OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 10 February 2011 [1]

1. Three linked undertakings participated, together with other undertakings, in price-fixing and market-sharing agreements and concerted practices on the market for copper industrial tubes, contrary to Article 81 EC (now Article 101 TFEU), and were fined by the Commission.

2. In fixing the fines, the Commission took account of the criteria set out in its own applicable guidelines, together with various aggravating and mitigating circumstances.

3. The three undertakings in question then applied to the General Court [2] for a significant reduction in the fines imposed on them, alleging five specific errors in the determination of the amounts.

4. Their application was dismissed in its entirety, [3] and they now appeal to the Court of Justice on five grounds, of which the first four correspond to their first four pleas in law at first instance. The fifth ground of appeal, however, raises the broader issue of the extent and nature of the review which the General Court should carry out when exercising unlimited jurisdiction with regard to financial penalties.

Legal background

Human and fundamental rights

5. Article 6(1) of the European Convention on Human Rights ('the ECHR') provides, in particular:

1 — Original language: English.

2 — The General Court was, at that time, before the Lisbon Treaty came into effect, designated 'Court of First Instance'. For the sake of simplicity and because the change was purely formal, I shall use its current name throughout this Opinion.

3 — Case T-127/04 *KME Germany and Others* v *Commission* [2009] ECR II-1167 ('the judgment under appeal'). The other participants in the cartel, fined in the same decision, had also contested that decision, and their applications were also dismissed on the same day: see Case T-116/04 *Wieland-Werke* v *Commission* [2009] ECR II-1087 and Case T-122/04 *Outokumpu and Luvata* v *Commission* [2009] ECR II-1135.

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …'

6. Article 6(2) and (3) lays down specific additional guarantees for those 'charged with a criminal offence', including the presumption of innocence and the availability of various resources to ensure their defence.

7. Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), [4] entitled 'Right to an effective remedy and to a fair trial', provides, in particular:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …'

8. The explanatory note to that article states, inter alia, that the second paragraph corresponds to Article 6(1) ECHR, subject to the proviso:

'In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, "*Les Verts*" v *European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.'

9. Article 49 of the Charter is entitled 'Principles of legality and proportionality of criminal offences and penalties'. With regard to penalties, Article 49(3) states: 'The severity of penalties must not be disproportionate to the criminal offence'. According to the explanatory note, that 'states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice …'.

4 — Proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). An updated version was approved by the European Parliament on 29 November 2007, after removal of references to the European Constitution (OJ 2007 C 303, p. 1); the most recent – post-Lisbon – consolidated version is published in OJ 2010 C 83, p. 389.

10. Article 51 of the Charter defines its scope. Article 51(1) provides:

'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.' [5]

Treaty provisions

11. Article 81(1) EC (now, after slight amendment, Article 101(1) TFEU), provides:

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

…

(c) share markets or sources of supply;

…'

12. Article 229 EC (now, after slight amendment, Article 261 TFEU), provides:

'Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations.'

13. More generally, Article 230 EC (now, after amendment, Article 263 TFEU) gives the Court of Justice jurisdiction to review the legality of acts of the institutions, including the Commission, 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers'.

5 — Original (2000) version. The second sentence now reads: 'They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.

14. In accordance with Article 225(1) EC (now, after amendment, Article 256(1) TFEU), the General Court has, in principle, jurisdiction to hear and determine such proceedings at first instance, subject to a right of appeal to the Court of Justice on points of law only.

Competition law enforcement

15. Article 15 of Council Regulation No 17, [6] which was applicable at the material time, provided, in particular:

'2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, [7] or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81(1) EC / 101(1) TFEU]; or

…

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

…

4. Decisions taken pursuant to paragraph … 2 shall not be of a criminal law nature.' [8]

16. Article 17 of Regulation No 17 provided:

'The Court of Justice shall have unlimited jurisdiction within the meaning of Article [229 EC / 261 TFEU] to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.' [9]

6 — Of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87). With effect from 1 May 2004, Regulation No 17 was repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), which shifted much of the responsibility for applying EU competition law to the courts and authorities of the Member States.

7 — The unit of account being the ancestor of the euro.

8 — Substantially the same provisions are now contained in Article 23(2), (3) and (5) of Regulation No 1/2003.

9 — Substantially the same provision is now contained in Article 31 of Regulation No 1/2003.

17. Also applicable at the material time were the Commission's 1998 Guidelines on the method of setting fines ('the Guidelines').[10] The preamble to those guidelines stated, inter alia:

'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating [11] circumstances.'

18. Section 1 of the Guidelines specified that the basic amount would be determined according to the gravity and duration of the infringement, the only criteria referred to in Article 15(2) of Regulation No 17.

19. As regards gravity, under Section 1 A, account was to be taken of the nature of the infringement, of 'its actual impact on the market, where this can be measured', and of the size of the relevant geographical market. There were to be three categories: minor infringements, serious infringements and very serious infringements, the last including horizontal restrictions such as price cartels and market-sharing quotas, attracting 'likely fines' of above EUR 20 million. It would also be possible 'to apply differential treatment to undertakings according to the nature of the infringement committed' and necessary 'to

10 — 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 1998 Guidelines were replaced as from 1 September 2006 by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2). The 2006 Guidelines adopt a rather different approach, essentially setting a basic amount calculated generally as 30% of the yearly value of the sales to which the infringement relates (adjusted where appropriate according to all the relevant circumstances), multiplied by the number of years of participation and then further adjusted in the light of aggravating circumstances, mitigating circumstances and an element of deterrence, all within the legal maximum of 10% of annual turnover and subject to application of the leniency rules (see point 22 and footnote 13 below), with an exceptional possibility of reducing a fine which would otherwise be fatal to an undertaking.

11 — Also referred to as "mitigating".

take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

20. As regards duration, under Section 1 B, a distinction was to be drawn between: infringements of short duration (in general, less than one year), in which case there would be no increase in the amount of the fine determined for gravity; of medium duration (in general, one to five years), involving an increase of up to 50% in that amount; and of long duration (in general, more than five years), involving an increase of 'up to 10% per year'. [12] The amount determined for gravity, plus the amount determined for duration, would together form the basic amount of the fine imposed.

21. Section 2 stated that the basic amount would be increased where there were aggravating circumstances including, inter alia, repeated infringements of the same type by the same undertaking or undertakings.

22. Section 3 stated that the basic amount would be reduced where there were particular attenuating circumstances including, inter alia: non-implementation in practice of the offending agreements or practices (second indent); termination of the infringement as soon as the Commission intervened (in particular when it carried out checks) (third indent); and effective cooperation by the undertaking in the proceedings, outside the scope of the Commission's 1996 'Leniency Notice' (sixth indent). [13]

23. The Leniency Notice set out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel might be exempted from fines, or might be granted reductions in the fine which would otherwise have been imposed upon them.

24. Point 4 of Section A of the Leniency Notice stated: 'The Commission considers that it is in the Community interest in granting [sic] favourable treatment to enterprises which cooperate with it in the circumstances set out below. The interests of consumers and citizens in ensuring that such practices are

12 — As will become apparent in the context of the third and fourth grounds of appeal, it may be useful to specify that this means (and it is an interpretation which has never, to my knowledge, been questioned) an increase of the whole amount by (≤10 x n)%, where n = number of years of the duration of the infringement. See also paragraph 19 of the judgment under appeal, in point 26 below, and footnote 16 below.

13 — Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), applicable at the material time. That notice was replaced as from 14 February 2002 by the Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), itself replaced in 2006 by the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

detected and prohibited outweigh the interest in fining those enterprises which cooperate with the Commission, thereby enabling or helping it to detect and prohibit a cartel'. Sections B, C and D identify in detail the kind of conduct that will enable an enterprise which has participated in anti-competitive activities nevertheless to be treated with leniency. They read as follows:

'B. NON-IMPOSITION OF A FINE OR A VERY SUBSTANTIAL REDUCTION IN ITS AMOUNT

An enterprise which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75 % of the fine or even from total exemption from the fine that would have been imposed if they [sic] had not cooperated.

C. SUBSTANTIAL REDUCTION IN A FINE

Enterprises which both satisfy the conditions set out in Section B, points (b) to (e), and disclose 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, will benefit from a reduction of 50 % to 75 % of the fine.

