JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

6 May 2009 *

In Case T-116/04,

Wieland-Werke AG, established in Ulm (Germany), represented by R. Bechtold and U. Soltész, lawyers,

applicant,

v

Commission of the European Communities, represented initially by É. Gippini Fournier and H. Gading, and subsequently by É. Gippini Fournier, O. Weber and K. Mojzesowicz, acting as Agents,

defendant,

APPLICATION for annulment of or reduction in the amount of the fine imposed on the applicant pursuant to Article 2(a) of Commission Decision C(2003) 4820 final of

* Language of the case: German.

16 December 2003, relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 — Industrial tubes),

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

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

Registrar: C. Kantza, Administrator,

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

gives the following

Judgment

Background

1 Wieland-Werke AG (hereinafter 'Wieland' or 'the applicant') is an unquoted German undertaking with its registered office in Ulm (Germany). It is the parent company of a worldwide group acting mainly in the manufacture, sales and distribution of special products and semi-products in copper and copper alloy.

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

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

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

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

6 After carrying out an inquiry, including additional investigations at the premises of Outokumpu and the KME group and meetings with representatives of the undertakings concerned and, under Article 11 of Regulation No 17, requests for information, in July 2003 the Commission initiated an infringement procedure and issued a statement of

objections against the KME Group, the applicant and Outokumpu. The undertakings concerned did not request an oral hearing on the case and therefore no hearing was held.

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

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

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

10 The contested decision includes the following provisions:

'*Article 1*

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

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

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

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

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

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

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

Article 2

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

(a) [Wieland]: EUR 20.79 million;

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

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

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

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

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

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

13 In reaching that finding, it based its reasoning, inter alia, on the following evidence. First, it looked at the implementation of the cartel, with reference to the fact that the participants had communicated sales volumes and price levels (recital 300). Secondly, evidence on the file showed that prices fell at times when the collusive agreement was not strictly adhered to, and rose sharply in other periods (recital 310). Thirdly, the Commission referred to the collective market share of between 75 and 85% held by the cartel members (recital 310). Fourthly, the Commission found that the respective market shares of the cartel participants remained relatively stable during the whole duration of the infringement, even if the customers of the participants had sometimes changed (recital 312).

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

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

16 Secondly, the Commission applied differential treatment to the undertakings concerned, in order to take account of the effective economic capacity of each of them to cause significant damage to competition. In that regard, the Commission pointed to the existence of a difference between the market shares for industrial tubes in the EEA held, on the one hand, by the KME Group, market leader in the EEA market with a [*confidential*] [1] % share, and, on the other, by Outokumpu and Wieland, holding respectively a [*confidential*] % and 13.4 % share. Having regard to that difference, the starting amount of the fine imposed on the applicant and Wieland was fixed at 33% of that for the KME Group, namely EUR 11.55 million for Outokumpu and for Wieland and EUR 35 million for the KME Group (recitals 327 and 328).

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

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

1 — Confidential data removed

19 Fifthly, in respect of aggravating circumstances, the basic amount of the fine imposed on Outokumpu was increased by 50% on the ground that it was guilty of repeat infringement, having been an addressee of Commission Decision 90/417/ECSC of 18 July 1990 relating to a proceeding under Article 65 [CS] concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (OJ 1990 L 220, p. 28) (recital 354).

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

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

Procedure and forms of order sought

22 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 24 March 2004.

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

24 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 5 March 2008.

25 The applicant claims that the Court of First Instance should:

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

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

27 In this case, in support of its action, the applicant begins by claiming that Article 15(2) of Regulation No 17 is unlawful for infringement of the principle that penalties must have a sound legal basis. It also makes four pleas, respectively alleging: (1) incorrect assessment of the size of the market affected by the infringement; (2) that the size of the undertakings concerned was inappropriately taken into account; (3) erroneous increase in the amount of the fine by reason of the duration of the infringement; and (4) discriminatory application in relation to Wieland of the 1996 Leniency Notice.

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

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

30 It is therefore for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning. In that regard, it should be noted that the Court of Justice has

confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is there indicated (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313).

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

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

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

The alleged unlawfulness of Article 15(2) of Regulation No 17

Arguments of the parties

34 The applicant argues, essentially, that Article 15(2) of Regulation No 17 and the application made of it by the Commission in its decision-making practice infringe the principle that penalties must have a sound legal basis, inasmuch as the Commission has almost unlimited room for manoeuvre in fixing the amount of fines and the amount of the fine at issue has consequently been determined in a random manner. Thus, the order to the applicant to pay EUR 20.79 million is, the applicant submits, unlawful.

35 The applicant argues that Community rules must respect the principle that penalties must have a sound legal basis, which is of particular importance in the case of rules that are in the nature of a penalty. By virtue of that principle, Community legislation should be clear, precise and foreseeable for the persons concerned, and, in the case of legislation capable of having financial consequences, the character of certainty and foreseeability constitutes an imperative which applies with particular force.

36 The applicant emphasises that Community rules must moreover define in a foreseeable manner not only the conduct to be penalised but also the legal consequences which follow for the individual. Even if, the applicant argues, the existence of a margin of discretion for the administration may prove necessary, the fact remains that that margin must not be unlimited, especially in the case of a rule of secondary law or a penal or 'quasi-penal' measure.

