the complaint alleging inadequate reasoning, it must be stated that the indications given concerning the reasons for attributing the market shares of the decentralised groupings set out in recitals 515 to 518 to the contested decision are sufficient to enable the applicants to defend their rights and for the Court to carry out its review. It is clear from recitals 516 and 518 that the Commission sought to take account of the economic reality represented by the position of the central establishments within the decentralised banking networks and the influence they were capable of bringing to bear on the banks in their sectors in order to assess the effective capacity of those establishments to distort competition. In order to explain why the effective capacity of the latter to cause damage to competition corresponded to the capacity of all the decentralised sectors, recital 517 refers to the contribution made by the central establishments to the effectiveness of the Lombard network, to the representation of the interests of the sectors by those establishments and to the perception of the other participants in the committees, which, according to the contested decision, regarded the central establishments as representatives of the sectors. Regardless of whether those considerations justify the Commission's approach, they indicate sufficiently clearly the reasons for which it considered that that approach should be adopted.

The legality of the Commission's approach in the light of the personal nature of liability for infringements of competition law

372 In accordance with the principle that liability for infringements of competition law is of a personal nature, a natural or legal person can be penalised only for acts imputed to him individually (see paragraph 333 above).

373 It must be borne in mind, in the first place, that the contested decision did not impute to the lead institutions the unlawful conduct of the banks in their sectors but penalised them for their own conduct, which was determined according to their capacity to cause damage to competition and the specific impact of their infringement, which result from the position occupied by them within the decentralised banking sectors (see paragraphs 355 to 366 above).

374 Since the Commission did not impute to the lead institutions any unlawful conduct of the decentralised banks, it is not relevant in this case to establish whether the links between the members of such a bank grouping mean that it can be classified as an economic unit. It follows that the complaint that the Commission's approach was incompatible with the personal nature of liability for infringements of competition law is unfounded.

375 In that context, the applicants criticise the Commission for taking an inconsistent approach leading to a twofold penalty, in so far as it imposed individual penalties on two establishments forming part of the decentralised sectors, in which it found an infringement had been committed. They are, first, RLB, which forms part of the Raiffeisen sector and, second, EÖ, which, before its merger with the lead institution GiroCredit from which Erste originated, was one of the decentralised banks in the savings bank grouping (see paragraph 319 above).

376 In making that complaint, the lead institutions claim essentially that the Commission, having chosen to divide the cartel members into categories according to their market shares, was required then to set in advance a maximum aggregate amount for the fine, corresponding to 100% of the market shares of the members of the cartel, and then to apportion that total amount among the undertakings penalised according to their individual market shares. Admittedly, the Court of Justice and the Court of First Instance have recognised that such an approach is compatible with the individual determination of penalties (Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraphs 55 and 56, and Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 52 and 53; Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1572). That cannot, however, be regarded as the only permissible approach. The only binding maximum amount that the Commission is required to observe in determining fines derives from Article 15(2) of Regulation No 17 and relates individually to each undertaking that participated in the infringement. The Commission may therefore, in particular, as it did in the Guidelines, give preference to an approach taking as its starting point the gravity of the individual infringement of each undertaking, assessed according to its power in the market.

377 As stated in paragraph 361 above, an undertaking's power in the market and its capacity to cause damage to competition may be greater than the power and capacity in those respects which it derives directly from its individual market share, by reason of the informal links that it maintains with other operators, even if those links do not give it complete control of the latter's conduct in the market. Where such links exist, the liability of those other operators is not affected by any consideration of the informal influence which the former undertaking is capable of bringing to bear on their conduct. It follows that it is not illegal, as regards individual determination of the penalty to be applied to each undertaking that participated in the infringement, to penalise both the lead institution, having regard to the impact of its infringement, as deriving from the influence it can exercise over the decentralised banks, and the latter for the infringement that they themselves committed.

378 Since the Commission's approach thus consists in penalising each of the addressees of the contested decision for its own conduct, that approach cannot be classified as inconsistent and no twofold penalty is inflicted on the banks. It follows that RZB's

criticism that the Commission imposed a penalty for the conduct of the decentralised banks without giving them an opportunity to defend themselves must also be rejected.

379 Similarly, since the lead institutions were not penalised for the conduct of the decentralised banks, the legality of the Commission's approach is not conditional upon each lead institution being able to pass on to the decentralised banks the burden of the fine imposed upon it.

380 It also follows that the criticism that the Commission tried to negate the effects of its decision not to take action against all the banks that participated in the committees is unfounded. The fact that the Commission does not initiate a procedure against certain undertakings that have participated in a cartel or that it does not impose any penalty on them cannot in itself preclude it from attributing the market shares of those undertakings to other cartel members if it is necessary to do so in order fully to establish the power of the latter in the market, having regard to the economic realities.

The other complaints concerning the legality of the Commission's approach

— The compatibility of the Commission's approach with the Guidelines

381 It must be borne in mind that, according to settled case-law, the factors to be taken into account in assessing the gravity of an infringement may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking (*MDF*, cited in paragraph 213 above, paragraph 120, and *IAZ and Others* v *Commission*, cited in paragraph 376 above, paragraph 52). However, that does not in

any way imply that the Commission is not entitled, in determining the gravity of the infringement, to attach more importance to the nature of the infringement than to the size of the undertakings (*FETTCSA*, cited in paragraph 167 above, paragraph 411). In this case, as emphasised in paragraphs 356 and 370 above, the criterion used to determine the gravity of the infringement was its nature, and the criterion of the applicants' market shares was used, according to recital 519 to the contested decision, only at the later and separate stage of classification of the undertakings into categories in accordance with the sixth paragraph of Section 1A of the Guidelines. It is clear from the considerations set out in paragraphs 360 and 361 above that the Commission is entitled to take account, at that last stage, of the relations which the authors of an infringement maintain with other undertakings. Therefore, the complaint that the imputation of responsibility in question cannot be justified by a reference to the effective capacity of the lead institutions to cause damage to consumers cannot be upheld.

382 Next, it must be stated that RZB's criticism that the contested decision infringed the Guidelines by taking the need for fines to be sufficiently deterrent as an independent ground for allocating market shares is factually deficient. As stated in paragraphs 364 to 366 above, the Commission based that allocation, essentially, on the role of the lead institutions. In those circumstances, neither the general reference to the dissuasive effect of the fine in recital 515 to the contested decision, nor the reference in recital 518, which was made when the economic reality was being examined in order to assess the effective capacity of the banks to cause damage to competition and the specific weight of the infringement, does anything more than take account of the dissuasive nature of fines as envisaged in the fourth paragraph of Section 1A of the Guidelines. Since deterrence is an aim of the fine, the requirement of ensuring deterrence is a general requirement by which the Commission must be guided throughout its calculation of the fine.

383 As regards RZB's complaint that it is not necessary to take account of the market shares of the groupings in order to ensure a deterrent effect as far as it is concerned, it must be observed that the requirement of ensuring that fines have a sufficient deterrent effect is not conditional upon any likelihood that the authors of the infringement will reoffend. Even if the addressees of the contested decision do not envisage repeating conduct similar to that addressed by the contested decision, the dissuasive effect of penalties set solely in relation to the market shares of the lead

institutions as commercial banks might prove insufficient in comparison with the damage that their infringements might cause. It is also legitimate for the Commission to take account of the dissuasive effect of its decision vis-à-vis other undertakings which might find themselves in a situation comparable to that of the lead institutions. Finally, RZB's complaint that the Commission infringed its obligation to state reasons because it did not set out, in the contested decision, considerations concerning such a dissuasive effect in general terms is unfounded. The relevance of that aspect of deterrence is clear and specific references to that point were not necessary to enable RZB to challenge the contested decision on that point or to enable the Court of First Instance to carry out its review.

384 In this context, ÖVAG's contention that the division into categories must take account only of the size of the undertakings and that deterrence is not relevant in that context must also be rejected. Provision is made for the size of undertakings to be taken into account and for them to be divided into categories essentially in order to ensure that the fines have a sufficiently dissuasive effect.

385 It follows that the applicants' complaints that the Commission's approach is contrary to the Guidelines must be rejected.

— The alleged breach of the principle of equal treatment

386 With regard to the criticism that the Commission infringed the principle of equal treatment by wrongly regarding the decentralised sectors as similar to the large centralised banks, it must be observed that, in so far as the personal nature of liability for infringements of competition law was respected, it is for the Commission, in accordance with the Guidelines, to assess whether the economic

reality justified attributing to the lead institutions the economic power of their sectors. Without prejudice to the exercise of its unlimited jurisdiction, the Court of First Instance may censure that assessment only in cases of manifest error. However, no such error has been established.

387 As regards ÖVAG's complaint that exchanges of information between BA-CA and certain banks in which the latter had holdings were disregarded, the Commission rightly points out that BA-CA would not have been classified in a different category if the market shares of the banks concerned had been attributed to it.

— The judgment in *SCK and FNK* v *Commission*

388 With regard to the argument that the allocation of market shares to the central establishments is contrary to the judgment in *SCK and FNK* v *Commission*, cited in paragraph 345 above, it must be observed that, in that case, the Court held that the assessment of the proportionality of a fine imposed on an undertaking (within the limits laid down in Article 15(2) of Regulation No 17) must be made in relation to that undertaking's turnover without account being taken of the turnover of other undertakings maintaining commercial links with it if they cannot as a whole be classified as an association of undertakings. Given that the applicants do not deny the proportionality of the fine imposed on them in relation to their own turnover, their complaint based on the *SCK and FNK* v *Commission* judgment must be rejected as ineffective.

The complaints concerning findings of fact and the assessment of the central establishments' role

389 With regard to the accuracy of the findings of fact on which the contested decision is based, the applicants in essence criticise the Commission for failing to produce

evidence of certain conduct referred to in recital 517 to the contested decision, namely exchanges of information (Erste and ÖVAG) and the representation of the decentralised banks within the committees (RZB and Erste).

390 On the other hand, in their arguments concerning the independence of the decentralised banks, the structure of the sectors and the tasks of the central establishments, the applicants do not contest the specific factual findings set out in the contested decision concerning the role of those establishments within the sectors but, in essence, object to the assessment of that role by the Commission and the inferences to be drawn from it regarding appraisal of their power in the market.

391 When examining these complaints, first, it is incumbent on the Court of First Instance to verify, as part of its examination of the legality of the contested decision, whether the Commission committed errors of fact or manifest errors of assessment in that regard. Second, it has power to assess, in the exercise of its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amount of the fines. That assessment may justify the production and taking into account of additional information which the duty to state reasons under Article 253 EC does not as such require to be set out in the decision (*KNP BT* v *Commission*, cited in paragraph 330 above, paragraphs 38 to 40, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 215).

392 In that regard, the links existing between the central establishments of the three sectors and the decentralised banks are described in particular in a judgment of the Constitutional Court of Austria of 23 June 1993, produced by the Commission in response to questions put to it by the Court.

393 Dealing with an application from a local (or primary) Raiffeisen bank against a provision of the Law on credit establishments then in force, which required decentralised banks associated with a central establishment as part of a 'sectoral network' (sektoraler Verbund) to maintain liquid reserves of a certain size with the central establishment, the Constitutional Court states first of all that the banks' membership of such a network is voluntary and that there are multiple legal relationships between the network members and the central establishment, based on the Law governing companies, cooperative societies and associations and the statutes thereof. It explains that that closely interlocking network of rights and obligations developed over many decades, in the case both of the Raiffeisen sector, to which its judgment related, and of the credit unions and savings banks. The Constitutional Court states that the legislature is entitled to take account of the situation deriving from those developments and to take as a starting point the principle that the partners which joined such a network work together, on the basis of the same cooperative philosophy and in the best way for both sides, to further their parallel interests. It emphasises that the provision at issue in the proceedings before it is designed more particularly to safeguard the legal and economic autonomy of the 'primary banks', whilst keeping to a minimum the disadvantages associated with the business operations of small or very small economic entities. The Constitutional Court then observes that that provision is not only designed to ensure sufficient liquidity but is supplemented by the 'legal guarantee of the sectoral grouping by the central body'. It goes on to say that those two objectives are clearly in the general interest and justify the contested rules, to such an extent that in many respects a grouping guarantees the activity of numerous smaller financial establishments, which is in line with the requirements of modern economic life and the resulting aspirations of the legislature.