D. SIGNIFICANT REDUCTION IN A FINE

1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10 % to 50 % of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— 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;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

Imposition and determination of the fines in the present case

25. On 16 December 2003, following various investigations, the Commission adopted a decision [14] finding that six undertakings – Wieland Werke AG ('Wieland'), Outokumpu Oyj, Outokumpu Copper Products OY (collectively, 'Outokumpu'), KM Europa Metal AG ('KME Germany'), Europa Metalli SpA ('KME Italy') and Tréfimétaux SA ('KME France') – had infringed the provisions of Article 81(1) EC and – from 1 January 1994 – Article 53(1) of the EEA Agreement by participating, between 3 May 1988 and 22 March 2001, in a complex of agreements and concerted practices consisting of price fixing and market sharing in the industrial tubes sector. KME Germany, KME France and KME Italy (which have since 1995 formed part of the KME Group; hereinafter, collectively, 'KME') were the applicants at first instance and are the appellants in the present proceedings.

26. Fines totalling EUR 39.81 million were imposed on KME. [15] The process by which the Commission determined the amounts in

14 — C(2003) 4820 final (Case COMP/E-1/38.240 – Industrial tubes) ('the contested decision' or 'the decision at issue'). A summary is published in OJ 2004 L 125, p. 50.

15 — Composed of EUR 10.41 million for KME Germany, EUR 10.41 million jointly and severally for KME France and KME Italy, both sums in respect of the period from 3 May 1988 to 19 June 1995, and EUR 18.99 million for all three companies jointly and severally in respect of the period from 20 June 1995 to 22 March 2001.

question is summarised as follows in paragraphs 11 to 22 of the judgment under appeal:

'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]% 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 Outokumpu 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 Since the KME Group had come into being in 1995, the Commission divided the starting amount of the fine imposed on the group, namely EUR 35 million, into two parts[: t]he first for the period from 1988 to 1995 (distinguishing KME Germany from KME France and KME Italy) and the second for the period from 1995 to 2001 (regarding the three entities as forming a group). That starting amount was therefore allocated as follows: EUR 8.75 million for KME Germany (1988 to 1995); EUR 8.75 million jointly and severally for KME Italy and KME France (1988 to 1995) and EUR 17.50 million for the KME Group, namely jointly and severally for KME Germany, KME France and KME Italy (1995 to 2001) (recital 329 of the contested decision).

18 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).

19 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 Commission increased by 55% the starting amount of the fine imposed on the KME Group for the period from 1995 to 2001, and by 70% the starting amount of the fines imposed on KME Germany of the one part and KME Italy and KME France of the other part

for the period from 1988 to 1995. The basic amount of the fines was therefore fixed at EUR 56.88 million for the whole of the KME Group (recitals 338, 342 and 347). [16]

20 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).

21 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 basic amount correspond to the fine which would have been imposed for such a period (recital 386).

22 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).'

Summary of the judgment under appeal

27. KME's application at first instance was headed: 'Application pursuant to Articles 225 and 230 EC'. In it, KME asked the General Court to:

— substantially reduce the fine;

— order the Commission to pay KME's legal fees and expenses as well as the costs incurred in providing a bank guarantee in lieu of payment of the fine pending judgment by the General Court; and

16 — Although not stated in the judgment under appeal, the decision at issue increased the starting amount by 125% for both Outokumpu and Wieland, respectively from EUR 17.33 million to EUR 38.98 million and from EUR 11.55 million to EUR 25.99 million (recitals 328, 334 and 347 of the decision at issue).

— take any other measures that the General Court considered appropriate.

28. In support of those claims, KME put forward five pleas in law, all concerning the determination of the amount of the fine: (a) failure to take sufficient account of the actual impact of the cartel when calculating the starting amount of the fine, (b) inadequate assessment of the size of the relevant market, (c) erroneous increase in the fine by reason of the duration of the infringement, (d) failure to take account of attenuating circumstances and (e) misapplication of the Leniency Notice. The General Court dismissed all five pleas and, consequently, the action in its entirety.

29. As regards the first plea (failure to take sufficient account of the actual impact of the cartel), the General Court found that the Commission was entitled to differentiate between participants by reference to the market share of each; that cartels, in particular price-fixing and customer-sharing, were by their very nature so serious as to merit the severest fines, regardless of market impact; and that 'in any event, and for the sake of completeness', the Commission had demonstrated to a sufficient legal standard that the cartel did have an actual impact on the market concerned.

30. In the second plea, KME argued that the Commission had wrongly evaluated the size of the copper tube manufacturing market from turnover including the cost of the raw material (namely, copper), whereas that cost was determined, and sometimes borne directly, by the purchaser; a correct evaluation would have been based on the value added by the manufacturers. The General Court found that there was no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs and that, despite its approximate nature, turnover was regarded by the legislature, the Commission and the Court of Justice as an adequate criterion for assessing the size and economic power of undertakings.

31. With regard to the third plea (erroneous increase in the fine – of 10% per year – by reason of the duration of the infringement), the General Court found that, without confusing the gravity and the duration of the infringement, the Commission had exercised its permissible discretion within the confines of the rules which it had imposed on itself in the Guidelines and that the increase of 125% for a duration of 12 years and 10 months was not disproportionate.

32. In the fourth plea, KME submitted that, contrary to its own Guidelines, the Commission failed to take account of certain alleged attenuating circumstances: (i) the fact that, while not systematically abstaining from implementing the agreements, KME did so in a limited manner; (ii) the fact that KME ended

the infringement, immediately and voluntarily, after the checks carried out by the Commission; (iii) the economically difficult situation of the industrial tubes sector; and (iv) the fact that KME provided evidence which was decisive or completed evidence held by the Commission. The General Court found, respectively, that: (i) KME had not adopted any actual competitive conduct and that limited implementation was not a sufficient attenuating factor; (ii) a reduction of the fine by reason of the termination of – in particular – an intentional infringement as soon as the Commission intervenes is a matter for the Commission's discretion depending on its appraisal of the circumstances; (iii) the Commission is not required to treat the poor financial health of a sector as a mitigating circumstance; and (iv) the Commission has a discretion as regards the application of attenuating circumstances, and did not exercise it incorrectly by considering that it was Outokumpu and not KME which had provided the important information.

Grounds of appeal

34. KME puts forward five grounds of appeal, which may be summarised as follows.

33. In the fifth plea (insufficient reduction of the fine pursuant to the Leniency Notice), KME alleged that: (i) third parties in earlier cases had received more favourable treatment; (ii) the information supplied by KME should have led to a reduction of more than 30%; and (iii) the Commission had infringed the principle of equal treatment by granting Outokumpu a 50% reduction. The General Court found, respectively, that: (i) the fact that the Commission had in the past granted a certain rate of reduction for specific conduct did not require it to grant the same rate for similar conduct in a subsequent procedure; (ii) only an obvious error of assessment could be censured, since the Commission enjoyed 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, and in this case there was no such obvious error; and (iii) that there was no discriminatory treatment because KME and Outokumpu were not in comparable situations.

35. First, in holding that the Commission had demonstrated to a sufficient legal standard that the cartel had an impact on the relevant market, a factor to be taken into account in determining the basic amount of KME's fine, the General Court infringed European Union ('EU') law and gave an illogical and

inadequate statement of reasons for dismissing the first plea in law. Furthermore, by upholding the Commission's conclusion that KME's econometric evidence did not show that the infringement as a whole had no market impact, the General Court manifestly distorted the facts and evidence put before it.

36. Second, in approving the Commission's determination of the size of the market affected by the cartel (industrial tubes) by including turnover on a separate upstream market (copper), even though the cartel members were not vertically integrated in that upstream market, the General Court infringed EU law and gave an inadequate statement of reasons for its rejection of KME's second plea in law.

37. Third, the General Court infringed EU law and gave an obscure, illogical and inadequate statement of reasons in upholding the relevant part of the decision at issue and rejecting KME's third plea in law, namely that the Commission had misapplied the Guidelines and infringed the principles of proportionality and equal treatment by imposing the maximum percentage increase to the basic amount of KME's fine on account of duration.