37 According to the applicant, it follows both from the official statements of the Commission and the wide interpretation given to the concept of criminal proceedings by the European Court of Human Rights (ECtHR) that fines imposed under Article

15(2) of Regulation No 17 are in the nature of penal sanctions. In support of that conclusion, the applicant also refers to Community case-law (Case 41/69 ACF *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 172 et seq.; Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 123).

38 The applicant claims that Regulation No 17, which merely indicates that account must be taken of the 'seriousness and duration' of the infringement in order to determine the amount of the fine, does not satisfy the requirements of clarity and precision for a law. The Council did not fulfil its obligation, as laid down by Article 83 EC, to delimit clearly the competence conferred on the Commission.

39 The applicant also argues that Article 15(2) of Regulation No 17 does not lay down a ceiling for the amount of the fine, which implies that, for a given infringement, that article allows the Commission to impose fines ranging from EUR 1 000 to, in the case of certain worldwide groups, many tens of billions of euros. That means that the law does not determine the amount of the fine in advance, but the latter is exclusively determined by the Commission. Thus, the fixing of the amount of the fine risks being arbitrary and uncontrollable. Consequently, the applicant submits, that article infringes a higher Community rule (the principle that penalties must have a sound legal basis) and fundamental rights in the matter of determining penal sanctions arising from the European Convention on Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and the case-law of the European Court of Human Rights.

40 The applicant considers that Article 15(4) of Regulation No 17, whereby decisions imposing fines shall not be of a criminal law nature, does not affect its reasoning, since, firstly, any Community rule, whether of a penal nature or not, must comply with the principle that penalties must have a sound legal basis and, secondly, in accordance with the case-law of the EctHR, it is not the designation of a legal measure which is the determining factor, but its content.

41 The applicant further argues that the Guidelines do not remedy the lack of precision and clarity in Regulation No 17. The starting amount of fines for infringements classified as 'very serious' is fixed arbitrarily and independently of the turnover of the undertaking. The applicant also argues that, in any event, the Guidelines cannot constitute a 'law' within the meaning of the ECHR. In that context, the applicant emphasises that the latter bind only the Commission and not the courts, which are empowered to exercise unlimited jurisdiction over the decisions of the Commission.

42 According to the applicant, since it is the courts which have jurisdiction to fix the final amount of the fines, they are not bound by the Guidelines, the latter having no impact on the assessment of the legality of a penal sanction for the purposes of Article 7 of the ECHR. Moreover, the applicant argues that the Court of First Instance has recently affirmed that the legal context for the determination of the amount of fines is defined solely by Regulation No 17.

43 Moreover, the applicant considers that the fact that the amount of the fines fixed by the Commission is reviewable by the Community judicature in the exercise of its unlimited jurisdiction also does nothing to remedy the unlawfulness of Article 15(2) of Regulation No 17.

44 The applicant further argues that, when a provision infringes the principle that penalties must have a sound legal basis, there can be no remedy merely for the reason that the principles of proportionality and equal treatment were complied with in applying the said provision.

45 The applicant also argues that, whilst it is possible that Article 15(2) of Regulation No 17 might have been compatible with the principle that penalties must have a sound legal basis at the time when it was drafted, that is no longer the case nowadays since company turnovers are much higher today than previously.

46 Finally, the applicant claims that, in any event and irrespective of the legality of Article 15(2) of Regulation No 17, the Commission should, when fixing the amount of fines, use its discretion in the light of the principle that penalties must have a sound legal basis. Thus it ought, in its decision-making practice and by the Guidelines, to have brought a certain degree of transparency and foreseeability into the matter of fixing the amount of fines. It has, however, the applicant submits, failed to do so, placing the emphasis instead on the deterrent effect of the penalty.

47 The Commission contends that the applicant's plea should be dismissed.

Findings of the Court

48 As regards the argument that the Commission ought, in its decision-making practice and by the Guidelines, to have brought a certain degree of transparency and foreseeability into the matter of fixing the amount of fines, this Court finds that that argument does not imply any specific legal complaint against Regulation No 17 or the contested decision, but formulates wishes as to the practical exercise of Commission policy. That argument must therefore be dismissed as inoperative.

49 As for the substance, it is sufficient to note that it is clear from Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 66 to 88), and Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 69 to 92), that the plea of illegality raised by the applicant cannot be accepted. Moreover, that case-law has been confirmed by the judgment of the Court of Justice of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, not published in the ECR, paragraphs 36 to 63).

50 Therefore, the objection of illegality must be rejected.

The first plea, alleging inadequate assessment of the size of the sector affected by the infringement

Arguments of the parties

51 The applicant argues that, in assessing the value of the market concerned at EUR 288 million, the Commission has exaggerated its size and thus also the seriousness of the infringement, thereby giving rise to an excessive fine. It also argues that the Commission's reasoning on the subject of the calculation of its turnover is insufficient, and thus constitutes a breach of Article 253 EC.

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

53 According to the applicant, the size of the market concerned is decisive in assessing the seriousness of an infringement and fixing the starting amount of the fine.