394 The applicants have not shown that that description of the role of the central establishments and their relations with the decentralised banks was not correct or that the situation during the period of the infringement significantly differed from that described by the judgment of the Constitutional Court. Admittedly, the applicants indicated at the hearing, in response to questions put by the Court, that a new Law on the banking system had been adopted in 1994, thus post-dating the

judgment of the Constitutional Court and pre-dating the period of the infringement. However, they gave no specific information concerning any divergences between that new law and the previous legal situation which might be relevant in assessing the role of the central establishments for the purposes of the present cases.

395 In view of the role of the central establishments and their relations with the decentralised banks, as described by a superior court of the Member State concerned, on the basis of information provided by the government of that State, it must be considered that the banks in the three groupings were linked with each other in such a way that they cannot in all respects be regarded as competitors in the market and that they had common interests which the lead institutions pursued.

396 It is true that RZB and Erste state that there is competition between the decentralised banks to the extent to which they are present in the same markets.

397 RZB admits, however, that the decentralised banks in the Raiffeisen sector were established in different markets and at different locations. With regard to the Raiffeisen sector, the Constitutional Court also observed that it was appropriate 'to take into account ... the particular market opportunities, which [could] be seized by the members when meeting as a grouping only by means of joint action in the economy, on an Austria-wide scale and beyond, thereby enabling them to build up advantages regarding both a regional focus and regional and supra-regional representation'. The Commission also produced extracts from a report on RZB's business for the year 2000 in which RZB itself describes the 'Raiffeisen bank grouping' as if it constituted one and the same undertaking.

398 On the other hand, Erste states that there were 17, or even 29, places where GiroCredit and Erste itself were in direct competition, through their subsidiaries, with members of the savings bank grouping and that in many places several savings banks were present and competed with each other.

399 That statement is not however incompatible with the existence of links of a structural nature between establishments in the decentralised sectors and the central establishments, which served as a basis for the Commission's view that competition in the Austrian banking market takes place between commercial banks (Aktienbanken) and the three 'sectors' of savings banks, Raiffeisen banks and credit unions. That view is the basis not only of the contested decision but also of the decisions in which the Commission dealt with concentrations in that market (see, in particular, the Commission decisions of 7 November 2000 declaring a concentration to be compatible with the common market (Case COMP/M.2140 — BAWAG/PSK), and of 14 November 2000 declaring a concentration to be compatible with the common market (Case COMP/M.2125 — Hypovereinsbank/Bank Austria) (OJ 2000 C 362, p. 7). The possibility cannot be excluded, in the case of a commercial bank which maintains a presence in the local markets through its subsidiaries, that there is some competition between the subsidiaries of such a bank established in the same locality.

400 Next, it is apparent from the judgment of the Constitutional Court that one of the functions of the central establishments is to provide the banks in their sectors with services relating to functions that those establishments could not undertake alone because of their smallness and their scant resources and that such a function is not incompatible with the independence of the decentralised establishments in those sectors, but is designed, on the contrary, to guarantee their autonomy. In their answers to the written questions put to them by the Court, Erste and ÖVAG confirmed that they carry out such a function. On the other hand, RZB stated that it had performed such a function in the past but denied that it continued to do so, stating in particular that the regional banks have not needed such services since the 1980s. That statement is, however, incompatible with the description of the functioning of the central establishments in the 1993 judgment of the Constitutional Court, which relates more particularly to the Raiffeisen sector. In that regard, the Constitutional Court referred in particular to certain services provided for in the statutes of the Raiffeisen regional bank in question, such as assistance and advice to members relating to economic issues, participation in guarantee establishments designed to protect both the members of the network and their customers and representation of members' interests. Furthermore, in the RZB business report for

the year 2000 mentioned above, it was stated that RZB performed 'central service functions' with the grouping. In those circumstances, it must be considered that the role of the central establishments was characterised, in particular, by service functions designed to enable the members of decentralised networks to carry on banking business despite their often limited size.

401 In view of all the foregoing, it must be stated that the links between the members of the bank groupings were liable to affect the structure of the market. Those considerations also show that an inherent feature of the position of the lead institutions was that, at the most important committee meetings in which they participated regularly, they played the role of representatives of their sectors, most of whose members, with the exception of RBW and NÖ-Hypo, were not present.

402 In that connection, it must be observed that the concept of 'representation' must be understood in the present context in an economic sense and not in a strict civil law sense. That concept implies, as indicated in recital 517 to the contested decision, representation of the economic interests of the entire sector. On the other hand, the question whether the central establishments had power legally to bind the decentralised banks is irrelevant in the present context, since in any event by virtue of Article 81(2) EC there was no possibility of the latter being legally 'bound' vis-à-vis other members of the cartel.

403 Nor is it relevant in that regard whether representation of the groupings' interests formed part of the functions attributed to the central establishments by law or by their statutes, or whether that task was entrusted to associations of which the establishments of the various groupings are members (Österreichischer Raiffeisenverband, Sparkassenverband and Österreichischer Genossenschaftsverband). In view of the important and central role played by the lead institutions within their respective groupings, their participation in the main committees was necessarily perceived by the other banks not as participation merely as commercial banks but as participation of the sectors as such. That is particularly so because the decisions of

most of the main committees concerned bank services which played a minor role in the lead institutions' own commercial activities, whereas they were an essential part of the business of the decentralised banks. Moreover, those committees gave out 'signals' designed to orientate the decisions of the regional and local committees. In those circumstances, no relevance attaches to the question whether the representatives of the lead institutions within the committees carried out, at committee meetings, specific acts of 'representation' of the decentralised banks, such as declarations made or commitments given on behalf of those banks. Consequently, the applicants' complaints that such conduct was not established by documentary evidence must be rejected as irrelevant.

404 The Court considers that, because of the links described above, a correct assessment of the effective capacity of the lead institutions to cause significant damage and of the specific weight of their unlawful conduct necessitates an examination not only of their own market shares as commercial banks but also of the market shares of the decentralised banks.

405 The service and assistance functions described above imply that the necessary expertise for operations falling outside the framework of day-to-day banking services, by reason of their difficulty, their importance or their exceptional nature, was concentrated within the lead institutions. The decentralised banks, which had no equivalent expertise, therefore had to rely on information from the lead institutions when taking decisions on questions falling outside ordinary banking operations. In those circumstances, the executives of the decentralised banks could easily be prompted to imitate the unlawful conduct of their lead institution without being overconcerned as to its legality, unless there were specific commercial reasons for following a different course of action. The lead institutions' membership of the cartel was therefore liable to give to the executives of the banks belonging to the groupings the impression that participation in the agreements was desirable conduct in the interest of the grouping as a whole, advocated by those with greater expertise and better information and that it was appropriate to adopt such conduct, without there being any exposure to unreasonable risk. It thus considerably facilitated the

decision of the executives of the decentralised banks to participate in it as well. On the other hand, non-participation of the lead institutions in the overall cartel would have given to the decentralised banks a signal that any anti-competitive conduct in which they might engage in the context of the Lombard network at local or regional level was a matter for which they alone were responsible and was not approved by the lead institution. In that regard, it is difficult to imagine that the decentralised banks would have systematically participated in local or regional concerted practices if the lead institutions had kept away from the committee meetings held in Vienna.

406 Although that influence of the lead institutions' conduct on that of the members of their groupings could be strengthened by information flows between the central establishment and the decentralised establishments, as admitted by RZB, the existence of such exchanges is not, however, decisive in that regard. Little importance attaches to the means by which the decentralised banks were informed of the agreements in which the lead institutions participated provided that it was such participation, in conjunction with the position of the central establishment within the sector, that influenced the competitive behaviour of the decentralised banks in the manner described in the foregoing paragraph. It follows that the arguments put forward by Erste and ÖVAG, to the effect that such exchanges of information were not established as far as they were concerned, must be rejected as irrelevant.

407 It follows from all the foregoing considerations that the links between the lead institutions and the decentralised banks of their groupings endowed the lead institutions with far greater economic power than that which derived from their market shares as commercial banks and reflected the market share of their respective groupings in their entirety.

408 In those circumstances, the applicants' complaints concerning the assessment of the facts in the contested decision in that regard cannot be upheld.

Conclusion

409 It follows that all the complaints made against the allocation of the market shares of the decentralised sectors to the central establishments must be rejected.

3. The statement of reasons for the division into categories and determination of the starting amounts (Cases T-260/02, T-261/02, T-263/02 and T-264/02)

(a) Arguments of the parties

410 BA-CA, BAWAG, PSK and Erste claim that the contested decision does not set out sufficient reasoning regarding the classification into categories. First, they criticise the Commission for not indicating the criteria it applied in that respect. Second, they claim that the contested decision does not enable them to verify the calculation of the market shares used for the classification into categories. BAWAG and PSK emphasise in particular that neither the period that the Commission considered as relevant, nor the sources on which it relied, nor its method of calculation based on market shares in the various markets taken into account, nor the overall market share are clearly apparent from the contested decision. PSK also claims that the Commission set separate starting amounts for it and for PSK-B (see paragraph 12 above) without indicating their respective market shares.

411 BA-CA, BAWAG and PSK are also of the opinion that the setting of the starting amounts for the various categories is not supported by an adequate statement of reasons, in particular regarding the calculation method and the criteria adopted.

412 The Commission is of the opinion that the contested decision contains an adequate statement of reasons. As regards the complaint that the market shares of PSK and PSK-B are not indicated separately, it adds that the banks know their own market shares and are therefore able to check the accuracy of the contested decision.

(b) Findings of the Court

413 It is settled case-law that the statement of reasons for an individual decision must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. It is not necessary for the reasoning to go into all relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to the context in which that measure was adopted (*Commission* v *Sytraval and Brink's France*, cited in paragraph 270 above, paragraph 63).

414 As regards the determination of fines for infringements of competition law, the Commission fulfils its obligation to state reasons where it indicates, in its decision, the factors on the basis of which the gravity and duration of the infringement were assessed, without being required to include in it a more detailed account or the figures relating to the method of calculating the fines (*Cascades* v *Commission*, cited in paragraph 286 above, paragraphs 38 to 47; see also *Atlantic Container Line and Others* v *Commission*, cited in paragraph 376 above, paragraphs 1522 and 1525). However useful statements of figures relating to the calculation of fines may be, they are not essential to compliance with the duty to state reasons (Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraph 75).

415 In this case, the indications in the contested decision enabled the applicants to put forward numerous pleas alleging substantive illegality in relation to the calculation factors used to divide them into categories. The Commission stated, first, that the classification was based on market shares (recital 519) and, second, indicated the market shares of the addressees of the contested decision according to its calculations (recital 9). The Austrian banks are aware of their own market shares, which they can calculate on the basis of the monthly statistics published by the OeNB and their own turnover. Therefore, the fact that the contested decision indicated only partially (in footnotes 17 and 522) the specific sources from which the Commission obtained the figures on which it relied and did not explain the calculation method used to determine market shares and to classify the banks into categories did not adversely affect the latter's defence. That applies also to the failure to indicate separately the market shares of PSK and PSK-B, which did not prevent PSK from contesting that aspect of the contested decision in detail. It follows that the Commission did not breach its obligation to give reasons in relation to the division into categories.

416 As regards determination of the starting amounts, those amounts translate into figures the division into categories made in the contested decision, and that provides an adequate explanation of their relative importance (*Atlantic Container Line and Others* v *Commission*, cited in paragraph 376 above, paragraph 1555). As regards the reasons underlying those amounts in absolute terms, it must be borne in mind that fines constitute an instrument of the Commission's competition policy and the Commission must be allowed a margin of discretion when fixing their amount in order that it may channel the conduct of undertakings towards observance of the competition rules (*Martinelli* v *Commission*, cited in paragraph 367 above, paragraph 59). Moreover, it is important to ensure that fines are not easily foreseeable by economic operators. The Commission cannot therefore be required to set out reasons in that connection other than those relating to the gravity of the infringement.

417 The complaints concerning the reasoning of the contested decision regarding classification into categories and determination of the starting amounts are therefore unfounded.

4. The alleged breach of the principle of equal treatment (Cases T-261/02, T-263/02 and T-271/02)

(a) Arguments of the parties

418 BAWAG and PSK are of the opinion that it was contrary to the principle of equal treatment for them to be classified, each with a market share of 5%, in the third category with ÖVAG and Erste, which have a market share of 7% each. BAWAG emphasises that that difference of 40% in relative terms is very close to the difference between ÖVAG and CA (42.9%), and they were placed in different categories. According to BAWAG, ÖVAG and NÖ-Hypo, the borderline between categories cannot be justified by differences in market shares in absolute terms because it is differences in relative terms that are decisive.