38. Fourth, the General Court infringed EU law by rejecting the fourth limb of KME's fourth plea in law and upholding the relevant part of the decision at issue, in which the Commission denied KME the benefit of a fine reduction on account of its cooperation outside the scope of the Leniency Notice, in violation both of the Guidelines and of the principles of fairness and equal treatment.

39. Fifth, the General Court violated EU law and the fundamental right to full and effective judicial review by failing to examine KME's arguments thoroughly and closely and by showing a biased deference to the Commission's discretion.

40. Of those grounds of appeal, it seems to me that the fifth and last must be examined first, since the view which the Court takes on the general question of the scope, degree and nature of the review which must be carried out by the General Court in cases of this kind will colour the approach to be taken to the first four grounds of appeal, each of which criticises a different specific application of that review.

Fifth ground of appeal: effective judicial review

Relevant passages of the judgment under appeal

41. KME cites the following passages of the judgment under appeal in support of its argument that the General Court 'deferred to an excessive and unreasonable extent to the Commission's discretion':

'92 ... the seriousness of the infringement is determined by reference to several factors, in respect of which the Commission has a discretion ...'

'103 ... It is for the Commission to choose, in the context of its discretion ..., the uplift which it intends to apply in respect of the duration of the infringement.'

'115 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. 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.'

'129 ... the Commission has a discretion as regards the application of attenuating circumstances ...'

42. Those passages may be read against the background of the 'preliminary observation' made by the General Court in paragraphs 32 to 37 of the judgment under appeal, although these passages are not specifically alluded to by KME:

'32 ... it should be noted, first, that, as is apparent 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], it is undisputed that it determined the amount of the fines by

applying the methodology defined in those guidelines.

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

34 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).

35 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).

36 Therefore, in areas where the Commission has maintained a discretion, for example as regards the uplift for duration, review of the legality of those assessments is limited to determining the absence of manifest error of assessment (see, to that effect, Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraphs 64 and 79).

37 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).'

Summary of the submissions

KME's appeal

43. KME complains of the General Court's failure to carry out a thorough and close examination of its arguments at first instance, and of that Court's 'excessive deference' to the Commission's discretion, upholding a disproportionate fine. That failure, in KME's view, violates the fundamental right to a full, effective and fair judicial review of the decision at issue by an impartial and independent tribunal.

44. EU competition law is shaped by the interplay between the Commission, as investigator, prosecutor and decision-maker, and the judicature, providing a measure of external control. However, the case-law has never clarified the exact meaning, scope or rationale of the margin of discretion accorded to the Commission, having regard to the institutional balance between the two.

45. The state of that interplay has been influenced by the evolution of the Commission's role in enforcing competition policy since Regulation No 17 was adopted. In 1962 the EEC comprised six Member States and there was little experience or acceptance of European competition law. Notifications were a useful source of information enabling the Commission to exercise a priori control and shape its enforcement policy; its role was mainly to educate and to provide legal certainty by issuing formal exemption decisions, comfort letters or clearance decisions. Although the Commission already combined investigative, prosecutorial and decision-making powers, investigations and prosecutions were relatively rare, and fines typically low. In that context, it was reasonable, logical and fair for the Court of Justice to hold in *Consten and Grundig*[17] that, since the exercise of the Commission's powers necessarily implied complex evaluations of economic matters, judicial review of those evaluations had to take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduced therefrom. Moreover,

17 — Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 347.

the Commission's self-restraint rendered less crucial the issue of defining clear boundaries to the exercise of its fining powers.

46. However, it is arbitrary, dangerous and unfair to apply the same 'judicial deference' to the Commission's discretion in the context of the current EU competition law enforcement regime, characterised by increasingly large fines having inevitable economic and financial impact on companies, shareholders and employees, and leading to de facto 'criminalisation' of competition law. EU competition rules are directly applicable provisions which leave no room for policy-based discretion in their interpretation and application, so that there is scope for only a very limited degree of deference by the Courts when reviewing their application by the Commission in a specific case.

47. Under the current regime introduced by Regulation No 1/2003, Article 101 TFEU as a whole is now applied not only by the Commission, but also by national competition authorities and courts. It has never been suggested that a national court applying Article 101 TFEU in individual cases enjoys a broad margin of discretion, to which deference is owed by the higher court on appeal.

48. The Commission's expertise in evaluating complex factual and/or economic matters cannot justify according it a broad margin of discretion in the application of EU competition law. Rather, a heightened scrutiny in complex cases is part of the mandate of the General Court, which was established in reaction to criticism that the intensity of judicial control then being exercised was no longer up to the standards required of a legal regime which had started to encroach significantly on individual rights by stringently enforcing the competition rules. Moreover, both the General Court and the Court of Justice have often satisfactorily engaged in particularly intense judicial scrutiny of complex cases. The intensity of the General Court's review does not decrease with the complexity of the facts at issue, but depends on its assessment of what kind of scrutiny is required and appropriate in the circumstances of each case.

49. Moreover, the General Court has unlimited jurisdiction with respect to penalties imposed in competition cases. In exercising that jurisdiction, it should not accord the Commission any margin of discretion as regards the appropriate and proportionate character of a fine or the method used in its calculation – a fortiori given the de facto criminal nature of such fines and the ECHR requirement of

effective judicial review of any administrative decision imposing a criminal penalty. Therefore, the General Court must examine how the Commission appraised the gravity and duration of unlawful conduct in each case and may substitute its own assessment by cancelling, reducing or increasing the fine. Full exercise of that unlimited jurisdiction entails control not only of the formal legality of the fine but also of its appropriateness, through an independent appraisal of the seriousness of the conduct to be sanctioned and of the overall fairness of the sanction in view of all the individual circumstances of each case.

50. The scope of the Commission's margin of discretion (if any) in cases such as the present must be narrowly defined and the degree of judicial deference (if any) to that discretionary assessment must be correspondingly limited. The technical nature of a case should not cause the Court to forsake its duty to ensure that the law is observed.

51. Another issue is whether the review provided for in the EU judicial system is broad and intense enough to ensure the degree of protection required by Article 6(1) ECHR. Debate on that issue has become more acute in light not only of the Commission's combination of investigative, prosecutorial and decision-making powers, but also of the ongoing 'criminalisation' of EU competition law. The European Court of Human Rights has long accepted that administrative law enforcement, including the imposition of fines, is not incompatible with Article 6(1) ECHR. However, although such enforcement need not be fully 'judicialised' in order to meet the requirements of that article, there must be sufficiently strong procedural guarantees, and effective judicial control with full jurisdiction to review the administrative decision. The requirements a system of judicial review must meet to comply with Article 6(1) ECHR have yet to be fully clarified, but it is uncertain whether the existing system of EU competition law enforcement, including judicial review, meets those requirements.

52. The right to an effective remedy before a tribunal is also enshrined in Article 47 of the Charter. The case-law confirms that addressees of Commission decisions imposing fines in competition cases have a right to a fair legal process, and that a breach of their right to an impartial tribunal arises if there is no appeal to a court with full jurisdiction within the meaning of the ECHR.

Commission's response

53. The Commission submits, first, that the ground of appeal is too general and imprecise to be assessed by the Court (thus not meeting the requirements of Article 112(1)(c) of the Rules of Procedure), and is therefore inadmissible; second, that the General Court's judgment was based on its own positive findings, and the ground of appeal is thus unfounded.

54. With regard to lack of precision, KME puts forward a range of arguments in favour of an intense review of Commission decisions by the General Court, but accepts that a system of administrative law enforcement coupled with judicial control with full jurisdiction is compatible with Article 6(1) ECHR. It also accepts that the General Court and the Court of Justice are in principle capable of carrying out adequate review and have done so in practice. It thus does not contest the fundamental structure for judicial review of Commission decisions.

55. Accordingly, KME should have (a) specified the elements of the judgment in which the General Court failed properly to address its submissions, (b) specified the standard by which the quality of that Court's review should be assessed, and (c) demonstrated how, by reference to that standard, the Court failed properly to address KME's submissions. Instead, it has quoted four passages from the judgment referring to the Commission's discretion, without explaining how they demonstrate the General Court's failure adequately to review the Commission's decision in the light of KME's submissions.