54 On that basis, the applicant maintains that, since the infringement concerned only the processing margin (30 to 40% of the final price), the Commission should have subtracted 60 to 70% of the overall price of the products concerned when assessing the size of the market affected, which would have led to the determination of a lower starting amount. In that regard, the applicant points out that the price of copper is outside its control, since it is determined in accordance with the LME. The price of copper, it argues, is merely an element to be passed on, essentially, to customers. The applicant states that, if the cartel members had tried to increase the price of copper, their customers would have obtained it from other undertakings.

55 Thus, in relation to the procuring of copper, the applicant acted as an intermediary. The Commission should therefore have calculated the market turnover in the same way as it calculates the turnover of intermediaries in the context of controlling concentration operations. Moreover, since the cost of copper represents a very major part of overall cost, the Commission could not treat it in the same way as delivery and packaging costs, which generally constitute a negligible part of overall costs. Thus, in order correctly to assess the size of the market in question and thus the seriousness of the cartel, the Commission should have taken into account only the fraction of the price which the infringement in question had affected, namely the processing margin. The Commission did the opposite by applying an excessively formalist approach in calculating the relevant turnover.

56 The applicant also argues that the Commission infringed its duty to state reasons by referring to Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757), cited in recital 319 of the contested decision, for the purposes of justifying the inclusion of the price of the metal in the turnover achieved on the market in question. That judgment was not relevant in this case, since it showed only that a cartel concerning only a part of the final price infringes competition law, which is undisputed in the present proceedings. Here, the relevant issue is the identification of the appropriate turnover figure for the purposes of establishing the starting amount of the fine.

57 The Commission contends that the applicant's plea should be dismissed.

Findings of the Court

58 Concerning, first, the claim that the statement of reasons was insufficient, it is settled case-law that the statement of reasons for an individual decision must disclose, clearly and unequivocally, the reasoning of the institution which adopted the measure, in such a way as to allow those concerned to know the grounds of the measure adopted and the

competent court to exercise its power of review. The requirement to state reasons must be assessed by reference to the circumstances of the case. The reasoning is not required to go into all the relevant facts and points of law, since the question whether it meets the requirements of Article 253 EC must be assessed by reference not only to the wording of the measure in question but also to the context in which it was adopted (see Case C-367/95 P *Commission* v *Sytravel and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law cited).

59 As regards the determination of fines for breach of the competition rules, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 463, and case-law cited).

60 In this case, the Commission has, as regards the assessment of the seriousness of the infringement in question, satisfied those requirements in recitals 292 to 320 of the contested decision. It is apparent, in particular, from recital 318 of that decision that, in its assessment of the seriousness of the infringement, the Commission took into account the turnover of the market concerned. In recital 319, the Commission further responded to the undertakings' criticisms concerning the taking of the copper price into account for the purposes of calculating that turnover. The fact that that response might be erroneous cannot call into question the sufficiency of the reasoning for the contested decision, since determination of the existence of such an error falls within review of the legality of that decision on the substance (see, to that effect, *Sytraval and Brink's France*, cited in paragraph 58 above, at paragraphs 66 to 72, and Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, *International Power and Others* v *NALOO* [2003] ECR I-11421, paragraphs 134 to 138).

61 The plea claiming an insufficient statement of reasons must therefore be dismissed.

62 Concerning, secondly, the substance of the matter, it is important to emphasise at the outset that the methodology set out in the Guidelines, which were applied by the Commission in the contested decision (see paragraph 28 above), correspond to a flat-rate logic whereby the general starting amount of the fine, determined by reference to the seriousness of the infringement, is calculated by reference to the nature of the infringement, its actual impact on the market where that is measurable and the extent of the geographic market concerned (Section 1 A, first paragraph, of the Guidelines). Subsequently, the general starting amount of the fine is individualised for each participant by reference, in particular, to its size.

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

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

65 It is, however, clear from the contested decision that the Commission did, in this case, choose to take account of the size of the industrial tubes market in the EEA in its assessment of the seriousness of the infringement in question. Although the Commission had already concluded, on the basis of the nature of the infringement, that it was 'very serious' within the meaning of the Guidelines (recital 294), it did, in the contested decision, determine the seriousness of the infringement and thus the general starting amount for the fine taking into account the actual effects of the cartel on the market (recitals 295 to 314), the geographical extent of the market in question (recitals 315 to 317) and the fact that the industry forming the subject of the infringement was an important market, the size of which in the EEA was assessed at EUR 288 million (recitals 318 and 319).

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

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

68 The applicant argues in that regard, first, that the price of copper is outside the control of industrial tube manufacturers, since it is fixed in accordance with the LME, and that, moreover, it is the buyers of industrial tubes who themselves decide at what price the metal is acquired. The applicant further argues that fluctuations in the metal price have no impact on its profit.

69 It must nevertheless be held that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Commission has rightly pointed out, there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which, therefore, cannot be excluded from its turnover when fixing the starting amount of the fine (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 5030 and 5031). The fact that the price of copper constitutes an important part of the final price of industrial tubes or that the risk of fluctuations of copper prices is far higher than for other raw materials does not invalidate that conclusion.

70 This Court therefore finds that the Commission was right to take account of the copper price for the purposes of determining the size of the market concerned.