419 BAWAG and PSK also consider that they were placed at a disadvantage compared with BA-CA and Erste, whose market shares are five, or even six times as big as theirs, whereas their fines are only four, or five times higher.

420 ÖVAG and NÖ-Hypo claim that the classification into categories does not take sufficient account of the difference in turnover and market shares of the undertakings placed in the fourth and fifth categories, which is much greater than the differences between the other categories, or of the differences of size of the undertakings classified in the latter category. Moreover, they claim that the classification into categories should be carried out separately for ÖVAG (whose market share is less than 1%) and for the grouping of credit unions (whose market share is about 4%), which, in their view, would result in the grouping being placed in the fourth category and ÖVAG in the last category. They are of the opinion that the Commission took that approach in Erste's case.

421 The Commission states that the market shares of the undertakings placed in the same category are closer to each other than the market shares of the undertakings placed in the neighbouring categories and that the divergences between market shares of undertakings placed in the same category are an inherent feature of the system.

(b) Findings of the Court

422 As regards the division of the cartel members into several categories, the effect of which is to make the basic amounts for all undertakings in the same group the same, it must be observed that the Commission's approach in so doing, although ultimately ignoring differences of size of undertakings in the same category, cannot in principle be criticised. The Commission is not required to ensure, when fines are imposed on several undertakings involved in the same infringement, that the final amounts of the fines reflect every distinction between the undertakings concerned with regard to their size (see *FETTCSA*, cited in paragraph 167 above, paragraph 385, and the case-law there cited).

423 The fact remains, however, that any such division into categories must be in conformity with the principle of equal treatment and the determination of thresholds for each of the categories identified must be coherent and objectively justified (*FETTCSA*, cited in paragraph 167 above, paragraph 416).

424 In this case, the Commission did not set precise thresholds for the five categories which it identified but indicated, in its defence, 'guide values' for the market shares of undertakings placed in the same category. The differences between those guide values are coherent and objectively justified as regards the first to fourth categories.

The guide value for the second to fourth categories corresponds, in each instance, to one-half of that of the category above, and the same applies to the corresponding starting amount.

425 As regards the fifth category, the so-called 'catch-up' category, the Commission departed from that system by grouping together undertakings whose market share (less than 1%) corresponds, at most, to about one-third of the guide value for the fourth category (2.75%), and it may also be considerably lower. Whilst the differences between the market shares of the undertakings belonging to that category are not great in terms of percentage points, the relative differences between them may be considerable. The starting amount of EUR 1.25 million which it set for that category is less than one-half, but greater than one-third, of the figure of EUR 3.13 million adopted for the fourth category.

426 Despite such differences of relative size as may exist between the undertakings with a market share of less than 1%, the Commission did not exceed its margin of discretion by placing them in the same category. Admittedly, it has been held that it is differences of size in relative terms that reflect the actual specific weight of the addressees of a decision (*FETTCSA*, cited in paragraph 167 above, paragraph 424). However, the usefulness of the Commission's right to classify undertakings into categories would be considerably diminished if any difference between market shares, although important in relative terms and even where it corresponded to a very small divergence in terms of percentage points, precluded the placing of different undertakings in the same category as regards fines.

427 Moreover, the principle of equal treatment does not mean that the starting amount for that 'catch-up category' cannot be higher, in comparison with the size of the undertakings concerned, than those set for the categories above. The deterrent nature of a fine depends not only on its relative size in relation to the size of the penalised undertaking or its position in the market, but also on the amount of the fine in absolute terms. In that regard, it is for the Commission, in the exercise of its

discretion concerning fines and subject to the exercise by the Court of First Instance of its unlimited jurisdiction, to set the starting amounts for all the undertakings covered by its decision at a sufficiently high level to ensure a deterrent effect.

428 The Commission did not therefore breach the principle of equal treatment to the detriment of the undertakings placed in the last category.

429 Next, it must be observed, subject to review of the complaints concerning the accuracy of the market shares, that the classification of BAWAG and PSK (with a market share of 5%) in the same category as ÖVAG and Erste (with a market share of 7%) does not exceed the limits of what is acceptable in the light of the principles of proportionality and equal treatment. A market share of 5% is very close to the guide value of 5.5% adopted for the third category, whilst a market share of 7% is significantly closer to that guide value than to that set for the category above (11%).

430 Finally, the principle of equal treatment did not in this case require the Commission to carry out its classification into categories separately for ÖVAG and for the credit union grouping. ÖVAG's view that the Commission should have carried out a separate classification of that kind in the case of the lead institution Erste and the savings bank grouping derives from a factual error, given that the separate fine imposed on Erste/EÖ related to the period in which the latter was not yet the lead institution for that grouping, whilst a single starting amount was set for the lead institution (GiroCredit before the merger, then Erste), having regard to the market share of the grouping.

431 Therefore, the complaints in Cases T-261/02, T-263/02 and T-271/02 alleging breach of the principle of equal treatment regarding the determination of starting amounts are unfounded.

5. Determination of market shares (Cases T-263/02, T-264/02 and T-271/02)

(a) Arguments of the parties

PSK and PSK-B (Case T-263/02)

432 First, PSK criticises the Commission for acting arbitrarily in relying, for the purposes of classification, on the market shares for retail and corporate lending and deposit transactions, without precisely defining the market, whereas, according to the contested decision, the cartel extended well beyond those transactions.

433 Second, PSK claims that the inappropriateness and arbitrariness of the Commission's aggregating approach is demonstrated by its own situation. It observes that its market shares display considerable differences depending on whether lending or deposit transactions are involved. It states that the figure of about 5% adopted by the Commission for the joint market share of PSK and PSK-B is incorrect and states that, except in the case of retail savings deposits, its market share is much lower than 5%. In its reply, PSK provides particularised data, compiled by it on the basis of official figures from the OeNB monthly statements, according to which its precise market share in the retail and corporate deposit and lending markets was, from 1999 to 2001 (that is to say after the takeover of PSK-B), between 3.2 and 3.6%. In response to questions put to it by the Court, it also produced a statement of its market shares for the years 1995 to 1998 and PSK-B's market shares for the years 1996 to 1998.

434 Third, PSK criticises the Commission for disregarding the fact that PSK-B's position in the market was totally insignificant. It explains that PSK-B was almost a detached

department of PSK specialising in lending, and it was absent from all the other areas of banking or else played only a minimal role. It states that PSK-B's market share during the period covered by the investigation represented barely 1.5% in lending to retail customers and about 0.7% in corporate lending. PSK considers that, if the market shares had been calculated correctly, PSK-B could, at most, have been placed only in the fifth category. In its reply, it adds that, even if the approach set out by the Commission in its defence is applied and the cumulative market share of the two establishments is apportioned as to half each between PSK and PSK-B, the result for each of those banks is an average market share varying only between 1.6 and 1.8%. According to PSK, it was therefore necessary to place both PSK and PSK-B in the fifth category and to reduce the amount of the fine accordingly.

435 First, the Commission states that it determined the capacity of the banks to distort competition on the basis of their shares of a representative market, the markets for retail and corporate lending and deposit business being the main markets for banking products. It considers that the division into categories made by it on that basis is objective and appropriate and submits that it was not required to apply a weighting to the market shares relating to the deposit and lending sectors because the latter display turnovers of similar size.

436 Second, the Commission states that PSK has not demonstrated that its market shares were lower than the level indicated in the decision. It concludes, on the basis of information given by PSK itself, that PSK and PSK-B together held a market share of at least 4%. It refers, first, to PSK's application, according to which, for deposit business, PSK's market share, aggregated with that of PSK-B, amounts to 5% and, second, the notice of the merger of PSK with BAWAG, which refers to a cumulative market share of 3% in the lending sector. The average of those two figures gives, according to the Commission, a total market share of 4%, which must then be apportioned as to approximately half each between the two banks, because PSK,

which, for a long period, was not authorised to engage in lending business, concentrated on deposit business and entrusted lending transactions to PSK-B. The Commission thus obtained for each of the two banks an average market share of at least 2%.

437 Third, the Commission is of the opinion that PSK and PSK-B were correctly placed in the fourth category, the guide value for which is 2.75%. In its view, it is immaterial in that regard whether their market share was 2.75%, as alleged by the Commission, or 1.6 to 1.8% as now asserted by PSK. It explains that the undertakings placed in the fourth category hold market shares which are smaller than those in the third category (about 5.5%) and higher than those in the fifth category (less than 1%). According to the Commission, the undertakings in the category in which PSK and PSK-B should be placed are between those two groups, and thus in a bracket of market shares extending from well over 1% to well under 5%.

Erste and the savings bank grouping

438 Erste claims that the 30% market share attributed to the savings bank grouping in recital 9 to the contested decision includes the market shares of two banks on which separate fines were imposed, namely, first, BA (without CA) and, second, EÖ (the name of Erste before the merger with GiroCredit).

439 Erste claims that BA is a savings bank by virtue of its legal form and therefore, for OeNB statistical purposes, falls within the savings bank sector. According to OeNB figures for 1995 to 1998, the market share of the savings bank sector (including BA) was about 30% (between 25 and 35% according to the markets), of which 12 to 13% related to BA. Erste infers that BA's market share was attributed to the savings bank

grouping in error, a fact which in its view is corroborated by the data concerning the number of branches and employees set out in recital 9 to the contested decision, which, in its view, include also those of BA. It states that OeNB official statistics have greater probative value than the decisions on control of concentrations on which the Commission relied and criticises the Commission for not applying weightings to the various sectors of business.

440 Erste also claims that the savings bank sector's market share includes that of EÖ, even though a separate fine was imposed on it for the period before the merger with GiroCredit

441 Erste also observes that EÖ's fine was calculated on the basis of a market share of 7% which, in its view, corresponds in fact to its market share after the merger with GiroCredit, EÖ's market share during the period for which the separate fine was imposed having been only about 4%.

442 The Commission denies having attributed BA's market share to Erste. In the alternative, it submits that that complaint is irrelevant since Erste would have to be placed in the first category even if its market share were 12 to 13% lower than that established in the contested decision. Similarly, the alleged inclusion of ËO's market share in that of the savings bank grouping would have no impact on the division into categories. As regards the market share established for Erste/EÖ (before the merger), the Commission states that it does not include that of GiroCredit and that it was, in any event, higher than 5%.

ÖVAG and the credit union grouping

443 ÖVAG and NÖ-Hypo state that the market share of the credit union grouping (including ÖVAG) is far lower than 7%, namely, according to ÖVAG's calculations, about 5% and, according to official studies, only 3 to 4%.

444 The Commission is of the opinion that those complaints are irrelevant because, with a market share of 5%, ÖVAG would in any event have been placed in the third category. It adds that ÖVAG's market share is significantly over 5% and offers to prove this by means of confidential documents produced in the procedures leading to the decisions on control of concentrations to which it referred in the contested decision.

(b) Findings of the Court

PSK and PSK-B (Case T-263/02)

445 As regards, first, the choice of markets, the Commission did not commit any error in considering that the retail and corporate lending and deposit markets were representative in order to evaluate the relationships of economic forces in the Austrian banking market and by taking the average of the banks' market shares in those markets as the basis for the division into categories.

446 As regards, second, the Commission's finding that the joint market share of PSK and PSK-B was 5% in the combined deposits and lending markets, it must be pointed out

that that figure is not disputed with regard to deposits by retail customers and that, according to the data produced by PSK in reply to questions put to it by the Court, the joint market share of PSK and PSK-B for all deposits, including those of corporate customers, was not on average lower than 4.89% for the years 1996 to 1998.

447 On the other hand, with regard to lending, the applicant maintains that the joint market share of PSK and PSK-B was lower than 2%, whilst the Commission contends that their market share was 3.5 or 4%. In support of their statements, the parties have produced the following documents:

— a document from the procedure for the control of concentrations submitted by the Commission as an annex to its rejoinder, according to which the market share of the 'PSK group' in the lending market was 3% in 1998;

— a document drawn up in 1997 by PSK, forming part of the administrative file in this case and produced by the Commission in response to questions put to it by the Court, according to which its 'customer share' in the lending market was 3 to 4%;

— a document drawn up in the procedure for the control of concentrations COMP/M.873, BA/CA, produced by the Commission in response to questions put to it by the Court, the confidential version of which demonstrates, according to the Commission, that PSK had in 1995 a market share of 4% in lending business, whereas the non-confidential version of that document indicates, for the various lending markets, brackets of 2 to 6%, 3 to 7% and 1 to 5%;

— a statement provided by PSK in response to questions put to it by the Court according to which the joint market share of PSK and PSK-B in the lending market varied, between 1996 and 1998, from 1.49 to 2.03%, with an average of about 1.8%.