56. Indeed, the standard by which the review of the General Court should be assessed in accordance with Article 6(1) ECHR is unclear, even accepting KME's assertion that EU competition law fines are 'criminal' for that purpose. KME avoids any discussion of what that might imply for the appropriate standard of review.

57. The European Court of Human Rights has made it clear that the requirements of Article 6(1) ECHR differ even within the overall category of 'criminal charges'. Since EU law explicitly characterises competition law fines as non-criminal, they would fall outside the 'hard core' of criminal law identified by the European Court of Human Rights, and the guarantees applicable to criminal proceedings would not necessarily apply with full stringency.

58. In any event, the General Court clearly has 'full jurisdiction' for the purposes of Article 6(1) ECHR (not to be confused with the EU concept of unlimited jurisdiction to review financial penalties). The European Court of Human Rights has condemned as inadequate a judicial remedy against administrative acts that is limited to review of errors of law and which thus does not allow the court to correct errors of fact. However, while the court may also need to review proportionality, a limited review on certain aspects is not in itself incompatible with the concept of 'full jurisdiction' under Article 6(1) ECHR.

59. As regards the second contention, that the General Court's judgment was based on its own affirmative findings, the Commission submits that, notwithstanding the references made to the Commission's discretion, the General Court carried out a thorough and effective review of the calculation of the fine and reached its own affirmative conclusions that KME's second, third and fourth pleas were unfounded. [18] On those points, the General Court considered and rejected KME's arguments on their merits, agreeing affirmatively with the Commission, and not 'deferring to its discretion'. Whatever the standard of review implied by Article 6(1) ECHR, the General Court met that standard.

18 — The Commission appears to refer here only to the second, third and fourth pleas in law because the passages of the judgment cited by KME (see point 41 above) relate only to those pleas.

Assessment

60. KME's argument is essentially that, by accepting that various assessments in the Commission's determination of the fines fell within the Commission's discretion and by not seeking, therefore, to make its own assessment in those regards, the General Court failed to subject the decision at issue to the scrutiny required by the ECHR and the Charter.

61. It is therefore important to ascertain what scrutiny is required by those instruments, the most relevant guidance being found in the case-law of the European Court of Human Rights.

62. KME contends that competition law enforcement procedures such as the one in issue, involving a finding that an undertaking has engaged in prohibited conduct and the imposition of a fine in respect of that conduct, are clearly of a criminal law nature for

the purposes of the ECHR. The Commission notes that decisions of the kind in issue are expressly stated *not* to be 'of a criminal law nature' but accepts that, according to the case-law of the European Court of Human Rights, that is not a conclusive criterion; if they were to be considered of a criminal law nature for the purposes of that case-law, they would in any event fall outside the 'hard core' of criminal law identified by that Court. The issue is of importance because the European Court of Human Rights has required more stringent procedural guarantees and higher standards of review for criminal than for civil proceedings and, within the sphere of criminal law, for 'hard core' than for other proceedings.

63. In deciding whether proceedings concerning misconduct are to be categorised as 'criminal' or not, the European Court of Human Rights has regard to the three '*Engel* criteria', so named after the judgment in which they were first formulated. [19] First, there is the formal classification in the legal system concerned, but that is regarded explicitly as 'no more than a starting point'. In *Engel*, as in subsequent judgments, the European Court of Human Rights accorded significantly more importance – to the extent of disregarding the national law classification – to its second and third criteria, namely, the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. It has in that regard considered it relevant whether the penalty is imposed under a general rule addressed to all citizens rather than to a group possessing special status and whether it is intended essentially as a punishment to deter re-offending rather than as pecuniary compensation for damage. [20]

64. In the light of those criteria, I have little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the 'criminal head' of Article 6 ECHR as progressively defined by the European Court of Human Rights. [21] The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as

19 — *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22.

20 — See, for example, *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIII.

21 — See also points 48 to 52 of Advocate General Bot's Opinion of Case C-352/09, pending before the Court *ThyssenKrupp Nirosta* v *Commission*, which I fully endorse, together with the case-law cited there.

underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; [22] a fine of up to [23] 10 % of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, [24] with no element of compensation for damage.

65. It is true that, as the Commission has pointed out, in *Neste*, [25] the European Court of Human Rights considered certain aspects of Russian competition law enforcement to fall outside the criminal sphere. However, the factors which it took into account there seem to me largely different from those of the situation with which we are concerned here. It stressed that the relevant anti-monopoly rules applied only to relations which influenced competition in commodity markets and were thus restricted in application; that they were aimed at protecting and restoring competition; and that the measures which could be imposed were not 'sanctions as such' but injunctions, together with confiscation of unlawful profit intended to provide pecuniary compensation for damage rather than punishment intended to deter re-offending.

66. Admittedly, in that decision the European Court of Human Rights also stressed that certain types of monopolistic behaviour may be authorised if proven to serve the common good (a possibility which is available under Article 85(3) EC, at least in theory, even for prohibited price-fixing and market-sharing agreements), whereas genuinely criminal behaviour is not usually subject to such utilitarian justification; and that freedom of market competition is a relative, situational value, encroachments on which are not inherently wrong in themselves. As regards the first of those considerations, however, I would point out – with all due respect to the European Court of Human Rights – that it is not difficult to find undeniably criminal conduct which can none the less be authorised in appropriate circumstances. The possession of firearms may be a criminal offence in general but authorised in certain situations for public protection; the sale of certain drugs may be a criminal offence in general but authorised

22 — It is not necessary to decide whether – as was queried at the hearing – that stigma is greater than the stigma attaching to tax evasion, although the mere fact that the point has been raised is not a flattering reflection of perceived business morality.

23 — I do not think it necessary to consider KME's submissions concerning the appreciable rise in the level of fines imposed by the Commission in recent years; it is not the severity of the penalty *actually* imposed which defines the nature of the offence but the range of penalties which *may be* imposed.

24 — The Guidelines speak of 'the objectives pursued in penalising infringements' and refer to setting the fine 'at a level which ensures that it has a sufficiently deterrent effect'.

25 — Decision of the Third Section of 3 June 2004 as to the admissibility of applications 69042/01, 69050/01, 69054/01, 69055/01, 69056/01 and 69058/01, *OOO Neste St Petersburg and Others v. Russia*.

for established medicinal purposes; and so on. And, as regards the second consideration, price-fixing and market-sharing have repercussions for the consumer, and thus for the general public, which go well beyond 'encroachment on freedom of competition' affecting the business community.

67. If the fining procedure in the present case thus falls within the criminal sphere for the purposes of the ECHR (and the Charter), I would none the less agree that, in the words of the judgment in *Jussila*, [26] it 'differ[s] from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency'. That implies, in particular, that it may be compatible with Article 6(1) ECHR for criminal penalties to be imposed, in the first instance, not by an 'independent and impartial tribunal established by law' but by an administrative or non-judicial body which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does comply with those requirements. [27] Put another way, it must be clear that the available forms of appeal make it possible to remedy any deficiencies in the proceedings at first instance. [28]

68. A good deal of criticism has been levelled at the Commission's triple role of investigator, prosecutor and decision-maker in competition law enforcement procedures, and KME has cited some of that criticism in its appeal. [29] However, while there may be cogent grounds for taking the view that the Commission is not, in that regard, an 'independent and impartial tribunal established by law', it seems to me that such considerations are, in reality, extraneous to the present appeal. KME's argument is not in fact based on the inadequacy of the procedure before the Commission, but on what it considers to be the inadequacy of the General Court's review of the outcome of that procedure. The fact that the Commission is an administrative body, and may not be able to separate entirely its three functions in the procedure, [30] is a given in the context of this appeal. The issue is whether the General Court exercised 'full jurisdiction'

26 — Cited in footnote 20 above, paragraph 43 of the judgment, citing *Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A, with particular regard to competition law.

27 — See also *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58.

28 — See *Belilos v. Switzerland*, 29 April 1988, § 68, Series A no. 132.

29 — KME cites, for example, D. Slater et al., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, GCLC Working Paper 04/08; and S. Wisking, *Does the European Commission Provide Parties with a Proper Opportunity to be Heard on the Level of Fines?*, GCP – The Online Magazine for Global Competition Policy (release June 2009(2)).