The second plea, alleging failure sufficiently to take into account the size of the applicant

Arguments of the parties

71 The applicant argues that, in fixing the starting amount, and hence the final amount, of the fine, the Commission failed to take account of its size as shown by its overall turnover, which amounted to EUR 1.2 billion in 2002. At the same time, the turnovers of KME and Outokumpu amounted, respectively, to EUR 2.05 billion and EUR 5.56 billion. The applicant argues that the 50% increase in the starting amount of the fine imposed on Outokumpu in recital 334 of the contested decision is not enough to satisfy the Commission's obligation to comply with the principles of proportionality and equal treatment. The Commission also infringed the principle that each fine must be the result of an individual calculation.

72 In support of its plea, the applicant argues that the overall size of the undertaking is of particular importance when fixing the amount of the fine and that the starting amount of the fine imposed on each of the three undertakings concerned should have been individualised in order to be proportionate to the differences in size between the undertakings. The applicant also argues that the principle of equal treatment requires the Commission to modify the starting amount of the fines by reference to the overall turnover of all undertakings and not just that of large companies. As a result, the Commission should have reduced the starting amount of the fine imposed on the applicant.

73 The applicant recalls in that respect, first, that the Commission did not increase the starting amount of the fine imposed on the KME Group, despite the fact that is almost twice as large as the applicant, and, secondly, that Outokumpu, which is five times larger than the applicant suffered an increase of only 50% of the starting amount of the fine imposed upon it.

74 The applicant concludes that the Commission, by not taking account of the disparity in economic capacity and size between the undertakings, has acted to the detriment of the applicant, a small undertaking. In support of its conclusion, the applicant refers also to certain decisions of the Commission, in which the ratio between the final amount of the fine and the turnover of the penalised undertakings was smaller than its own.

75 Finally, the applicant considers that the Commission has neglected its duty to state reasons by not justifying the discriminatory treatment to which it has been subject.

76 The Commission contends that the applicant's plea should be dismissed.

Findings of the Court

77 Concerning, first, the plea alleging an insufficient statement of reasons, it must be dismissed for the following reasons.

78 First, inasmuch as Wieland blames the Commission for not indicating why it had chosen an increase of 50% against Outokumpu, it should be noted that the Court of

Justice has held that the duty to state reasons is fulfilled where the Commission indicates in its decision the assessment factors which enabled it to measure the seriousness and duration of the infringement (*Limburgse Vinyl Maatschappij*, cited in paragraph 59 above, at paragraph 463). By contrast, the Commission is not required to include figures or a more detailed statement concerning the method of calculating the fine (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 50).

79 It should also be noted that a decision such as the contested decision, although drafted and published in the form of a single decision, must be analysed as a series of individual decisions finding in respect of each of the addressee undertakings the infringement(s) found against it and imposing a fine where appropriate (Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraphs 59 and 60).

80 Therefore, the applicant cannot criticise the statement of reasons for the contested decision regarding the increase imposed on Outokumpu for deterrent effect.

81 In any event, the Commission indicated, in recitals 332 to 334 of the contested decision, the factors which it had taken into account in order to increase for the purposes of deterrence the fine imposed on Outokumpu. As is apparent from the case-law cited above (see paragraph 78 above), the Commission cannot be blamed for not stating further reasons for its decision in that respect.

82 In so far as the applicant's argument may be understood as accusing the Commission of not stating the reasons why the starting amount of the fine imposed upon it was not reduced on the ground of deterrence, it should be noted that Article 253 EC, in the light of the case-law referred to in paragraph 78 above, cannot be interpreted as requiring the Commission to explain in its decisions why, as regards calculation of the amount of the

fine, it did not adopt hypothetical alternative approaches to that actually adopted in the contested decision (see to that effect, and by analogy, Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 127).

83 It follows from the above that the plea alleging an inadequate statement of reasons must be dismissed.

84 Concerning, secondly, the substance of the matter, it should be noted that the applicant is criticising the differentiation made by the Commission between the starting amounts of the fines imposed on the undertakings concerned in accordance with the method set out in the Guidelines. The applicant argues that, in fixing the amount of the fine, the size of the undertaking is of particular importance and that, in this case, the starting amount of the fine imposed on each of the three undertakings concerned should have been individualised in order to be proportionate to the differences in size between the undertakings.

85 In that regard, it should first be noted that the Commission decisions relied on by the applicant are not relevant, since the latter's previous decision-making practice does not serve as a legal framework for fines in competition matters (*Dansk Rørindustri*, cited in paragraph 30 above, at paragraphs 169 to 171; Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 292, and case-law cited).

86 The fact that the method of calculation set out in the Guidelines is not based on the overall turnover figures of the undertakings concerned and therefore allows disparities to appear between the undertakings as regards the relationship between their turnover figures and the amount of the fines imposed on them is irrelevant to an assessment of whether the Commission infringed the principles of proportionality and equal treatment and that penalties should fit the individual offender. The Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines

resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover (Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraphs 141 to 147; Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 159).

87 It follows that the Commission cannot be required, at any stage in the application of the Guidelines, to ensure that the intermediate amounts of the fines adopted reflect all existing differences between the overall turnover figures of the undertakings concerned.