448 As regards the first of those documents, it must be observed in the first place that the Commission had indicated in its rejoinder, mistakenly, that it derived from procedure COMP/M.2140, BAWAG/PSK (see paragraph 436 above). In its written replies to the Court's questions, it indicated that that document had in fact been produced in procedure COMP/M.2125, HypoVereinsbank/Bank Austria, in which it was one of the documents notified. It must be held that that error prompted the Commission to attribute to that document greater probative value than it had in reality. Contrary to what the Commission considered when relying on that document, it had not been drawn up by PSK but by competitors of PSK, which were parties to another concentration. Since each bank knew its own market share (see paragraph 415 above), the statements given by the parties to a concentration in the Austrian banking market regarding their own market shares have considerable probative value. On the other hand, information that may be given by banks concerning the market shares of their competitors is normally of an approximate nature, given that it concerns the latter's business secrets. That is confirmed, in this case, by the fact that that document, which does not indicate the period to which it relates, mentions a market share of 4% for the PSK group in the deposits market, whereas, according to PSK and the Commission, that market share was about 5%. Therefore the figures contained in that document cannot be regarded as reliable regarding the market shares of PSK and PSK-B.

449 As regards the second document, the 'share of customers' to which it refers must be distinguished from the market share, given that the latter depends not only on the number of lending transactions but also on their volume. As regards the third document, only the non-confidential version can be taken into account by the Court of First Instance, in accordance with Article 67(3) of the Rules of Procedure. That version indicates brackets that are too wide to facilitate, in this context, a sufficiently

precise evaluation of the joint market share. Finally, it must be pointed out that the figures calculated by PSK on the basis of the OeNB monthly statements are significantly lower than those resulting from the documents produced by the Commission.

450 According to those figures, the joint market share of PSK and PSK-B in the deposits market (4.89%) and the lending market (1.8%), calculated in accordance with the method used by the Commission, amounted on average to about 3.35%. It must be pointed out that it has not been established, by the details provided by the parties in response to measures of organisation of the procedure, that the joint market share of PSK and PSK-B exceeded that figure.

451 The discrepancy between that figure and the Commission's finding as to the joint market share of PSK and PSK-B is such that it may have influenced the category in which they were placed.

452 On the basis of a joint market share for PSK and PSK-B of 3.35%, a market share of 1.675% would have had to be attributed, according to the Commission's approach, to each of those two establishments. In such a case, their being placed in the fourth category would not have been acceptable in the light of the principles of proportionality and equal treatment and would have undermined the coherence of the system of division into categories adopted by the Commission in this case. A market share of 1.675% corresponds to only about 60% of the guide value of 2.75% set for the fourth category and about 25% of the market share of 7% which, according to the Commission, justified the placing of Erste and ÖVAG in the third category and the setting of a fine twice as high as that imposed on PSK and PSK-B. Finally, the taking into account of the joint market share of PSK and PSK-B (3.35%) should have resulted, according to the system adopted by the Commission, in their being placed in the fourth category, in which it placed PSK and PSK-B separately. However, it is not compatible with the classification system adopted in this case for undertakings of which one has a market share twice as big as that of the other to be placed in the same category, except as regards the 'catch-up category'. Admittedly, as

the Commission observes, the discrepancy between a market share of 1.675% and the guide value for the fifth category (less than 1%) is too big for PSK and PSK-B to be placed in the latter. It must be pointed out that the Commission, in view of the data on the basis of which it made its division into categories, did not take account in its system of market shares of between 1 and 2%, whereas it should have done so if the market shares of PSK and PSK-B had actually been within that bracket.

453 In those circumstances, the Court should, in the exercise of its unlimited jurisdiction, set the starting amount for the fines to be imposed on PSK and PSK-B.

454 In that connection, it is appropriate to set a single starting amount for PSK and PSK-B. Whilst it is true that the Commission had determined separate starting amounts, it nevertheless, taking account of the merger of those two establishments in 1998, imposed a single fine on PSK. In view of all the information in the file regarding the market shares of PSK and PSK-B, in particular information produced in the context of measures of organisation of procedure, it is appropriate to set a starting amount of EUR 3.13 million, corresponding to the fourth category.

Erste and the savings bank grouping

455 According to recital 9 to the contested decision, Erste (after merging with GiroCredit) and the savings bank grouping had a market share of 30%, whilst the market share of Erste alone was about 7%. It is apparent from recitals 519 and 522 to the contested decision that the Commission calculated two separate starting amounts, first for the lead institution (GiroCredit before the merger and Erste after the merger), to which the market shares of the savings bank grouping were

attributed and, second, for EÖ as regards the period prior to the merger. The increase by reason of the duration of the infringement was applied to the starting amount of the lead institution for the whole period concerned (three-and-a-half years) and that of EÖ for the period prior to the merger (three years).

— The fine imposed on the lead institution

456 It is apparent from the considerations set out in paragraphs 377 and 378 above that the Commission did not illegally consider that the market share of the savings bank grouping included that of EÖ, which was thus taken into consideration both to determine the starting amount for the savings bank grouping and for the determination of its own fine.

457 As regards the complaint that BA's market share, which was close to 12 to 13%, was mistakenly included in the figure of 30% attributed by the contested decision to the entity made up of the lead institution and the savings banks, it must be stated that, after deduction of BA's market share, the remaining market share of 17 to 18% still justified classification in the first category, given that it is much closer to the guide value of 22% than to that of 11%, which related to the second category. That complaint must therefore be rejected in the context of the examination of the legality of the Commission decision, given that, even if it were upheld, it could not call in question the operative part of the contested decision. Moreover, the Court considers, in the exercise of its unlimited jurisdiction, that the placing of Erste in the first category is justified with a view to arriving at a fine of an appropriate amount.

— The separate fine imposed on EÖ

458 The complaint alleging inaccuracy of the market share of 7% attributed to EÖ by the contested decision is ineffective. According to the indications given by Erste in its application and in response to questions put to it by the Court, EÖ's market share was 5.3% for deposits, 4.8% for corporate lending and 4.1 to 4.4% for retail lending. If it is assumed that those figures are accurate, the result would merely be that, overall, EÖ's market share was lower than 5%, so that its classification in the third category, with a guide value of 5.5%, must, in any event, be regarded as justified.

ÖVAG and the credit union grouping (Case T-271/02)

459 To demonstrate the Commission's error regarding the market share attributed to ÖVAG by the contested decision, ÖVAG produced three documents, namely:

— a table for the years 1994 to 1998 according to which the market share of the credit union grouping varied, in terms of balance-sheet total, from 4.31 to 4.45%;

— a table apparently drawn up by the OeNB indicating the market shares of the Austrian banks in 1999 and 2000, according to which the market share of the credit union grouping was 2.7%, or 2.8%, but without specifying the market in relation to which those figures were calculated;

— a diagram apparently drawn up by the OeNB which indicates market shares in terms of balance-sheet totals, without indicating the period covered by it, according to which the market share attributed to ÖVAG was 4.38%.

460 It must be pointed out that those documents do not relate to the markets in retail and corporate lending and deposit business, in relation to which the Commission evaluated the market shares of the addressees of the contested decision. Moreover, the second document does not relate to the period of the infringement, and the figures it contains differ significantly from those in the first document for that period. Moreover, the market shares indicated in the first and third documents are closer to the guide value for the third category (5.5%) than to that of the fourth category (2.75%), both in absolute and in relative terms.

461 It follows that the complaints put forward by ÖVAG are not such as to affect the validity of its classification in the third category. Moreover, the Court considers, in the exercise of its unlimited jurisdiction, that the classification of ÖVAG in the third category is justified for the purpose of arriving at a fine of an appropriate amount.

(c) Conclusion

462 It follows that the starting amount of the fine imposed on PSK and PSK-B (Case T-263/02) should be set at EUR 3.13 million, whilst the complaints concerning the determination of market shares and the setting of starting amounts raised by Erste (Case T-264/02) and ÖVAG (Case T-271/02) must be rejected.

6. Conclusion concerning the division into categories and the setting of starting amounts

463 It follows from all the foregoing that, except as regards PSK and PSK-B (Case T-263/02), all the applicants' complaints concerning the division into categories and the setting of starting amounts must be rejected.

D — *The pleas concerning the duration of the infringement (Cases T-259/02, T-261/02 and T-263/02)*

(a) Arguments of the parties

464 RZB, BAWAG and PSK consider that the increase of 35% of the starting amount on account of the duration of the agreements is excessive. They refer to the reduced frequency of the committee meetings and of the intensity of concertation between the banks in 1997 and 1998 and submit that an increase of 10% per year is, under the Guidelines, the maximum by which the starting amount may be increased. BAWAG and PSK also state that, for infringements lasting less than one year, no increase of the fine is permissible. They consider that, by applying a rate of increase of 10% per year, the Commission illegally failed to exercise the discretion available to it under the Guidelines.

(b) Findings of the Court

465 Under the last subparagraph of Article 15(2) of Regulation No 17, regard must be had, in addition to the gravity of the infringement, to the duration of the infringement in fixing the amount of the fine. It follows that the impact of the

duration of the infringement on the starting amount of the fine must, as a general rule, be significant. Except in special circumstances, that militates against a purely symbolic increase of the starting amount on account of the duration of the infringement. Thus, where an agreement with an anti-competitive objective is not implemented, it is nevertheless necessary to take account of the period during which the agreement existed, that is, the time between the date on which it was entered into and the date on which it was terminated (*FETTCSA*, cited in paragraph 167 above, paragraph 280).

466 The applicants' view that, according to the Guidelines, the starting amount may not be increased by more than 10% a year on account of the duration of the infringement cannot be upheld. The Guidelines lay down that limit only for infringements of long duration, whilst for those of medium duration (in general one to five years) the sole upper limit was set at 50% of the starting amount, which does not rule out exceeding a rate of increase of 10% a year. Therefore, the applicants' view that an increase corresponding to 10% a year of the starting amount must be reserved for special cases must be rejected. Similarly, the criticism that the Commission failed to use its discretion when fixing the additional amount within the maximum limit is unfounded.

467 As regards the assertion that the infringement which the applicants are alleged to have committed was diminishing in intensity, it must be pointed out that an increase in the fine by reference to the duration of the infringement is not limited to a situation in which there is a direct relation between the duration and serious harm caused to the Community objectives referred to in the competition rules (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 106; see also Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 278).

468 Therefore, the pleas concerning the increase of the starting amount on account of the duration of the infringement must be rejected.

E — *Mitigating circumstances*

1. Preliminary observations

469 The applicants criticise the Commission for failing to take account of the mitigating circumstances to which they referred in the administrative procedure.

470 First, RZB (Case T-259/02), BAWAG (Case T-261/02), PSK (Case T-263/02), and ÖVAG and NÖ-Hypo (Case T-271/02) claim that the infringement was committed negligently and not intentionally. As has been held in paragraphs 201 to 211 above, that complaint is unfounded. Second, BAWAG, PSK and Erste (Case T-264/02) assert that the agreements were not implemented. In so far as their arguments relate to the infringement as a whole and not to the individual conduct of the applicants, they have been examined in the context of assessment of the intrinsic gravity of the infringement (see paragraphs 289 to 295 above). Third, the same applies to the argument concerning the allegedly marginal effects of the infringement, put forward as a mitigating circumstance in Cases T-259/02, T-261/02 and T-263/02, which comes within the scope of the assessment of the intrinsic gravity of the infringement (see paragraphs 231 to 233 above).

471 Fourth, RZB, BAWAG, PSK, ÖVAG and NÖ-Hypo criticise the Commission for disregarding their individual roles within the cartel. Fifth, several banks refer to the immediate termination of the infringement after the investigations. Sixth, BAWAG, PSK and Erste maintain that the Commission should have taken account of the fact that there was reasonable doubt as to whether the banks' conduct constituted an infringement. Seventh and last, Erste criticises the Commission for failing to take account, as a mitigating circumstance, of the crisis in the Austrian banking sector.