30 — Although it must be acknowledged that steps have been taken at various points in time to provide enhanced separation of the functions, perhaps the most notable example being the decision to appoint an independent hearing officer to preside over the hearing, rather than the director of the directorate leading the investigation, as had previously been the case (see the Commission's *11th Report on Competition Policy* (1981), point 26).

within the meaning of the case-law of the European Court of Human Rights. [31]

69. That Court has described 'full jurisdiction' in that sense as including 'the power to quash in all respects, on questions of fact and law, the decision of the body below'. A judicial body charged with review 'must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it.' [32] The same Court has also held that, in order to determine whether a second-tier tribunal has 'full jurisdiction', or provides 'sufficiency of review' to remedy a lack of independence at first instance, it is necessary to have regard to such factors as 'the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal'. [33]

70. It seems to me that there can be little doubt that the 'unlimited jurisdiction' conferred upon the General Court by Article 229 EC and Article 17 of Regulation No 17 meets those requirements as regards appeals against the amount of the fine imposed, even if it is, as the Commission submits, a different concept from the 'full jurisdiction' criterion of the European Court of Human Rights, which must be taken to cover also appeals against, for example, the actual finding of an infringement (which the General Court can and does also consider – albeit in a restricted way – if that is the basis of the case before it). Here, however, we are concerned solely with an appeal against the amount of a fine, and I do not propose to extend my analysis any further. In that context, unlimited jurisdiction to cancel, reduce or increase the amount, with no restriction as to the type of grounds (of fact or law) on which it can be exercised, must necessarily, in my view, provide the guarantee required by Article 6 ECHR – at least in theory.

71. The question may none the less arise whether, in any particular case, the General Court has in fact adequately exercised that jurisdiction, and it is just such a question which KME raises here.

72. It is a legitimate question, but its consideration must, in my view, be subject to a number of caveats, both general and particular, and the way in which it has been raised must be scrutinised in the light of certain of the Commission's criticisms.

31 — The same would be true even if the proceedings concerned a purely 'civil' dispute (see, for example, *Obermeier v. Austria*, 28 June 1990, §§ 67 and 70, Series A no. 179), which would include administrative law disputes.

32 — See *Valico S.r.l. v. Italy* (dec.), no. 70074/01, p. 20, ECHR 2006-III, and the case-law cited there.

33 — See *Crompton v. the United Kingdom*, no. 42509/05, § 71, 27 October 2009, and the case-law cited there.

73. First, I consider that what is of greatest importance is the way in which the General Court actually carried out its review, the way in which it described that review being less relevant. Thus, it cannot necessarily be concluded from references to the degree of discretion, choice or latitude available to the Commission that the General Court failed in its duty to assess, in response to KME's arguments, the way in which the fine was set. Nor, conversely, can it be concluded from the use of the words 'in the exercise of its unlimited jurisdiction' that that Court did indeed adequately exercise its powers of assessment. Each instance must be examined on the basis of its actual content.

74. A point which follows from that is that, whatever the extent of its jurisdiction, proceedings before the General Court are adversarial in nature. Nothing in Article 6 ECHR or the case-law of the European Court of Human Rights requires the 'independent and impartial tribunal' to investigate, of its own motion, matters which are not raised before it. Of course, this Court's own case-law requires certain matters of public policy (essentially concerned with procedural guarantees) to be raised in that way but, in other regards, the General Court's exercise of its unlimited jurisdiction must be measured against the content of the arguments on which it was asked to adjudicate.

75. None the less, I note that the General Court did request the Commission to produce a number of documents in its administrative file, and that the Commission produced well over 500 pages in response. That at least suggests a *thoroughness* of review sufficient to satisfy the requirements of the ECHR and the Charter. However, it remains to be verified, from the judgment itself, whether that review was *of the requisite kind*. In other words, was it confined to verifying that the Commission had not exceeded the bounds of its discretion, or was there also consideration (when called for by KME) of the assessment made within those bounds?

76. I turn now to two specific criticisms made by the Commission of the arguments advanced by KME.

77. A formal point which the Commission raised only at the hearing is that KME's application at first instance was explicitly stated to be pursuant to Article 230 EC, and not Article 229 EC. Consequently, the suggestion appeared to be, KME was not even asking the General Court to exercise its unlimited jurisdiction and was therefore not in a position to criticise its alleged failure to do so.

78. As such, that would not seem to me to be a serious suggestion. The reference to Article 230 EC is only in the heading to the application. The mere fact that KME sought a

reduction in its fine is enough to make it clear that it was on the General Court's unlimited jurisdiction with regard to penalties that it relied, rather than on a review of legality alone. Such a review, if favourable to the applicant, could have led only to annulment of the fine, leaving the Commission to impose a new fine in accordance with the grounds of the judgment. The application, however, insists throughout on a reduction of the fine, which the General Court could decide upon only on the basis of Article 229 EC and Article 17 of Regulation No 17.

79. On the other hand, it must be borne in mind that KME did not ask that Court specifically to reassess the fine *a novo*, but rather to adjust the amount in the light of alleged defects in the decision at issue.

80. The Commission's second criticism appears more serious. It points out, essentially, that, however well KME may have put the general case for an assiduous exercise by the General Court of its unlimited jurisdiction in cases such as the present, it has failed to identify a specific standard of review which should have been observed, or the passages of the judgment under appeal in which that standard was not observed.

81. Here, I agree with the Commission. KME's fifth ground of appeal is presented much more as a general critique of the whole EU competition law enforcement system and the role of the General Court within that system than as an identification of specific failures, in the judgment under appeal, on the part of that Court. It is, however, settled case-law that an appeal must indicate precisely the contested elements of the judgment under appeal and the legal arguments specifically advanced. [34]

82. Normally, a finding of such a defect in a ground of appeal would lead to its simply being dismissed as inadmissible. It seems to me, however, that such an approach might not be wholly appropriate in the present case. It is true that, as a self-standing submission, KME's fifth ground of appeal does not provide the Court with sufficiently precise indications to decide whether and to what extent the General Court may have specifically failed to perform an adequate review. None the less, it is an argument which can provide a further yardstick by which to assess the remaining grounds of appeal – as the Commission has, in fact, treated it in its response, examining it in the context of the second, third and fourth grounds of appeal.

83. I propose, therefore, to disregard the fifth ground of appeal as a separate submission but

34 — See, for a recent example, Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 24.

to bear the arguments put forward in mind when examining the first four grounds of appeal. In doing so, I shall none the less limit myself – as I have indicated above – to the ways in which the General Court in fact examined the pleas in law raised before it, the language it used in describing that examination being only one indication in that regard.

First ground of appeal: actual impact on the market

Relevant passages of the judgment under appeal

84. In its assessment of KME's first plea in law (failure to take proper account of the actual impact of the cartel on the market), the General Court first admitted as evidence three econometric studies submitted by KME, then made the following findings:

'60 … the applicants challenge both the Commission's assessment of the seriousness of the infringement (see paragraphs 12 and 13 above) and the differentiated treatment which it carried out on the basis of the market shares of the undertakings concerned (see paragraph 16 above).

61 Concerning, first, the differentiated treatment of the undertakings in question, the reasoning provided by the Commission in the contested decision on that subject refers in particular to a concern to take account of the "specific weight and therefore the real impact of the offending conduct of each undertaking on competition" (recital 322 of the contested decision). It should, however, be emphasised that, even without proof of actual impact of the infringement on the market, the Commission is entitled to carry out differentiated treatment, by reference to the shares held in the market concerned, such as that set out in recitals 326 to 329 of the contested decision.

62 The case-law shows that the market share of each of the undertakings concerned in the market which formed the subject-matter of a restrictive practice constitutes an objective factor which gives a fair measure of the responsibility of each of them as regards the potential harmfulness of that practice for the normal operation of competition (see, to that effect, 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, paragraph 197).

63 Similarly, concerning the assessment of the seriousness of the infringement, it should also be noted that, even if the Commission had not proved that the cartel had had an actual effect on the market, that would have been irrelevant to

the classification of the infringement as "very serious" and thus to the amount of the fine.