88 In this case, it is apparent from recitals 321 to 323, 326 to 328 and 332 to 334 of the contested decision that the Commission made a distinction in two stages between the undertakings concerned First of all, in accordance with Section 1 A, sixth paragraph, of the Guidelines, it made a distinction by reference to the share of the responsibility belonging to each of the participants in the infringement in question. Then, pursuant to Section 1 A, fourth paragraph, of the Guidelines, it carried out a weighting in order to ensure that the fines imposed had a sufficiently deterrent effect.

89 Concerning the share of responsibility belonging to each of the participants in the infringement in question, the Commission took into consideration the EEA market share of each of the undertakings present in the industrial tubes market in 2000, the last full year of the infringement. It concluded that KME, with a market share of [*confidential*] [2] %, was by far the most important player in the market and therefore belonged to a first rank of undertakings, whereas Outokumpu ([*confidential*] % market share) and Wieland (13.4 % market share) fell within a second category comprising undertakings which could be regarded as being of medium size in the market in question, so that a differentiated treatment should be applied. Therefore, the starting amount of the fines imposed on Outokumpu and the applicant was fixed at 33% of the starting amount of the fine imposed on KME, namely EUR 11.55 million for Outokumpu and the applicant and EUR 35 million for KME.

2 — Confidential data removed.

90 The case-law shows that the Commission cannot be blamed for following that approach as regards the first weighting stage. When determining the amount of the fine according to the seriousness of the infringement, even if the effect of the division into groups is that certain applicants are allocated the same starting amount even though they differ in size, that difference in treatment is objectively justified by the importance attached to the nature of the infringement in comparison with the size of the undertakings in the assessment of the seriousness of the infringement (*Degussa*, cited at paragraph 49 above, paragraph 330, and case-law cited).

91 In the context of the second weighting stage, the Commission took the view, having regard to Outokumpu's overall turnover, that the starting amount of the fine imposed on Outokumpu should be increased by 50% in order to ensure sufficient deterrent effect and to take account of the fact that large undertakings have knowledge and legal and economic infrastructures enabling them better to appreciate the unlawfulness of their conduct.

92 The applicant cannot blame the Commission for carrying out such a weighting. The increase in the starting amount of the fine imposed on Outokumpu 'to take account of its size and overall resources' (recital 334 of the contested decision) does not imply that the Commission should have reduced the starting amount of the fine imposed on the applicant having regard to the latter's overall turnover. It should be noted in that regard (see paragraphs 86 and 87 above) that the Commission is not required, when amending the starting amount of fines for deterrence, to ensure that the amounts adopted for the various undertaking reflect every difference between them as regards their overall turnover.

93 On the contrary, in accordance with the reasoning set out in paragraphs 30 and 31 above, it is lawful for the Commission, in its discretion, to adjust the amount of the fines by a flat-rate method provided they do not appear unreasonable having regard to the circumstances of the case.

94 In that context, it is important to note that, when taking deterrence into account, the amount of the fine is adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the contrary excessive, in particular in the light of the financial capacity of the undertaking in question, in accordance with the requirements arising from, on the one hand, the need to ensure effectiveness of the fine and, on the other, compliance with the principle of proportionality (*Degussa*, cited in paragraph 49 above, at paragraph 283).

95 Moreover, in choosing the amount of uplift for larger undertakings, the Commission is limited by the fact that the starting amount cannot, in any event, exceed an amount proportional to the seriousness of the infringement. Therefore, even in situations where the turnover of the largest undertaking is clearly higher than that of the other undertakings concerned, it is possible, in relation to the seriousness of the undertaking in question, that the Commission may be able to increase the starting amount of the fine on the largest undertaking only marginally.

96 Having regard to the whole of the above, and taking account of the seriousness of the infringement in question, the applicant's market share in the EEA and its overall turnover in 2002, namely EUR 1.2 billion, the Court of First Instance considers that the starting amount of the fine imposed on the applicant is justified.

97 It follows from the above that the second plea must be dismissed.

The third plea, alleging an erroneous increase in the starting amount of the fine by reason of the duration of the infringement

Arguments of the parties

98 First, the applicant notes that the discretion which the Commission has under Section 1 B of the Guidelines permits it to decide both whether it is appropriate to make an uplift for duration and the amount of that uplift, within a ceiling of 10%. The applicant observes that, in adopting the formulation of recital 338 of the contested decision, the Commission waived the use of the prerogative conferred upon it by Section 1 B, first paragraph, of the Guidelines for the first five years of the cartel. As a result, the Commission could raise the amount of the fine imposed on the applicant only for the last seven years of the infringement.

99 According to the applicant, the Commission cannot rely on the fact that recital 338 of the contested decision is badly formulated. The applicant considers that it is for the author of a decision to bear the consequences of erroneous drafting and that, if a decision contains contradictory statements, the one more favourable to the person concerned is the one which should be adopted.

100 Moreover, the applicant argues, an ambiguous statement of reasons constitutes a statement of reasons which is vitiated by error, and therefore an infringement of Article 253 EC.

101 Secondly, the applicant argues that the Commission has infringed the principle that each fine must be the result of an individual calculation. It also failed to comply with its duty to state reasons by not explaining why it did not use its discretion. According to the applicant, the Commission used the same aggravating circumstance, namely that the infringement in question lasted more than five years, both to support the application of an uplift and to determine the maximum uplift of 10%.