472 Before the complaints concerning the various matters referred to above are examined, it should be noted that the Commission must comply with the terms of its own Guidelines when determining the amount of fines. However, the Guidelines do not state that the Commission must always take account separately of each of the mitigating circumstances listed in Section 3 of the Guidelines and it is not obliged to grant an additional reduction on such grounds automatically; the appropriateness of any reduction of the fine in respect of mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances.

473 The adoption of the Guidelines has not rendered irrelevant the previous case-law under which the Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines it intends imposing, by reference in particular to the circumstances of the case (see, to that effect, the order of the Court of Justice of 25 March 1996 in Case C-137/95 P *SPO and Others* [1996] ECR I-1611, paragraph 54; *Ferriere Nord* v *Commission*, cited in paragraph 166 above, paragraphs 32 and 33, and 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 465; see also, to that effect, the judgment in *KNP BT* v *Commission*, cited in paragraph 330 above, paragraph 68). Thus, in the absence of any binding indication in the Guidelines regarding the mitigating circumstances that may be taken into account, it must be concluded that the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of mitigating circumstances.

2. The role of certain applicants within the committees (Cases T-259/02, T-260/02, T-261/02, T-263/02 and T-271/02)

(a) Arguments of the parties

474 RZB (Case T-259/02) states, first, that the agreements were essentially unconnected with its own banking business so that it pursued no interest of its own and, second,

that its contribution to the committees was limited to forwarding information to the other Raiffeisen sector banks and was minimal compared with that of the other banks, whose own business was covered by the agreements. It considers that its position is comparable to that of an 'overseer of the cartel', that is to say an undertaking whose limit is confined to overseeing compliance with the cartel and carrying out acts of collaboration such as the forwarding of information, coordination and control.

475 PSK (Case T-263/02) claims that its role was negligible by reason of the restrictions to which its business was subject, whilst PSK-B had very limited commercial weight, that they did not participate at all in certain committees and that their participation in others was limited or passive. It refers to the sporadic nature of PSK-B's participation in the committees (15% of 335 committee meetings, for which a list of participants was supplied as an annex to the statement of objections) and criticises the Commission for failing to assess the individual participation of PSK and PSK-B separately, in so far as it imposed separate fines on them.

476 ÖVAG and NÖ-Hypo (Case T-271/02) claim that they should be classified as 'followers'. They again refer to the existence of a 'small banking circle' (see paragraph 145 above), within which the largest banks consulted each other before the committee meetings and took the decisions with which the other members of the cartel (such as ÖVAG and NÖ-Hypo) could only associate themselves, without being able to influence their content.

477 BA-CA (Case T-260/02) asserts, without explicitly invoking mitigating circumstances, that its own conduct did not conform to the agreements and that there was no causal link between the agreements and its own interest rate policy. BAWAG (Case T-261/02) refers to its role as a 'free electron' whose systematic failure to observe the agreements considerably upset the work of the committees and gave rise to retaliatory measures and criticisms from the other banks. It explains its participation in the committees by the need not to be isolated from the numerous concerted practices that took place within that environment that were compatible with competition law.

478 The Commission refers to its discretion regarding the taking into account of mitigating circumstances and considers that there was no need to take account of the allocation of roles within the cartel, in so far as all the participants benefited equally from the agreements and exchanges of information and the participation of all the banks was of capital importance to ensure that the cartel worked.

479 With regard to RZB, PSK and PSK-B, it observes that their role in the committee meetings was not passive or insignificant. In Case T-271/02, the Commission does not contest the existence of the 'narrower circle' mentioned by ÖVAG and NÖ-Hypo, but contends that those occasional concerted practices between some members of the cartel were merely preparatory. It draws attention to the active participation of ÖVAG and NÖ-Hypo in the concertations in the context of the most important committees and the importance of that participation for the functioning of the cartel.

480 According to the Commission, BAWAG has not demonstrated that it was compelled to participate in the infringement against its will and, in any event, its conduct was not capable of neutralising many of the anti-competitive effects of the agreements concluded by the other banks, its market share being only 5%.

(b) Findings of the Court

Passive conduct or 'follow-my-leader' role (Cases T-259/02, T-263/02 and T-271/02)

481 According to the first indent of Section 3 of the Guidelines, 'an exclusively passive or "follow-my-leader" role' of an undertaking in the commission of the infringement may, if established, constitute a mitigating circumstance.

482 In that connection, first, it is clear from the case-law that one circumstance that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the 'ordinary' members of the cartel (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 343; *Cheil Jedang* v *Commission*, cited in paragraph 391 above, paragraph 168, and *Tokai I*, cited in paragraph 331 above, paragraph 331).

483 It was precisely on the basis of their frequent participation in the committees that it regarded as most important that the Commission chose the addressees of the contested decision (see recital 470), and it is clear from the statement recording the participation of the various banks in those committee meetings, produced by the Commission, that RZB, PSK and ÖVAG participated in about 70% of the meetings (the total number of which was 126), PSK-B in 30% and NÖ-Hypo in about 40%, and that cannot be described as sporadic (see paragraph 146 above). The fact that PSK-B may have participated less frequently in other committees does not justify any different conclusion.

484 As regards the criticism based by ÖVAG and NÖ-Hypo on the failure to take account of the role of a 'smaller banking circle' which, according to them, ran the cartel, it must be borne in mind that the Commission did not disregard the existence of prior concertation among the large banks and that it does not appear that its decision to attribute decisive importance to other committees in assessing the respective role of the cartel members was adopted in breach of rules governing procedure or statements of reasons. Nor have ÖVAG and NÖ-Hypo demonstrated that the Commission committed errors of fact or misused its powers or that it committed any manifest error of assessment in choosing to concentrate on the 'institutionalised' meetings of the various committees of the Lombard network (see paragraphs 144 and 145 above).

485 As regards, second, the conduct of the banks at the meetings, RZB, PSK, ÖVAG and NÖ-Hypo do not refer to any specific circumstances, or evidence such as statements by other members of the cartel, capable of demonstrating that their attitude at the meetings in question differed significantly from that of the other banks by amounting to a purely passive or follow-my-leader role.

486 Moreover, provided that an undertaking has participated, even without playing an active role, in one or more meetings with an anti-competitive purpose, it must be regarded as having participated in the cartel unless it proves that it publicly distanced itself from the unlawful concertation (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, the '*Cement* judgment', paragraph 3199, and the case-law there cited). By their presence at the meetings, the applicants adhered or at least gave the other participants to believe that they adhered in principle to the terms of the anti-competitive agreements concluded at the meetings (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 296).

487 It must also be pointed out that the contested decision recognises, in recitals 539 to 541, the existence of certain differences between the roles played by the various banks within the committees, and in particular the more important role of the large banks, or the banking groups, with regard both to invitations to the committee meetings and to the conduct of meetings. It observes however that, in so far as the role of the various banks or the various banking groups is in line with their position in the market, the necessary differentiation was already taken into account when the banks were allocated to different categories. The applicants have not demonstrated that the Commission committed a manifest error in considering that such differentiation was sufficient to reflect the role of the various banks within the cartel (see, by analogy, *FETTCSA*, cited in paragraph 167 above, paragraph 293), and the Court considers that it is likewise not appropriate to depart from that view in the exercise of its unlimited jurisdiction.

488 That differentiation is also sufficient to take account of the alleged absence of any interest of their own in relation to the agreements concerning bank business which they did not carry on themselves, to which RZB and PSK refer. In RZB's case, the assessment of its role within the cartel cannot be separated from that of its role as a lead institution, and the complaints concerning the taking into account of that role have been rejected in paragraphs 367 to 407 above. As regards PSK and PSK-B, it must be noted that the circumstances invoked by PSK in the present context have been taken into consideration in relation to the division into categories (see paragraphs 445 to 454 above), which is sufficient to take adequate account of the role of PSK and PSK-B within the cartel.

489 Finally, in assessing the passive or follow-my-leader role of the applicants, it is not relevant whether or not the addressees of the contested decision benefited from the agreements. First, a follower may also benefit from the effects of a cartel. Second, the fact of not benefiting from an infringement cannot constitute a mitigating circumstance, since otherwise the fine would cease to have any deterrent effect (see, to that effect *FETTCSA*, cited in paragraph 167 above, paragraphs 340 to 342, and the case-law there cited, and *Tokai I*, cited in paragraph 331 above, paragraph 347).

The role of BA-CA (Case T-260/02) and of BAWAG (Case T-261/02)

490 According to the second indent of Section 3 of the Guidelines, 'non-implementation in practice of the offending agreements or practices' may also amount to a mitigating circumstance. However, the fact that an undertaking whose participation in a concerted practice with its competitors is established did not conduct itself in the market in the manner agreed with its competitors does not necessarily have to be taken into account, as a mitigating circumstance, when the amount of the fine to be imposed is determined.

491 An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit (*SCA Holding* v *Commission*, cited in paragraph 324 above, paragraph 142, and *Cascades* v *Commission*, cited in paragraph 262 above, paragraph 230) and an undertaking which does not distance itself from the results of a meeting in which it was present in principle retains full responsibility for the fact of its participation in the cartel (*Cement* judgment, cited in paragraph 486 above, paragraph 1389). Therefore, the Commission is not required to recognise the existence of a mitigating circumstance consisting of non-implementation of a cartel unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question. It would be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful cartel and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition (*Mannesmannröhren-Werke* v *Commission*, cited in paragraph 224 above, paragraphs 277 to 279).

492 As regards BA-CA, it does not appear from the file that it openly opposed the conclusion or implementation of agreements. It merely invokes the lack of any influence of the decisions taken at certain committee meetings on the interest rates actually applied by it or the former CA. That circumstance cannot be taken into account to reduce the fine imposed on BA-CA.

493 As regards BAWAG, the extracts from the Commission's administrative file which it produced as an annex to its application do not give a uniform impression as to its conduct. Thus, it appears that, on several occasions, BAWAG unilaterally offered to customers better conditions than those agreed between the banks, sometimes surprising its competitors or behaving differently from what had been indicated at a committee meeting, sometimes after announcing its intention not to comply with the agreements. However, on one of those occasions, CA and Erste behaved in the same way as BAWAG, which was therefore not the only member of the cartel to behave independently at that time. There are also examples of meetings in which

BAWAG manifested its disapproval, at least partially or with regard to the dates for implementation of the agreed conditions. Its conduct occasionally forced other banks to adjust or to examine whether they could implement an agreement regardless of BAWAG's conduct; it was criticised on that point, the other banks having stated that their confidence in BAWAG was shaken, and its exclusion from certain committees was envisaged. However, it is apparent from minutes referred to by BAWAG itself in another context, cited in paragraph 294 above, that BAWAG reproached certain of its agencies which were not complying with the agreements.

494 Those documents show that BAWAG sometimes explicitly refused to participate in the agreements, that on occasions it used the cartel for its own benefit, and that, on other occasions, it respected the agreements concluded. Despite its limited market share, the possibility is not excluded that its conduct may also at certain times have disrupted the implementation of the agreements by the other banks. In view of the ambiguous nature of BAWAG's conduct, it has not however been demonstrated that the Commission committed a manifest error by refusing to recognise a mitigating circumstances in its case. The Court considers that again it is not appropriate to reduce the fine on that ground by exercising its unlimited jurisdiction.

3. The termination of the infringement (Cases T-259/02, T-261/02, T-263/02, T-264/02 and T-271/02)

(a) Arguments of the parties

495 RZB, BAWAG, PSK, Erste, ÖVAG and NÖ-Hypo criticise the Commission for failing to comply with the Guidelines by refusing to take into account the fact that the banks brought the committee meetings to an end immediately after the

investigations. They consider that the Commission cannot in this case rely on the fact that the infringement at issue was 'well known' as a basis for refusing to consider that fact as a mitigating circumstance within the meaning of the Guidelines. ÖVAG and NÖ-Hypo emphasise in that connection that they were not aware that they were infringing Article 81(1) EC. They add that the Commission failed in its obligation to state reasons because the contested decision does not disclose the 'special circumstances' which prevented the immediate termination of the infringement from being regarded as a mitigating circumstance.

496 The Commission states that there is no automatic mechanism whereby the termination of an infringement always amounts to a mitigating circumstance and the continuation of an infringement an aggravating circumstance. In this case, it considers that because the infringement was 'well known' for many years, its hypothetical termination, after the investigations carried out by the Commission, cannot be regarded as a mitigating circumstance within the meaning of the Guidelines.