64 In that regard, it should be noted that the Community system of penalties for infringement of the competition rules, as established by Regulation No 17 and interpreted by the case-law, shows that, by reason of their very nature, cartels merit the severest fines. Their possible concrete impact on the market, particularly the question to what extent the restriction of competition resulted in a market price higher than would have obtained without the cartel, is not a decisive factor for determining the level of fines (see, to that effect, Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 129; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 68 to 77; Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraphs 129 and 130; *Tokai Carbon*, cited in paragraph 62 above, at paragraph 225; Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, I-9858, points 95 to 101).

65 Moreover, it follows from the Guidelines that agreements or concerted practices involving in particular, as in the present case, price-fixing and customer-sharing may be classified as "very serious" on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is supported by the fact that, whilst the description of "serious" infringements expressly mentions market impact and effects over extensive areas of the common market, the description of "very serious" infringements makes no mention of a requirement that there be an impact or that there be effects in a particular geographic area (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 150).

66 In any event, and for the sake of completeness, the Court considers that the Commission has demonstrated to a sufficient legal standard that the cartel did have an actual impact on the market concerned.

67 In that context, it should be emphasised that the applicants' premiss, to the effect that, if the Commission relied on concrete impact of the cartel in determining the amount of the fine, it was under a duty scientifically to demonstrate the existence of a tangible economic effect on the market and a link of cause and effect

between the impact and the infringement, has been rejected by the case-law.

68 The Court of First Instance has held on numerous occasions that actual impact of a cartel on the market must be regarded as sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market (see, in particular, *Scandinavian Airlines System*, cited in paragraph 36 above, at paragraph 122; Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraphs 159 to 161; Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 153 to 155; Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraphs 176 to 178; Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 73 to 75).

69 It should be noted in that regard that the applicants have not challenged the accuracy of the facts, set out in paragraph 13 above, on which the Commission relied in concluding that the cartel had an actual impact on the market, namely the fact that prices fell during periods when the collusive agreement was not strictly complied with and rose strongly in other periods, the implementation of a system for exchanging information concerning sales volumes and price levels, the major share of the market held by the cartel participants as a whole, and the fact that the respective market shares of the cartel participants remained relatively stable throughout the duration of the infringement. The applicants have merely argued that those facts were not capable of demonstrating that the infringement in question had an actual effect on the market.

70 On that point, however, the case-law shows that it is legitimate for the Commission to deduce, on the basis of the indicators referred to in the previous paragraph, that the infringement had an actual effect on the market (see, to that effect, *Jungbunzlauer*, paragraph 159; *Roquette Frères*, paragraph 78; T-59/02 *Archer Daniels Midland*, paragraph 165; T-329/01 *Archer Daniels Midland*, paragraph 181; and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 285 to 287).

71 As for the applicants' argument that the file contains examples of non-compliance with the collusive agreements, the fact that cartel members did not always comply with the agreements is not sufficient to exclude their having had a market impact (see, to that effect, *Groupe*

Danone, cited in paragraph 65 above, at paragraph 148).

72 Nor can this Court accept the arguments which the applicants make based on their own conduct. The actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must be taken only of effects resulting from the infringement taken as a whole (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 167). Nor can the Commission be blamed for finding, in recital 303 of the contested decision, that the initial report was not sufficient to refute the Commission's conclusions concerning the actual effects of the cartel on the market. The econometric analysis contained therein deals only with detailed figures relating to the applicants.

73 Therefore, having regard to the above considerations as a whole, this plea must be dismissed as unfounded.

74 The Court further considers, in the context of its unlimited jurisdiction and in the light of the above considerations, that there is no cause to call into question the assessment of the starting amount of the fine determined by reference to seriousness, as carried out by the Commission.'

Summary of the submissions

KME's appeal

85. KME contests the General Court's conclusion that the Commission had demonstrated to the required legal standard that the cartel had an impact on the market and could take such impact into account in determining the starting amount of the fine. The Guidelines required the Commission to take account of three elements, including the 'actual impact on the market, where this can be measured'. Consequently, it could take account of such actual impact only if, and in so far as, it could establish and quantify that impact. It should not have been allowed to have recourse – behind the shield of 'reasonable probability' established in *Roquette Frères* [35] – to assumptions enabling it to take market impact into account even where it could not establish the existence or extent of such impact in accordance with the Guidelines. Allowing

35 — Case T-322/01, cited in paragraph 68 of the judgment under appeal, paragraph 73.

recourse to such assumptions negates any possibility of differentiating between infringements on the basis of market impact. The case-law referred to at paragraphs 68 and 70 of the judgment under appeal is plainly wrong.

86. Moreover, if one cartel participant provides econometric evidence that the cartel as a whole did not have any impact on market prices, and the other participants make similar claims, the Commission should not be entitled to disregard that evidence to find that the infringement had such an impact – and to take that factor into account when setting the starting amount of a fine under the Guidelines – on the sole basis of indirect evidence such as that discussed at paragraph 69 of the judgment under appeal. In such a scenario the Commission should put forward direct evidence that the cartel did have a market impact.

87. The econometric evidence submitted by KME was based on comprehensive data drawn from all of its available invoice and customer information for over a decade, showing that (i) the cartel had no statistically significant impact on prices charged by KME and (ii) that analysis held good for the cartel as a whole. The lack of impact was confirmed by evidence in the case-file of non-compliance by the various participants. Finally, the lack of any harm for end users was confirmed by the fact that the tubes in question represented only around 2 % of the retail price of the final products in which they were incorporated.

88. As a matter of law, the Commission should have produced direct counter-evidence, based on objective economic factors pertaining to the relevant market and economic context, substantiating the existence and extent of the assumed market impact; it was not entitled to find that the cartel had a market impact on the sole basis of the indirect evidence relied upon in the decision at issue.

89. The judgment under appeal is also vitiated by an illogical and inadequate statement of reasons. The General Court, assessing the merits of KME's claim that the econometric evidence it provided demonstrated the absence of any market impact, (i) referred only to the initial report, according to which the cartel had no impact on KME's prices, thus (ii) failed to take account of the two subsequent reports, concluding that the cartel as a whole had no market impact; and (iii) ultimately rejected KME's claim on the ground that the econometric evidence did not show that the cartel as a whole had no market impact. In other words, the General Court, while admitting evidence showing a lack of

market impact, rejected KME's claim on the ground that it did not provide any such evidence – thus manifestly distorting the facts and evidence put before it.

90. Thus, by failing to recognise the errors in law committed by the Commission, the General Court violated EU law. KME therefore submits that the Court of Justice should redetermine the starting amount of the fine by excluding the market impact factor from the calculation.

Commission's response

91. The Commission contends, first, that the ground of appeal, being directed against inessential complementary reasoning, is inoperative.

92. The finding that the Commission had demonstrated to a sufficient legal standard that the cartel had an actual impact on the market was explicitly made purely for the sake of completeness. It is settled case-law that a judgment cannot be set aside on the basis of a challenge directed solely against such findings. The General Court held that each of the two elements of the decision at issue for which KME claimed the actual impact on the market was relevant were justified whether such impact could be established or not. It held, with respect to the differentiated treatment of the participating undertakings, that, even without proof of actual impact on the market, the Commission was entitled to differentiate by reference to market shares; and, with respect to the seriousness of the infringement, that, even if the Commission had not proved an actual effect on the market, that would have been irrelevant to the classification of the infringement as 'very serious' and thus to the amount of the fine. KME does not even mention either of those key findings of principle, which thus fall outside the scope of the appeal. Its criticisms of the additional finding, made for the sake of completeness, cannot result in the judgment under appeal being set aside.

93. Secondly, the Commission submits that the ground of appeal is inadmissible as contesting factual assessments.

94. KME merely argues that the General Court (i) wrongly found that the Commission was entitled to deduce an actual market impact from the evidence listed at paragraph 69 of its judgment; (ii) should have given greater weight at paragraph 71 to evidence which KME views as suggesting a lack of impact and non-compliance by cartel members; (iii) should have given greater weight

at paragraph 72 to the econometric studies which KME views as suggesting no statistically significant impact; and (iv) should have required 'direct evidence' of the existence and extent of any impact.

95. However, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence accepted by the General Court. It is for the latter alone to assess the value of the evidence, provided that it has been properly obtained and the relevant rules and principles have been observed. Unless the clear sense of the evidence has been distorted, that appraisal is not subject to review by the Court of Justice.