102 The applicant argues that the Commission, which chose to apply the maximum uplift of 10% for each year of the infringement, does not adduce the reasons why such an increase was appropriate. It submits that the Commission should have referred to the circumstances particular to the cartel concerned in this case which made application of the uplift in question appropriate. It also accuses the Commission of not stating sufficient reasons for the increase in the amount of the fine from the point of view of the intensity and continuity of the cartel in question.

103 The Commission contends that the plea should be dismissed.

Findings of the Court

104 Concerning, first, the complaint alleging ambiguity in reasoning and that, in the contested decision, the Commission waived increasing the starting amount of the fine imposed on the applicant for the first five years of the cartel, the Court must examine recitals 338, 340 and 342 of the contested decision, which read as follows:

'(338) First, it must be noted that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17... Hence, KME's argument in recital (337) based on a previous Commission decision must be rejected. The current policy of the Commission for cartel cases is to increase the fines by 10% per year of infringement in excess of five years. This has resulted in increases in duration of more than 100% in several recent cases... In this case, where the cartel was of a duration of 12 years and 10 months, the Commission considers it appropriate to increase the fines by 10% per year.

…

(340) Based on the above, the Commission considers that [Wieland], Outokumpu and [the KME Group] infringed Article 81(1) [EC] and Article 53(1) of the EEA Agreement from at least 3 May 1988 until 22 March 2001. They committed a continuous long-term infringement of over twelve years and ten months.

…

(342) The starting amount of the fines determined for gravity will therefore be increased by 125% for Outokumpu and [Wieland] …'

105 A combined reading of those recitals and Section 1 B of the Guidelines leaves no doubt as to the Commission's intention to increase the starting amount of the fine on the applicant by 10% for each year of the infringement. Therefore, the applicant's complaints in that respect must be dismissed.

106 Concerning, secondly, the substance of the matter, it should be noted that an increase in the amount of the fine by reference to duration is limited to the hypothesis in which there is a direct relation between the duration and acute damage to the Community objectives pursued by the competition rules (see, to that effect, *Michelin*, cited in paragraph 85 above, at paragraph 278, and case-law cited).

107 It is, moreover, clear from the Guidelines that the Commission has not established any overlap or interdependence between assessment of the gravity and that of the duration of the infringement.

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

109 It follows that the mere fact that the Commission reserved for itself the possibility of increasing the fine per year of infringement, going in the case of long-lasting infringements up to 10% of the amount adopted for the seriousness of the infringement, does not in any way oblige it to fix that uplift by reference to the intensity of the activities of the cartel or its effects, or of the seriousness of the infringement. It is for the Commission to choose, in the context of its discretion (see paragraph 31 above), the uplift which it intends to apply in respect of the duration of the infringement.

110 As regards the complaint that the Commission used the same aggravating circumstance, namely that the infringement in question lasted more than five years, both to support the application of an uplift and to determine the maximum uplift of 10%, the Court sees nothing unlawful in the fact that the duration of an infringement gives rise not only to the increase in the basic amount as such, but also, where appropriate, to the final amount of the uplift. As set out in the previous paragraph, the Commission is not required to take account of the seriousness of the infringement in choosing the uplift applied for the duration of the infringement.

111 In this case the Commission stated, notably in recitals 335 and 340 of the contested decision, that the applicant had participated in the infringement for a period of 12 years and 10 months, namely a long duration for the purposes of the Guidelines, and therefore increased the fine by 125%. In so doing, the Commission did not depart from the rules which it imposed upon itself in the Guidelines. Moreover, the Court considers that, in the present case, that increase of 125% is not obviously disproportionate.

112 It follows from the whole of those considerations that the plea concerning the increase in the amount of the fine for duration must be dismissed as unfounded.

The fourth plea, alleging discriminatory application of the 1996 Leniency Notice

Arguments of the parties

113 Essentially, the applicant considers that it has been discriminated against compared with KME, which obtained a reduction of 30% of the amount compared with the applicant's 20%, notwithstanding that the applicant's cooperation was at least as great as that of KME.

114 First, the applicant argues that the Commission was wrong to grant KME a reduction greater than that given the applicant on the ground that 'KME disclosed the existence of the anticompetitive arrangements since the 1980's …, as opposed to 1993 which was identified as the beginning of the cartel activities in Wieland's application for leniency' (recital 423 of the contested decision).

115 Whilst admitting the limited value of its contribution to the investigation for the period prior to 1993, the applicant argues that it did not deny the existence of the cartel during that period, but that, by reason of the resignation of several of its employees, it was not in a position to confirm it. According to the applicant, the Commission gave disproportionate significance to the contribution of KME compared with its own. Only a statement by KME truly established the existence of the cartel before 1993. Moreover, that statement was made after an express request by the Commission. The other statements of KME were of the same kind as those of the applicant, since they attested to the existence of meetings without describing them as anti-competitive.

116 Referring to recitals 397, 417 and 418 of the contested decision, the applicant states that the Commission found that KME had only very sketchily illuminated the facts for the period before 1993. The applicant concludes that the granting of a larger reduction to KME than to itself is clearly erroneous and vitiated by a lack of reasoning, since its cooperation was of comparable value to that of KME.