(b) Findings of the Court

497 Under the third indent of Section 3 of the Guidelines, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is a mitigating circumstance. However, a reduction of the fine by reason of the termination of an infringement as soon as the Commission intervenes cannot be automatic but depends on an appraisal of the circumstances of the case by the Commission, in the context of its discretion. In that regard, the application of that provision of the Guidelines in favour of an undertaking will be particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive, on the assumption that it is proven (*Mannesmanröhren-Werke* v *Commission*, cited in paragraph 224 above, paragraph 281, and 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 292 and 294).

498 Even if, in the past, the Commission has regarded voluntary termination of an infringement as a mitigating circumstance, it is entitled, when applying its Guidelines, to take account of the fact that, even though their illegality was established at the inception of Community competition policy, very serious manifest infringements are relatively frequent and, therefore, to take the view that it is appropriate to abandon that generous practice and no longer reward the termination of such an infringement by a reduction of the fine (see, by analogy, *MDF*, cited in paragraph 213 above, paragraphs 108 and 109).

499 In those circumstances, the appropriateness of a reduction of a fine by reason of termination of the infringement depends on whether the banks could reasonably doubt the illegality of their conduct, which will be examined in paragraph 500 et seq. below. It also follows from the foregoing that the reference in recital 529 to the contested decision to the manifest nature of the infringement constitutes a sufficient indication of the reasons for the Commission's choice.

4. The existence of a reasonable doubt as to the illegality of the restrictive conduct

(a) Arguments of the parties

500 BAWAG (Case T-261/02), PSK (Case T-263/02) and Erste (Case T-264/02) consider that the Commission should have taken into account, as a mitigating circumstance, the existence of reasonable doubts on the part of the banks as to the illegality of their conduct. First, they refer to certain matters disclosed by themselves, and also by other applicants, to contest the classification of the infringement as 'very serious'. Since those elements are not such as to mitigate the intrinsic gravity of the infringement (see paragraphs 252 to 263 above), it is appropriate at this stage to examine whether they affect the reprehensible nature of the individual conduct of the applicants which have invoked them. The applicants' arguments in that

connection concern in particular the historical context of the cartel and the role played by the national authorities, the fact that, during the relevant period, Austrian law did not prohibit 'behavioural cartels' (Verhaltenskartelle), that is to say agreements without binding force, and that it provided for a sectoral derogation from the law governing cartels in favour of credit establishments, the lack of any secrecy surrounding the cartel and the recent accession of the Republic of Austria to the European Union.

501 Second, BAWAG, PSK and Erste refer to the Commission's previous practice which, in their view, was not clear with regard to credit establishments or, in particular, agreements on interest rates.

502 Erste also claims that the banks entertained reasonable doubts as to the cross-border nature of their conduct. It makes a detailed analysis of the information from which the Commission infers, in recitals 30 to 50 to the contested decision, that the banks were aware of the illegality of their conduct, and states that it does not follow from that information that the banks were aware of the possibility of an infringement throughout the relevant period, or with regard to all the meetings, such doubts having existed only in relation to the committees concerning cross-border transactions or arisen towards the end of the relevant period.

(b) Findings of the Court

503 In contrast to the rules which prevail when determining whether an infringement has been committed intentionally (see paragraphs 205 to 211 above), it is relevant to ascertain in the present context whether the applicants should reasonably have been aware that they were infringing Article 81 EC, and not merely been aware of the events constituting that infringement.

504 It must be recognised that the situation giving rise to the present case is special by reason of its historical context and the legal origin of the committees. However, it was the responsibility of credit establishments such as the applicants, which have considerable resources available to them, to prepare for the legal consequences of the accession of the Republic of Austria to the European Union, which could have been no surprise to them. In particular, it was the responsibility of the applicants to apprise themselves in due time of the terms of the Community competition rules (and indeed the law of the EEA) which were to be applicable to them and the new features thereof compared with Austrian law. The possible legality of the agreements under national law is therefore not in itself sufficient to leave room for reasonable doubt as to the illegal nature of their conduct under Community law.

505 As regards the participation of certain public authorities (OeNB, the Ministry of Finance and the Wirtschaftskammer) in the meetings, the information produced by the applicants is not sufficient to show reasonable doubt as to the illegality of the committees under Community competition law. Whilst it is not excluded that, in certain circumstances, a national legal framework or conduct on the part of national authorities may constitute mitigating circumstances (see, by analogy, *CIF*, cited in paragraph 258 above, paragraph 57), the approval or tolerance of the infringement by the Austrian authorities cannot be taken into account under that heading in this case, having regard in particular to the resources available to the banks to obtain precise and accurate legal information.

506 The view that the applicants could reasonably think that their agreements were lawful because the cartel was not secret cannot be upheld. The articles in the press on which BA-CA and Erste rely admittedly demonstrate that the Lombard Club and, to a lesser extent, certain other committees were known in the sectors concerned and that the fact that there was collusion on interest rates was not secret. That is not, however, sufficient to demonstrate that the full extent of the cartel was known

to the public. RZB and BA-CA, which contest the legality of the publication of the contested decision, also confirmed in their answers to the questions put to them by the Court that the details of the discussions within the committee meetings were not publicly known.

507 The banks are also wrong to allege legal uncertainty as to the applicability of Article 81 EC to the agreements on bank interest rates, such as to give rise to reasonable doubts as to the illegal nature of their conduct. Even if it is assumed that the Commission's position regarding such agreements was ambiguous during the 1980s, the press release from the Member of the Commission responsible for competition of 16 November 1989 (referred to in footnote 425 to the contested decision) clearly indicates that, according to the Commission, agreements on bank interest rates 'limit competition in the same way as price cartels' and 'should be avoided or abandoned'. Thus, when the Republic of Austria acceded to the European Union, no uncertainty lingered on that point.

508 BAWAG and PSK cannot contest the relevance of that view on the grounds that it has no binding legal effect and does not explicitly deal with certain legal aspects of the application of Article 81 EC, in particular the appreciable effects of such agreements on competition, the impact on inter-State trade and the possibility of obtaining an exemption. In the measures to which the applicants refer to demonstrate the existence of legal uncertainty regarding interest rate agreements, the Commission reserved its position regarding such agreements, in so far as they are not legally binding measures in relation to which it would have disapplied Article 81 EC. Moreover, questions concerning appreciable effects on competition and the effect on trade between Member States are not specifically concerned with interest rate agreements, whereas the question whether an exemption is possible could have been clarified by recourse to a notification. Furthermore, the fact that the contested decision is the first in which the Commission has imposed a fine for interest rate agreements does not, as such, fall to be classified as a mitigating circumstance.

509 Finally, a possible doubt on the part of the applicants as to the cross-border nature of the agreements cannot be considered reasonable in the present case.

5. The crisis in the banking sector (Case T-264/02)

510 As regards, finally, the structural crisis in the banking sector in Austria referred to by Erste, it must be borne in mind that the Commission is not required to treat the poor financial health of the sector in question as a mitigating circumstance (Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraphs 319 and 320). The fact that in previous cases the Commission took account of the economic situation in the sector as a mitigating circumstance does not mean that it must necessarily continue to follow that practice (*ICI* v *Commission*, cited in paragraph 196 above, paragraph 372). As a general rule, cartels come into being when a sector is experiencing difficulties.

6. Conclusion

511 It follows from the foregoing that the applicants' complaints concerning the appraisal of mitigating circumstances by the Commission are unfounded.

F — *The pleas alleging disregard of the Leniency Notice*

1. The contested decision

512 The Commission examined the banks' cooperation in the light of Section D of the Leniency Notice. It granted them a reduction of 10% of their fines, in accordance

with the second indent of Section D.2, on the ground that they did not substantially contest the facts set out in the statement of objections (contested decision, recitals 558 and 559). On the other hand, it refused to grant them a reduction under the first indent of Section D.2, according to which a fine may be reduced if, 'before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement'.

513 As regards the responses to the requests for information, the Commission considered that neither the disclosure of the dates of committee meetings and their participants nor the disclosure of documents concerning the committees was voluntary and that such disclosure could not therefore be treated as cooperation. As to the answers to the questions concerning the subject-matter of the collusory meetings, the Commission states that the decision is founded only on documents that were already available, so that those answers provided no added value (contested decision, recitals 545 and 546).

514 As regards the joint disclosure of facts made by the banks, it considers that it gave no added value beyond what was legally required. It accepts that the joint exposition of the facts goes beyond the information requested by describing in detail the historical context of the network and summarising the subject-matter of the various committee meetings. However, in its view, that statement served not to clarify the facts but rather to defend the banks, by attenuating the gravity of the facts, in particular by omitting to mention interest rates or precise commissions, by embellishing reality when describing certain committees, by describing various committees in isolation and by denying the managerial function carried out by the Lombard Club.

515 As regards the documents produced with the joint exposition of the facts, the Commission observes that the banks were not in a position to identify, in response to its request, those disclosing new facts not contained in the documents gathered during the investigations or required to be produced following requests for

information, and concludes that those documents, even though numerous and arranged in chronological order, provided no added value. It also criticises the banks for failing to forward all the documents requested. It refers in that connection to the minutes of the 'Halle committee meeting' of 25 May 1998, which it obtained in January 2001 from an anonymous informant, and to reports produced with the response to the supplementary statement of objections (contested decision, recitals 547 to 557).

2. Arguments of the parties

516 With the exception of RLB (Case T-262/02), all the applicants claim that the Commission illegally failed to take into account, as voluntary cooperation meriting a reduction of the fine of between 10 and 50% under the first indent of Section D.2 of the Leniency Notice, in particular the responses to the requests for information sent to them and the documents annexed thereto, and the joint exposition of the facts and the documents annexed thereto.

517 In Case T-259/02, RZB, which considers that its cooperation should be treated as spontaneous cooperation under Section B or C of the Leniency Notice, also refers to its admission of the anti-competitive purpose of the infringement. In Case T-260/02, BA-CA criticises the Commission for failing to take account of 33 files of additional documents containing more than 10 000 pages which it produced in April 1999, and additional information which it provided in its reply to the statement of objections.

518 The applicants criticise the Commission for having insisted that their cooperation should provide 'added value' in order to be taken into account. They consider that this amounts to unlawful retroactive application of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

519 The applicants assert that their cooperation in the form of replies to the requests for information and production of the joint exposition of the facts was voluntary, in so far as it exceeded by far what the Commission was entitled to request under Article 11 of Regulation No 17 and, in any event, that it considerably facilitated the Commission's task.

520 As regards their responses to the requests for information, the applicants claim that the Commission put questions to them that were unlawful by virtue of their rights of defence, and to which they were not required to reply. With the exception of RZB (Case T-259/02), they claim that that applies to the questions concerning:

— production of internal documents (memoranda, minutes, etc.) concerning specific meetings,

— or, in so far as such documents do not exist, descriptions of the subject-matter of those meetings.

In addition, they regard as unlawful 'catch-all' questions calling on them:

— to indicate the dates (including the dates of the first and last meetings) and the participants (name, company, post held) of numerous specifically identified meetings and 'any other committees that met regularly', and of all the committees for the *Länder* or regions (separately for each *Land*),

— to disclose to the Commission all minutes, memoranda, correspondence or other documents — official or otherwise — (in so far as they had not already been seized during investigations) which relate to meetings, discussions or other contacts between each bank and other Austrian credit establishments in connection with the committee meetings covered by the foregoing question (whether those documents were drawn up before, during or after such contacts).

521 According to the banks, their replies to those unlawful questions and the production of the documents requested must be classified as voluntary cooperation. BA-CA (Case T-260/02) maintains that that applies to all the replies to the request for information, because the replies to the lawful questions are closely linked to the replies to the unlawful questions. RZB also claims that all the replies from the banks must be classified as voluntary, since the Commission did not adopt any decision under Article 11(5) of Regulation No 17.

522 As regards the joint exposition of the facts, the applicants assert that the information contained in it and the documents accompanying it went far beyond the information and documents referred to in the requests for information.

523 The applicants assert that their cooperation was useful to the Commission's investigation. They state that the replies to the unlawful questions and the joint exposition of the facts disclosed new facts by informing the Commission of several committees of whose existence it had been unaware despite its investigations. In their replies, some of the banks provided a list of 36 documents that were cited in the contested decision and, according to them, were produced for the first time with the joint exposition of the facts.