96. The evidence of actual impact relied on in the decision at issue, and the conclusions drawn from it, were debated in detail before the General Court, which summarised the evidence at paragraph 69 of its judgment, concluding at paragraph 70 that the Commission was entitled to deduce that the cartel had had an actual impact, and going on at paragraphs 71 and 72 to reject KME's arguments that other elements undermined that finding.

97. In addition, besides the fact that KME's arguments were based only on its own conduct, the econometric studies it produced were fundamentally undermined by a number of issues that were fully debated before the General Court. The General Court did not need to rule on those issues because it rejected KME's arguments in any event, but the Commission summarises them as follows.

98. The studies sought to draw conclusions about the impact of the cartel by comparing admittedly cartelised prices with prices in 'competitive' periods and/or countries. However, that included many areas for which there was direct evidence of cartel conduct. One price agreement involved specific increases for named countries and 8 % for 'any other not mentioned', suggesting that all KME's sales were cartelised and there were no 'competitive countries' available for comparison.

99. In any event, examination of the statistical calculations indicated that the claimed results were also consistent with the cartel having increased prices. KME's model could not exclude an average increase of 10.5 % per year and showed that KME Germany's prices increased by an average of 29.9 % per year

throughout the cartel. In other respects, the studies produced unusual results which KME could not explain.

100. Thus the General Court properly examined the evidence relied on in the decision at issue to establish an actual impact, and all of KME's arguments challenging that conclusion. On the basis of specific, credible and adequate evidence, going substantially beyond the fact that price agreements were implemented, the General Court concluded that an actual impact had been established.

101. Thirdly, the Commission submits that the General Court's findings were adequately reasoned.

102. KME's argument – that the General Court's reasoning was illogical and inadequate in finding that KME's econometric evidence did not show that the infringement as a whole had no market impact, referring to the initial report which related only to KME's prices but not mentioning the two additional reports which concerned the cartel as a whole – is based on a misreading of paragraph 72 of the judgment.

103. Before the General Court, KME argued that the studies carried out on its own prices proved that the cartel had no actual market impact. However, both the initial study (considered by the Commission in the decision at issue) and the two additional studies (presented before the General Court) related to KME's sales alone. At paragraph 72 of its judgment, the General Court rejected KME's argument in its sovereign appraisal of the facts and evidence, insisting that the conduct of a single undertaking was not relevant to assessing the impact of the cartel as a whole. There is no inconsistency in that logic.

104. The importance of examining the effect of the cartel as a whole is clear in the present case. At first instance, the Commission stressed that the cartel included customer allocation and a system under which, before customer visits, participants had to contact the market leader in each country to ask what quantity could be sold at what price. Data on KME's prices thus cannot justify conclusions about those of other cartel members – for example, where KME did not try to sell to customers because of the allocation arrangement. KME suggested that it cheated on the arrangements, but for its econometric studies to be informative in that respect, it would have had to prove cheating in relation

to every customer allocated to another participant. KME did not even attempt to do so before either the Commission or the General Court.

105. The final sentence of paragraph 72 of the judgment under appeal refers only to the initial report because KME argued that the decision at issue was wrong to reject the relevance of that report. The additional reports did not exist at the time of the decision at issue, and could not have been taken into account. The General Court clearly examined all three econometric studies to reach its findings on KME's arguments based on analysis of its prices. Those arguments were rejected for a reason common to all three studies – that they related to KME's prices alone.

Assessment

106. The first issue is whether the General Court's acceptance both of the Commission's assessment of the infringement as 'very serious' and of its consequent fixing of the starting amount of the fine can be justified by the nature of the infringement (a price-fixing and market-sharing cartel) alone, regardless of proof of actual market impact.

107. In the decision at issue, the Commission fixed the starting amount on the basis of its findings (a) that the infringement was 'very serious' because of (i) its nature, (ii) its impact on the market and (iii) the geographical size of that market and (b) that KME's market share was approximately three times greater than that of Outokumpu or of Wieland. It determined an overall starting amount of EUR 58.1 million – EUR 35 million for KME and EUR 11.55 million for each of the others.

108. KME argued at first instance that, both in assessing the seriousness of the infringement and in allocating the starting amount of the fine among the cartel participants, the Commission had failed to take actual market impact into account; it had reasoned simply that the existence of a market impact was established but could not be quantified and that the starting amount could validly be allocated on the basis of market share. KME contended, essentially, that the Commission was legally required to take actual market impact into account when it could be measured, that in this case it could be measured and that the econometric study submitted by KME showed that it was statistically insignificant; the overall starting amount should therefore have been set towards the lower end of the

appropriate scale (beginning at EUR 20 million for 'very serious' infringements).

109. The General Court took the view, at paragraph 63 of its judgment, that, 'even if the Commission had not proved that the cartel had had an actual effect on the market, that would have been irrelevant to the classification of the infringement as "very serious" and thus to the amount of the fine', with additional reasoning to similar effect in paragraphs 64 and 65.

110. Before this Court, KME's arguments are directed principally at the subsequent findings in paragraphs 66 to 72 of the judgment under appeal, in which the General Court found, '[i]n any event, and for the sake of completeness,' that the Commission had sufficiently demonstrated the cartel's actual impact on the market.

111. The Commission submits, therefore, that the ground of appeal is inoperative because KME has not challenged the key finding in paragraph 63; even if its arguments concerning actual market impact were upheld, the finding on the 'very serious' nature of the cartel would stand and the judgment could not be set aside in so far as it dismissed the first plea in law.

112. I can find no fault with that reasoning, but I do not think that the premiss, that KME has not challenged the key finding in paragraph 63, can necessarily be accepted.

113. It is certainly true that KME has not challenged the finding that the Commission was entitled to consider the infringement to be 'very serious' on the basis of its nature alone. Indeed, it points out (albeit in a footnote) that it had not taken issue with that point at first instance; it had argued rather that, in the light of the limited actual market impact of the cartel, the starting amount of the fine should have been set, overall, at the lower end of the scale for 'very serious' infringements – namely, according to the Guidelines, EUR 20 million – rather than at EUR 58.1 million. Viewed in that context, it seems to me, KME's first ground of appeal must be seen as necessarily (though not, admittedly, as explicitly as would have been desirable) calling into question the General Court's finding that, because the actual market impact was irrelevant for classifying the infringement as 'very serious', it was also irrelevant for determining the starting amount of the fine.

114. I agree, however, that if the findings in paragraphs 63 to 65 of the judgment under appeal are upheld, a challenge to the further findings in paragraphs 66 to 72, even if successful, would be to no avail. It is clear from the introductory words to paragraph 66 [36] that what followed was over and above what the General Court considered to be sufficient

36 — Which, even if they might give rise to some hesitation in English, are the equivalent of the unequivocal '[à] titre surabondant' in the French version in which the General Court drafted its judgment.

reasoning. Moreover, it is a matter of logic that if, 'by reason of their very nature, cartels merit the severest fines', regardless of their actual effect on market prices, and if the Commission relied on the existence rather than the precise degree of that effect when fixing the starting amount of the fine, then that amount cannot be called in question by seeking to prove that the effect was limited.

115. The Commission also argues that this ground of appeal is inadmissible because it challenges only assessments of fact by the General Court.

116. Here again, I am not entirely convinced. Several aspects of KME's argument do appear to be concerned with assessments of fact – in particular those set out in paragraphs 18 to 20 and 22 of the appeal, and points 87 and 89 above – but others are legal arguments directed at alleged inadequacies in the judgment under appeal (although, again, they could have been more adequately formulated). Essentially, KME argues that, faced with disagreement over the conclusions to be drawn from the available evidence, the General Court should not simply have allowed the Commission to rely on presumptions derived from 'evidence indicating with reasonable probability that the cartel had an impact on the market' but should have required it at least to satisfactorily rebut KME's counter-evidence. That argument must be seen, as I have explained at point 113 above, in the context of a challenge to the General Court's finding, not that the actual market impact was irrelevant for classifying the infringement as 'very serious', but that it was also irrelevant for determining the starting amount of the fine.