117 Moreover, the applicant considers that it has been penalised by the Commission in that respect by reason of its refusal, unlike KME, to make a general admission. Although, following an in-depth internal investigation, the applicant provided a detailed statement of the facts, that investigation did not permit it to verify and admit the existence of an anti-competitive practice during the period from 1988 to 1993. The treatment suffered by the applicant largely amounted to forcing an undertaking to accuse itself, contrary to Community law in that it constituted an infringement of defence rights.

118 Secondly, the applicant argues that the Commission was wrong, in taking account of the fact that KME had referred to eight 'working group' meetings not mentioned by the other participants, to grant KME a greater reduction than that granted to the applicant. Indeed, in its letter to the Commission of September 2002, the applicant referred to a series of meetings which took place between 1999 and 2000 and gave a more complete description of them than that provided by KME.

119 Thirdly, the applicant argues that it voluntarily supplied the Commission, in its letter of 30 September 2002, with information considerably more precise and detailed than that provided by KME on the period from 1997 to 1999 ('the quiet period'). According to the applicant, the Commission bases its reasoning, as stated in a single passage in recital 202 of the contested decision, on summary information emanating from KME in order to demonstrate the existence of anti-competitive conduct during the quiet period, even though the applicant described, in a more detailed manner than KME, the holding of 12 meetings during the years 1997 and 1998. Moreover, the statement of facts provided by the applicant was referred to by the Commission in 11 footnotes inserted into recitals 157 to 167 and 202 to 212 of the contested decision.

120 Fourthly, the applicant claims that its cooperation with the Commission two weeks before KME should have entitled it to a reduction in the amount of the fine greater than, or at least identical with, that granted to KME. In that respect, the applicant refers to the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'), which provides for the granting of a greater reduction to the undertaking which cooperates the most rapidly. The applicant acknowledges that that notice does not apply in the present case, but the Court could take it into account as the expression of a general principle of law.

121 The Commission challenges all of the claims made by the applicant.

Findings of the Court

122 Concerning, first, the complaint of lack of reasoning, this is clearly unfounded. The factors for assessment which the Commission took into account in order to grant fine reductions to KME and the applicant by virtue of the 1996 Leniency Notice are clearly

indicated in recitals 404 to 423 of the contested decision, which is sufficient to fulfil the requirements of Article 253 EC (see paragraphs 58 to 59 above).

123 Concerning, secondly, the substance, it should be noted, as a preliminary observation, that, where an undertaking has committed an infringement of the competition rules, it may attempt to obtain a substantial reduction in the fine it risks incurring, or escape a fine altogether, by cooperating with the Commission. In that respect, it should be noted that, according to consistent case-law, a reduction in the fine for cooperation in the administrative procedure is based on the consideration that such cooperation facilitates the Commission's finding of infringements (see, to that effect, Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 325; Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363).

124 It should also be remembered that, in assessing the cooperation given by members of a cartel, only a manifest error of assessment by the Commission is open to censure, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88). In exercising that discretion, however, it cannot disregard the principle of equal treatment.

125 Since the applicant's complaints all refer to the discrimination which it alleges it has suffered in comparison with KME, it therefore needs to be determined whether the Commission was able, without disregarding the principle of equal treatment or overstepping the bounds of its discretion, to grant fine reductions of 20% to the applicant and 30% to KME for their respective cooperation.

126 Concerning the chronology of the communication of information to the Commission, it should be noted that both the applicant and KME began to cooperate with the Commission after receiving a request for information from the latter, but before the

sending of the statement of objections. In addition, both KME and the applicant fell within Section D of the 1996 Leniency Notice, which makes no reference to the criterion of whether one undertaking started to cooperate before another.

127 The case-law shows, moreover, that, in assessing the degrees of cooperation provided, respectively, by two undertakings, the chronological element cannot be taken into account in situations where the information sent by the parties concerned was sent within a fairly brief period and at an essentially identical stage of the administrative procedure (see, to that effect, Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 139; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 467).

128 Therefore, even though the applicant was two weeks before KME in cooperating with the Commission, that difference does not in itself imply that the Commission was required to grant it a reduction in the amount of its fine greater than, or at least identical with, that granted to KME.

129 In so far as the applicant relies on the application, by analogy, of paragraph 23 of the 2002 Leniency Notice, with provides that the Commission may grant a greater fine reduction to the undertaking which is first to provide evidence of the infringement representing added value, it should be noted that application by analogy is possible only for the purposes of filling a gap in the rules. In this case, the cooperation of the applicant, and that of KME and Outokumpu, were governed by the 1996 Leniency Notice.

130 In so far as the applicant's argument may be understood as effectively raising a temporal conflict of laws, it is sufficient to note that such a conflict cannot exist. It is only in the absence of transitional provisions that new rules apply immediately to the future effects of a situation which arose under the old rules (Case C-512/99 *Germany* v *Commission*

[2003] ECR I-845, paragraph 46, and case-law cited). In this case, paragraph 28 of the 2002 Leniency Notice clearly provides that that notice was to apply from 14 February 2002 to all cases in which no undertaking had availed itself of the 1996 Leniency Notice. In this case, it is undisputed that the undertakings concerned, including the applicant, availed themselves of the 1996 Leniency Notice.