524 In any event, they contend that, with or without such new information, their cooperation considerably facilitated the Commission's task. First, they refer to the detailed nature of their replies to the requests for information. Second, with regard to the joint exposition of the facts, they claim that, without that orderly presentation of all the facts and documents carried out at great expense and effort, and delivered to the Commission shortly after the start of the investigation, it would have been very difficult for the Commission to understand the relationships between the information and isolated documents from various banks. They observe, giving examples, that on numerous occasions the Commission made use of the description of the committees contained in that exposition and the documents annexed thereto, particularly with regard to the facts which it had not ascertained on the basis of investigations and replies to requests for information. The applicants contest the Commission's view that the joint exposition of the facts was intended to embellish the facts. They consider that the failure to produce the minutes of a single local meeting, in which several of them did not take part and of whose existence they were even unaware, cannot affect the usefulness of the joint exposition of the facts and that the documents produced in response to the additional statement of objections were not relevant.

525 BAWAG and PSK (Cases T-261/02 and T-263/02) also consider that the reduction of 10% granted because they did not substantially contest the facts is too small, having regard to the Commission's previous practice in its decisions.

526 The Commission in essence contends that the information and documents provided by the applicants, both in their replies to requests for information and in connection with the joint exposition of the facts, did not provide added value over and above what the banks were required to disclose to it under Article 11 of Regulation No 17. It states that, even if it is assumed that some of the questions asked in the requests for information went beyond what it was entitled to require from the banks, that had no impact because the contested decision was based exclusively on existing documents.

3. Findings of the Court

(a) Preliminary considerations

527 First of all, RZB's view that its cooperation should be appraised in the light of Section B or C of the Leniency Notice must be rejected.

528 That cooperation was provided after the Commission carried out checks, and therefore Section B of the Leniency Notice, which refers to cases where an undertaking has reported a secret cartel to the Commission before it has carried out an investigation, is inapplicable. As regards Section C, which relates to circumstances in which an undertaking 'disclose[s] the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision', it cannot be inferred from the fact that the Commission made requests for information following its investigations that the latter did not provide it with a sufficient basis for initiating the procedure with a view to the adoption of a decision. Moreover, as stated in paragraph 506 above, certain aspects of the cartel were not even secret. Therefore, Section C of the Leniency Notice is likewise not applicable in this case.

529 Next, it is settled case-law that cooperation in an investigation that does not go further than what is required of undertakings under Article 11(4) and (5) of Regulation No 17 does not justify reduction of the fine (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and *Cascades* v *Commission*, cited in paragraph 262 above, paragraph 260). On the other hand, such a reduction is justified where an undertaking has provided information well in excess of that which the Commission may require under Article 11 of Regulation

No 17 (*Cascades* v *Commission*, cited in paragraph 262 above, paragraphs 261 and 262, and Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 137).

530 It is also settled case-law that, in order to justify reduction of a fine for cooperation, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of Community competition rules (see *KTS*, cited in paragraph 333 above, paragraph 270, and the case-law there cited, and Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 193) and reveal a true spirit of cooperation (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraphs 395 and 396).

531 Therefore, the Court must first consider whether the Commission disregarded the extent to which the banks' cooperation in this case exceeded what was required under Article 11 of Regulation No 17. In that connection, it should undertake a comprehensive review concerning, in particular, the extent to which the undertakings' rights of defence limit their obligation to reply to requests for information.

532 Second, the Court should verify whether the Commission correctly appraised, in the light of the Leniency Notice, the extent to which the cooperation provided helped to establish the infringement. Within the limits laid down by that notice, the Commission has a discretion in assessing whether the information or documents voluntarily provided by the undertakings have facilitated its task and whether it is appropriate to grant a reduction to an undertaking under that notice (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 189 above, paragraphs 393 and 394). That assessment is the subject of limited review by the Court.

533 In the exercise of its discretion, the Commission is not, however, entitled to disregard the principle of equal treatment, which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified (*KTS*, cited in paragraph 333 above, paragraph 237; see Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 240, and the case-law there cited, and *Tokai I*, cited in paragraph 331 above, paragraph 394). That principle precludes the Commission from treating in different ways cooperation on the part of undertakings covered by the same decision.

534 On the other hand, the mere fact that the Commission has, in earlier decisions, granted a certain rate of reduction for particular conduct does not mean that it is obliged to grant the same proportional reduction when appraising similar conduct in the context of a later administrative procedure (see, with regard to a mitigating circumstance, *Mayr-Melnhof*, cited in paragraph 205 above, paragraph 368, and Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 82, and, as regards cooperation, Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 193).

(b) The replies to requests for information

The absence of a decision under Article 11(5) of Regulation No 17 (Case T-259/02)

535 First of all, the Court rejects RZB's view that the replies to requests for information must be taken into consideration, as a whole, as voluntary cooperation because the Commission did not address to the banks decisions under Article 11(5) of Regulation No 17.

536 Where a request for information is made under Article 11(1) and (2) of Regulation No 17 in order to obtain information of which the Commission may require disclosure by a decision under paragraph 5 of that article, only the promptness of the reply from the undertaking concerned can be classified as voluntary. It is for the Commission to decide whether that promptness facilitated its task in such a way as to justify a reduction of the fine and the Leniency Notice does not require it systematically to reduce fines for that reason.

The appraisal of the voluntary nature of the responses to the requests for information

537 It must be borne in mind that the breadth of the requests for information addressed by the Commission to the various banks under Article 11(1) and (2) of Regulation No 17 varied between 30 questions (BA-CA) and 3 questions (ÖVAG and PSK-B). The questions in the more detailed requests, to which the banks replied, sought the following, in particular:

— for specific meetings of certain committees:

— an indication of the participants (names, companies for which they work, posts held);

— the production of all internal documents relating thereto (notes, memoranda, minutes);

— a description of the subject-matter of meetings, to the extent to which it was not disclosed by the documents produced;

— for specifically named committees:

  — an indication of the dates of their meetings, including those of the first and last meetings, and details of the participants;

  — production of all documents relating thereto in so far as they had not already been seized during the investigations;

— for committees referred to in general terms:

  — an indication of dates, including those of the first and last meetings, and the participants;

  — production of all documents relating thereto in so far as they had not already been seized in the investigations;

  — details of the subject-matter of the meetings;

— for 'any other committees meeting regularly': an indication of dates, including those of the first and last meetings, and the participants.

538 The requests for information also contained questions of the following type:

— 'Kindly provide all minutes, file notes, correspondence or other documents relating to meetings, discussions or other contacts between your undertaking and other Austrian credit establishments in connection with the committees referred to below or any other committees that met regularly (whether drawn up before, during or after such contacts). Kindly indicate the dates, including those of the first and last meetings, and the participants (name, company, post held)' (a list of certain committees followed);

— 'Kindly provide all documents (correspondence, instructions, memoranda, file notes, circulars, etc.) and details of any action publicly taken by your undertaking having any bearing on changes to the conditions for deposit and lending business, advertising measures, arrangements concerning commissions and introduction of the "rate indexing clause" during the period from January 1994 to the present time.'

539 It is settled case-law that the Commission may not compel an undertaking, by means of a request for information under Article 11(5) of Regulation No 17, to provide it with answers that might involve an admission on its part of an infringement which it is incumbent upon the Commission to prove (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 35, and Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 67). It is nevertheless entitled to compel undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish the existence of anti-competitive conduct. The Commission may thus compel undertakings to answer purely factual questions and ask for documents already in existence to be produced (*Orkem* v *Commission*, paragraph 34, and *Mannesmannröhren-Werke* v *Commission*, paragraph 65).

540 On the other hand, requests calling on an undertaking to describe the object of and what occurred at meetings in which it participated and also the results or conclusions of those meetings where it is suspected that the object of the meetings was to restrict competition are incompatible with the rights of the defence, given that they are liable to compel the undertaking concerned to admit its participation in an infringement of the Community competition rules (see *Mannesmannröhren-Werke* v *Commission*, cited in paragraph 539 above, paragraphs 71 to 73, and the case-law there cited, and *Tokai I*, cited in paragraph 331 above, paragraphs 402, 403, 406 and 407).

541 It follows that the Commission was fully entitled, by means of requests for information under Article 11(5) of Regulation No 17, to require the banks to indicate dates of committee meetings and details of their participants. That applies not only to the committees about which, after its investigations, the Commission had precise information, such as their names and the dates of certain meetings, but also for all the other committees, given that, following its investigations, the Commission had copious information indicative of the existence of a network of agreements organised within a large number of committees covering all banking products. In those circumstances, the replies to the requests for factual information concerning all the committees cannot be classified as voluntary, and the Commission committed no error in law by refusing to take them into consideration as constituting voluntary cooperation.

542 Next, it is apparent from recital 546 to the contested decision that the Commission acknowledged the voluntary nature of the replies to the questions concerning the subject-matter of the collusive meetings.

543 As to whether the Commission committed an error in law by stating, in recital 546 to the contested decision, that the production of documents in response to the requests for information was not voluntary, it must be borne in mind that, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all necessary

information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct (*Orkem* v *Commission*, cited in paragraph 539 above, paragraph 34; Case C-301/04 P *Commission* v *SGL Carbon* [2006] ECR I-5915, paragraph 41; and *Mannesmannröhren-Werke* v *Commission*, cited in paragraph 539 above, paragraph 65).

544 It follows that the production of documents relating to the meetings identified in the requests for information cannot be regarded as voluntary cooperation because the Commission could have compelled the banks to provide those documents by requesting information under Article 11(5) of Regulation No 17 (*Commission* v *SGL Carbon*, cited in paragraph 543 above, paragraph 44). Therefore, the complaint alleging that the Commission erred in law regarding the voluntary nature of the production of those documents cannot be upheld.

545 In any event, the same would apply in the case of a different assessment as to the voluntary nature of the production of such documents.

546 The taking into consideration, as voluntary cooperation, of documents produced by the banks in response to requests for information would not be capable, in this case, of giving rise to a greater reduction of the fines than the 10% which the Commission had already granted in the contested decision.

547 It is apparent, in that connection, from the replies from BAWAG, PSK, Erste and the Commission to the questions put to them by the Court, the correctness of which has not been contested by the other applicants, that, following its investigations, the Commission had in its possession around 5 000 pages of copies of relevant documents to demonstrate the existence, operation, participants, duration and

scope of the cartel within the Lombard Club and to identify the most important committees. Whilst it is true that 11 000 pages of documents were produced in response to the requests for information, the applicants do not deny that, for many documents, several copies are contained in the file and that the responses to the requests for information contain numerous documents which the Commission already possessed as a result of its investigations. Moreover, the applicants did not state, in their replies to the questions put to them by the Court, what proportion of the documents produced in response to the requests for information had not been seized during the investigation and of which the production was tantamount to an admission of the infringement.

548 In that connection, it is clear from a table produced by Erste and not challenged by the other parties that 44% of the citations from documents in the contested decision involve documents obtained in the investigations. That demonstrates the importance of those documents for the establishment of the infringement. That importance is borne out by the very detailed nature of the requests for information which the Commission sent to the banks. Those requests show that the Commission had discovered indications or evidence concerning very numerous meetings of the main committees. It must also be stated that, even if the Commission asked numerous questions to which the parties could not be compelled to reply — a matter which it disputes — that does not apply to questions concerning the dates of meetings and the names of the participants. The applicants could therefore be compelled to provide the Commission with information enabling it to attribute the documents seized during the investigations to the various committees and thus to assess their importance and evidential value.

549 It must also be pointed out that the fact that the Commission cited, in the contested decision, documents produced in response to requests for information does not show that it did not possess those documents as a result of its investigations. The Commission stated, without being contradicted, that it preferred to cite documents produced by the applicants by reason of their orderly presentation, whether or not they were previously contained in the file.

550 Moreover, those of the applicants which analysed the evidential value of those documents identified only a few documents to which they attribute substantial probative value. Thus, BAWAG and PSK claim that 37 documents produced by them in response to the requests for information, out of almost 900 documents cited in the contested decision, have considerable evidential value. They do not however claim that those documents were necessary to support the essential findings made in the contested decision.

551 It follows from the foregoing that the applicants have not established that the documents produced in response to the requests for information were necessary to enable the Commission to identify all the essential committees, or that, without them, the evidence obtained through the investigations would have been insufficient to prove the essential elements of the infringement and to enable a decision imposing fines to be adopted.