131 Having dismissed the applicant's arguments based on the chronology of the communication of information to the Commission, it is necessary to verify from the point of view of quality whether KME's contribution, compared with the applicant's, was capable of justifying the difference of 10 percentage points between the reductions applied to the amounts of the fines imposed on those undertakings.

132 First of all, the applicant's argument that the granting of a fine reduction by reason of an undertaking's acknowledgement of its participation in an infringement constitutes an infringement of the rights of the defence cannot succeed.

133 The case-law shows that the Commission is entitled to reduce the amount of the fines which it imposes on undertakings which do not content themselves with sending the Commission useful information but go so far as expressly to recognise their participation in an infringement. Whilst the Commission may not compel an undertaking to admit its participation in an infringement, it is not thereby prevented from taking account, when fixing the amount of the fine, of the assistance given by that undertaking, of its own volition, in order to establish the existence of the infringement (Case C-57/02 P *Acerinox* v *Commission* [2005] ECR I-6689, paragraph 87; Joined Cases C-65/02 P and C-73/02 P *Thyssen Krupp* v *Commission* [2005] ECR I-6773, paragraph 50).

134 The acknowledgement by an undertaking of an infringement of which it stands accused is a purely voluntary act on its part, which it is not in any way obliged to make (*Acerinox*, paragraph 89; *Thyssen Krupp*, paragraph 52).

135 In this case, a combined reading of recitals 405 and 406 and recitals 416 to 422 of the contested decision shows that the Commission granted fine reductions to the applicant and KME on the basis of two cumulative factors, namely, first, the fact that they did not dispute the reality of the facts constituting the infringement found, and, second, the fact that their cooperation in establishing the facts went beyond the obligations arising from Article 11 of Regulation No 17.

136 Regarding that latter factor, recitals 168, 169, 171, 405, 417, 419 and 423 of the contested decision show that the Commission considered that the contributions of KME and the applicant were of similar quality, save, first, for acknowledgement of the existence of collusive activities before 1993, and, secondly, for the disclosure of auxiliary meetings supposedly intended to intensify the functioning of the infringement.

137 Given that it has been established that the cartel started in 1988, it is obvious that the Commission's determination of the duration of the infringement was not helped by the applicant's reply in its letter of 30 September 2002. In that letter, the applicant supplied a list of official meetings of Cuproclima held since 1985, without indicating the subjects which were discussed during those meetings. In that same letter, it estimated that collusive contacts started around 1993.

138 By contrast, in its letter of 15 October 2002, KME admitted that the participants agreed on the sharing of customers in the early years following the creation of Cuproclima in 1985 and described the manner in which they operated.

139 As regards the quiet period (from 1997 to 1999), it should be noted that, in KME's letter of 15 October 2002, information was given on the development of the functioning of the cartel within Cuproclima, as well as on the fact that KME, Wieland and, to a lesser extent, Outokumpu had regular contact outside the context of Cuproclima until 1999, mostly by telephone, in order to discuss certain customers or prices.

140 Concerning the period from 1999 to 2001, that letter shows that the members of Cuproclima met at about eight 'working group' meetings held outside the regular meetings of Cuproclima in order to intensify the cartel's activities.

141 As for the applicant's cooperation concerning those periods, the Court finds that, although the list of meetings which it supplied was fuller than that provided by KME, it did not indicate whether, at meetings which featured on that list, subjects related to the cartel were discussed. It follows that, by that list, the applicant did not contribute to the Commission's knowledge of the context of those meetings and its understanding of their purpose. Therefore, the applicant cannot rely on that list in order to argue that, for the purposes of the Commission's investigation, its cooperation was of a higher value than, or of equivalent value to, the statements made by KME (see paragraphs 139 and 140 above).

142 In the context of its cooperation, the applicant nevertheless supplied the Commission with some relevant information concerning the quiet period and the period from 1999 to 2000.

143 In particular, like KME, it supplied evidence concerning the anti-competitive correspondence which it had exchanged with KME in 1997 (recital 163 of the contested decision).

144 It also stated that members of Cuproclima had decided, towards the end of the 1990's, that they would resume their collusive activity, which materialised by the adoption in 1999 of a table supposed to be accessible electronically to members of the cartel and containing sensitive information. However, that information, whilst concerning the infringement, does not reveal the organisation of auxiliary meetings for the purpose of adapting and reinforcing the collusive activity carried on at the regular meetings of Cuproclima, which, by contrast, KME had notified to the Commission by denouncing the eight 'working group' meetings.

145 Having regard to the above, the Court finds that the applicant's claims that it contributed more fully than KME towards illuminating the period of infringement between 1997 and 2000 are not supported by the documents on the court file.

146 Therefore, and in the light of the case-law cited in paragraph 133 above, the Court of First Instance finds that the Commission did not make a manifest error of assessment in determining the level of reduction, for cooperation, of the fines imposed on the applicant.

147 Having regard to the whole of those considerations, it must be concluded that the final plea is also unfounded.

148 The action must therefore be dismissed.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Wieland-Werke AG to pay the costs.

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 6 May 2009.

[Signatures]