(c) The assessment of the joint exposition of the facts

552 The Commission acknowledged, in recital 553 to the contested decision, that the banks had provided voluntarily, in the joint exposition of the facts, information going beyond what had been asked of them.

553 By deciding that such cooperation could only be taken into account if it gave rise to added value either by the disclosure of 'new facts' or explanations improving understanding of the case, the Commission did not exceed the discretion available to it in assessing, in accordance with the first indent of Section D.2 of the Leniency Notice, whether cooperation 'contribute[s] to establishing the existence of the infringement'. Neither the Leniency Notice nor the case-law cited in paragraph 530 above requires the Commission to reduce a fine by reason of action which, in practice or logistically, supports its investigation.

554 As to whether the Commission, in assessing the scope and value of such cooperation, disregarded the extent to which the documents annexed to the joint exposition of the facts were 'new' as compared with those annexed to the replies to the requests for information, it must be borne in mind that the banks considered, in the administrative procedure, that they were not in a position to provide the Commission with the detailed information requested on that point (see paragraph 19 above). In those circumstances, the Commission cannot be criticised for making any mistake in that regard.

555 Next, it was legitimate for the Commission to take account, in assessing the usefulness of the banks' voluntary cooperation, of the fact that they did not submit to it, with the joint exposition of the facts, all the documents concerning the committees (see paragraph 515 above). The incompleteness of the annexes to the joint exposition of the facts affected the reliability of that document and detracted from its usefulness for the Commission's task.

556 It is also for the Commission to determine whether the explanations given in the joint exposition of the facts enabled it better to understand the case, and the Court cannot censure that assessment unless there has been a manifest error. In that regard, the Commission was entitled to consider that the banks had used that document to present their own view of the committees and therefore as a means of defending itself. It is natural and legitimate for an undertaking involved in a Commission inquiry to act in that way. It follows that such a document, whatever its specific content, cannot relieve the Commission of its own task of studying the case and making its own analysis and evaluation of the facts and evidence.

557 In those circumstances, the fact that the Commission, in drafting the contested decision, used copies of documents provided by the banks in an orderly fashion as an annex to the joint exposition of the facts rather than the copies it had obtained itself through investigations and requests for information, and the descriptive part of

the joint exposition of the facts, does not show that the explanations given facilitated the Commission's substantive work, even if its processing of the file may have been facilitated from the technical point of view.

558 Therefore, the applicants' complaints concerning the Commission's assessments of the joint exposition of the facts must be rejected.

(d) The complaints specific to RZB and BA-CA

RZB's admission that the object of the infringement was anti-competitive

559 RZB's view that the Commission should have taken account of its explicit admission of the anti-competitive aim of the infringement must be rejected. Admittedly, an admission that a cartel exists is likely to facilitate the Commission's task during an inquiry more than mere acknowledgement that the facts are substantially correct and the Commission may therefore treat undertakings that have admitted the facts differently from those that have also admitted the existence of a cartel (*KTS*, cited in paragraph 333 above, paragraph 270). The Commission is not, however, obliged to draw such a distinction. It must, in each individual case, consider whether such an admission actually made its task easier. However, the anti-competitive object of the conduct in question in this case derives, with regard to most of the meetings whose existence was admitted by all the banks, from their very purpose, which was to collude on prices or other aspects of competition. Explicit admission of that purpose adds nothing. The Commission was not therefore required in this case to reduce the fine for that reason.

The additional information referred to by BA-CA

560 As regards the 33 binders containing more than 10 000 pages of documents sent by BA-CA to the Commission in April 1999, it must be borne in mind that the banks, when submitting the joint exposition of the facts, all sought to cooperate in the investigation in the same way, so that observance of equal treatment in the application of the Leniency Notice means that any reduction of the fine on that ground must be the same for all (*KTS*, cited in paragraph 333 above, paragraph 270). In those circumstances, the production of additional documents by one of the banks can only justify a further reduction of its fine on an individual basis if that cooperation actually involved the production of new and useful information as compared with that provided jointly by all the undertakings. Moreover, as the Commission has rightly pointed out, the value of those additional documents is inversely proportional to that of the joint exposition of the facts: if the latter were exhaustive, the production of new documents by BA-CA could not have been significant, whereas, in the opposite case, the usefulness of the joint exposition of the facts must be regarded as limited.

561 In that regard, it is clear from BA-CA's answers to the questions put to it by the Court that, of the more than 10 000 pages of documents produced, 33 documents were cited in the contested decision. The value of voluntary cooperation depends not on the number of documents produced but rather on their relevance and usefulness in establishing the infringement. It cannot be automatically conceded that the production of more than 10 000 pages of documents, of which only 33 are among those on which the contested decision is based, made the Commission's task any easier. Although documents produced by BA-CA might have contributed to establishing the existence of the infringement, even without having been cited in the contested decision, the use of those documents is an important indication of their usefulness, as, moreover, BA-CA itself asserts in its submissions. In view of the fact that, according to BA-CA's submissions, the Commission cited 892 documents in the factual part of the contested decision, the contribution made by the additional documents produced by BA-CA must be regarded as limited. That is further supported by the fact that BA-CA does not claim that the documents produced in April 1999 were decisive as regards the essential findings of the contested decision. Admittedly, BA-CA states that, in 21 cases, findings in the contested decision are

based solely on one of the documents produced by it in April 1999. However, in six of those cases, the document referred to by BA-CA was cited jointly with other documents, and the applicant has not provided further details enabling the respective importance of the different various documents to be ascertained. In two other cases, BA-CA's documents relate to examples of concerted practices whose importance in the framework of the cartel as a whole is secondary (recitals 65 and 66 to the contested decision) and, in one case, the document concerned is one set of minutes among several sets for the same meeting (recital 248 to the contested decision).

562 In those circumstances, the Commission was not required to grant BA-CA an additional reduction of the fine on that ground.

563 In order to prove that the Commission used documents which it produced, BA-CA asks the Court to take witness evidence from the Commission official mainly responsible for drafting the contested decision. Given that the use of those documents does not in itself demonstrate that the production of them made the Commission's task substantially easier, that call for evidence is not directly relevant to assessing the usefulness of those documents. That request for measures of organisation of procedure should not therefore be granted.

564 BA-CA is also wrong to claim that the Commission should have taken account, as cooperation, of its response to the statement of objections. The essential purpose of such a response is to enable an undertaking to defend its rights, so that its content must be very closely examined by the Commission. The influence of such a response on the decision taken by the Commission shows that it fulfilled that defensive function but does not mean that it provided added value or that it facilitated or lightened the work of the institution.

(e) Conclusion

565 It follows from the foregoing that the pleas alleging non-observance of the Leniency Notice must be rejected.

566 Furthermore, in view of the gravity of the infringement, by reference to which the level of the fines set by the Commission seems relatively low, the Court considers, in the exercise of its unlimited jurisdiction, that the applicants' cooperation does not in this case justify any additional reduction of the fines imposed on them.

G — *Infringement of procedural rules (Case T-271/02)*

567 The claim made in the alternative by ÖVAG and NÖ-Hypo that the Court should reduce the fines imposed on them by reason of the improper admission of the FPÖ as a complainant and the forwarding of the complaints to that political party cannot be upheld.

568 Admittedly, certain procedural irregularities may on occasion justify a reduction of the fine even if they are not such as to entail annulment of the contested decision (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 26 to 48).

569 However, only procedural irregularities capable of seriously harming the interests of the party invoking them can justify a reduction of the fine (*Baustahlgewebe* v

*Commission*, cited in paragraph 568 above, paragraph 30). That in particular may be the case where irregularities involve an infringement of the European Convention for the Protection of Human Rights and Fundamental Freedoms. No such infringement is alleged in this case, nor is it apparent from the file that the Commission's conduct to which the banks take exception, in contrast to the conduct of the FPÖ political party, whose actions are not attributable to the Commission, was liable seriously to harm their interests. Without there being any need for the Court to decide whether or not the Commission's conduct was irregular, it must be pointed out that the irregularities alleged in this case would not, if established, be sufficiently serious to justify a reduction of the fine.

H — *Conclusion concerning the claims for reduction of the fines*

570 It follows from the foregoing considerations that the applicants' pleas for reduction of the fines on the basis of a review of legality must be rejected, with the exception of those relating to the accuracy of the findings concerning the joint market share of PSK and PSK-B (see paragraphs 446 to 452 above). Moreover, the Court considers that there is no reason to reduce the fines on other grounds in the exercise of its unlimited jurisdiction.

571 As regards the amount of the joint fine to be imposed on PSK and PSK-B, the Court considers, in the exercise of its unlimited jurisdiction and having regard to the duration of the infringement and to the banks' cooperation with the Commission, that the final amount of the fine, as determined for PSK (including PSK-B) in recital 560 to the contested decision and Article 3 of the decision, must be reduced by one-half. Therefore, the joint fine imposed on PSK and PSK-B must be set at EUR 3 795 000.

V — *The Commission's claim that the fine imposed on RZB should be increased*

572 In Case T-259/02, the Commission has asked the Court to increase the fine imposed on RZB, on the ground that it contested, for the first time in its application, the existence of agreements between the banks on cross-border payment transactions, documentary business and the buying and selling of securities.

573 In that connection, it is important to ascertain whether RZB's conduct made it necessary for the Commission, contrary to any expectation which it might reasonably have based on RZB's cooperation in the administrative procedure, to draw up and submit a defence to the Court focusing on the arguments concerning illegal acts which it was entitled to consider that RZB would no longer call in question.

574 The importance of the points challenged by RZB in the scheme of the contested decision is minimal. Contrary to RZB's contention, the existence of the above-mentioned cross-border transactions does not contribute decisively to the possibility of establishing that the cartel to which the contested decision relates was liable to affect trade between Member States (see paragraphs 177 and 178 above).

575 The Commission devoted three paragraphs in its defence to its rebuttal of the arguments put forward by RZB. First, it summarised the applicant's arguments, then it pointed out that RZB had stated that it would not substantially contest the facts and, finally, it stated that it had demonstrated, in the contested decision, the existence of the agreements, the documents challenged by RZB not being intended to provide such proof but rather to provide examples of cross-border payments. The drafting of that defence was not therefore such as to entail special efforts on the part of the Commission.

576 In those circumstances, no increase of the fine is appropriate in this case.

**The claims that the decisions to admit the FPÖ as complainant and to disclose the statements of objections to it should be annulled (Case T-271/02)**

577 The claim made in the alternative by ÖVAG and NÖ-Hypo for annulment of the decisions to admit the FPÖ to the administrative procedure and to disclose the complaints to it must be rejected as belated. In reply to the questions put to them by the Court, ÖVAG and NÖ-Hypo stated that they had been informed of the admission of the FPÖ to the procedure and of the intention to forward the complaints to it by a letter from the Commission of 5 November 1999, whereas the Commission states that it sent them that information by letter of 27 March 2001. The application in Case T-271/02, dated 2 September 2002, is therefore, in any event, out of time as regards those decisions.

**Costs**

578 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 applicants in Cases T-260/02 to T-262/02, T-264/02 and T-271/02 have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

579 As regards Cases T-259/02 and T-263/02, under Article 87(3) of the Rules of Procedure, the Court of First Instance may, where each party succeeds on some heads and fails on others, order that the costs be shared or order each party to bear its own costs.

580 In Case T-259/02, the applicant's application has been unsuccessful, and the Commission has not succeeded in its counterclaim. Since that counterclaim was merely for an increase of the fine by 10%, it must be held that the applicant has, in essence, been unsuccessful. In those circumstances, RZB should bear its own costs and pay 90% of the Commission's costs, and the Commission should bear 10% of its own costs.

581 In Case T-263/02, each of the parties should bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **In Case T-263/02, reduces to EUR 3 795 000 the amount of the fine imposed on Österreichische Postsparkasse AG, of which the applicant is the successor, by Article 3 of Commission Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.571/D-1: Austrian banks — 'Lombard Club');**

2. **For the rest, dismisses the applications;**

3. **In Case T-259/02, rejects the Commission's counterclaim;**

4. **In Cases T-260/02 to T-262/02, T-264/02 and T-271/02, orders the applicants to pay the costs;**

5. **In Case T-259/02, orders the applicant to bear its own costs and to pay 90% of the Commission's costs, and orders the Commission to bear 10% of its own costs;**

6. **In Case T-263/02, orders the parties to bear their own costs.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 14 December 2006.

E. Coulon J. Pirrung

Registrar President

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