117. I would not, therefore, dismiss the first ground of appeal as inoperative, or as inadmissible in that it challenges only findings of fact.

118. On the other hand, in so far as it does raise issues of law, I do not propose that it should be upheld. The General Court's statement at paragraph 64 of its judgment, that the possible concrete impact of a cartel on the market is not a decisive factor for determining the level of fines, is amply supported by the case-law which it cites. [37] Such impact is merely one of numerous factors – not confined to the three enumerated in the Guidelines – which must be taken into account. To the extent that the Commission did, in the decision at issue, establish that there was

37 — I would refer in particular to the summaries at point 95 et seq. of Advocate General Mischo's Opinion in *Mo och Domsjö* v *Commission*, and paragraphs 129 and 130 of the judgment in *Dalmine* v *Commission*, both cited at paragraph 64 of the judgment under appeal, quoted in point 84 above.

some impact (a point which is not denied by KME), it could use that finding as one of the factors on which to base the calculation of the starting amount of the fine. And in so far as, in doing so, the Commission did not presume the degree of impact to be at any specific level – on the contrary, it proceeded on the explicit basis that the impact could not be quantified precisely [38] – it cannot be criticised for not having accurately identified that level, nor can the General Court be criticised for having accepted the Commission's approach.

119. I should like to add that, if undertakings choose to submit econometric studies to support their arguments, the Commission is of course required to have due regard to that evidence in its overall assessment. If, however, it does not accept the evidence in its entirety, it is not required to produce an econometric counter-study to prove the opposite.

120. It remains to be considered, as I indicated at point 83 above, whether the General Court's scrutiny of the plea in law may have failed to meet the standard required by the ECHR and the Charter.

38 — See, in particular, points 299 to 301 and 314 of the decision at issue.

121. In that regard, I note that KME does not appear to allege any such failure. None of the passages cited in the context of its fifth ground of appeal is taken from the relevant part of the General Court's judgment. Nor, indeed, does that part of the judgment use the type of wording to which KME particularly objects, namely a reference to the Commission's discretion.

122. It seems to me, moreover, that the General Court dealt with the first plea in law in accordance with the manner in which it was raised by KME.

123. KME's argument was based essentially on the contention that the Commission was bound, by the terms of its own Guidelines, either to measure the cartel's actual impact on the market and rely on that measurement or to refrain from relying on market impact at all. The General Court dealt with that argument, and also – although it considered it superfluous to do so – examined both the evidence available to the Commission and the subsequent econometric reports submitted by KME, concluding that the Commission's reference to and use of market impact when fixing the starting amount of the fine could not be criticised. Thus, even if other matters could have been raised – concerning, for example, the possible need to explain why the overall starting amount was EUR 58.1 million,

rather than EUR 20 million or EUR 100 million – they were not, and the General Court addressed the matters which were raised in a manner which in no way suggests that it was not exercising its full jurisdiction as required by the ECHR.

Second ground of appeal: size of the market

Relevant passages of the judgment under appeal

124. In the decision at issue, the Commission had calculated the size of the relevant market by including the cost of the copper used in manufacturing the tubes. KME argued at first instance that such a calculation ignored the reality of the market. In fact, the purchasers of the tubes themselves determine the price of the copper to be used and that price, accounting for about two thirds of the final price of the tubes, is merely passed on to them. The real economic weight of the market was confined to the processing margin, about one third of the value of EUR 288 million used in the decision at issue.

125. At paragraphs 86 to 89 of its judgment, the General Court noted that the Commission was entitled, but not required, to refer to the size of the market when determining the gravity of the infringement for the purpose of fixing the starting amount of the fine; that in this case it had done so, albeit as only one of the factors taken into account; and that it was therefore necessary to consider whether the Commission was wrong to take account of the copper price in that regard. The General Court's conclusion is in paragraphs 91 to 94:

'91 … 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.

92 ... regarding the applicants' various claims seeking to argue that, instead of using the criterion of the turnover of the relevant market, it would be more appropriate, having regard to the deterrent purpose of fines and the principle of equal treatment, to fix their amount by reference to the profitability of the sector affected or the added value relating thereto, the Court finds that they are irrelevant. First, the seriousness of the infringement is determined by reference to several factors, in respect of which the Commission has a discretion (Joined Cases T-101/05 and T-111/05 *BASF* v *Commission* [2007] ECR II-4949, paragraph 65), no binding or exhaustive list of criteria having to be taken into account in that regard having been drawn up (*Dalmine*, cited in paragraph 64 above, at paragraph 129), it is not for the Community Court but for the Commission to choose, within the framework of its discretion and in accordance with the limits which follow from the equal treatment principle and Regulation No 17, the factors and the detailed figures which it will take into account in order to implement a policy which ensures compliance with the prohibitions laid down by Article 81 EC.

93 It is undeniable that, as a factor for assessing the seriousness of the infringement, the turnover of an undertaking [or] of a market is necessarily vague and imperfect. It does not make a distinction either between sectors with a high added value and those with a low added value, or between undertakings which are profitable and those which are less so. However, despite its approximate nature, turnover is currently considered, by the Community legislature, the Commission and the Court, as an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned (see, in particular, *Musique diffusion française*, cited in paragraph 64 above, at paragraph 121; Article 15(2) of Regulation No 17; recital 10 and Articles 14 and 15 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)).

94 Having regard to all of the above, the Court finds that the Commission was right to take the copper price into account for the purposes of determining the size of the market concerned.'

Summary of the submissions

KME's appeal

126. KME considers that its account of the characteristics of the relevant market, not having been contested in the judgment under appeal, must be regarded as established facts for the purposes of the appeal. It submits however that the General Court erred in law and gave an inadequate statement of reasons by not acknowledging that the Commission is entitled to interpret 'turnover' as net turnover when calculating market value.

127. First, the case-law and the Commission's practice show that, in calculating the starting amount of a fine, the Commission must take account of the specific features of the market or undertaking concerned. The Courts have held that it may depart from its general practice of basing its calculation on turnover during the last full year of the infringement, if that year is not representative of the undertaking's true size and economic power and of the scale of the infringement. With respect to the calculation of the maximum fine, the Court of Justice has held that, in each specific case, and having regard both to the context and to the objectives of the scheme of fines, the Commission must assess the intended impact on the undertaking in question, taking account in particular of a turnover which reflects the undertaking's real economic situation during the infringement. In recent practice, the Commission has often relied on the possibility in the Guidelines of departing from the rule of using sales during the last full business year of participation in the infringement where such departure is warranted by the specific facts of the case or other external factors. And the General Court has held that the Commission may base its assessment of effective economic capacity to cause significant damage on data relating to turnover and market share, unless particular circumstances, such as the characteristics of the market, appreciably diminish the significance of such data and require other factors to be taken into account.

128. Secondly, the fact that the copper price depends solely on the customer's decision to buy on a certain day makes the copper tube industry unique and unsuitable for comparison with other industries, just as copper cannot be compared with other inputs – such as energy, water and equipment – whose prices are contractually determined between the manufacturer and the relevant provider. Yet the General Court wrongly concluded that there was no valid reason to exclude copper price from the size of the market affected by a cartel for fine calculation purposes. In doing so, it also infringed the principles of

non-discrimination – under which different situations must be treated differently – and proportionality. In the latter regard, KME's fine represented approximately 2 % of its total worldwide turnover in 2002, 40 % of its EEA turnover in the industrial tube market on the basis of the full price including copper, 80 % of its conversion turnover in that market, 42 % of its consolidated gross operating profit in 2003 and 16 % of its consolidated net worth in June 2003.

129. Thirdly, if the Commission had fined KME for a cartel in the same market, ceasing in 2007, and had calculated the market value on the basis of full turnover for that year, the starting amount of the fine would have been much higher simply because of the enormous increase in copper prices between 2003 and 2007.

130. Fourthly, the General Court wrongly relied upon its *Cimenteries CBR* judgment: [39] in that case, the relevant input costs, such as costs for transport and the supply of bags, were under the cartel members' control, whereas here the copper price was not under the tube manufacturers' control. It further wrongly relied on the case-law according the Commission discretion in choosing the factors it uses to establish the gravity of an infringement including, as a general rule, turnover, since full-price turnover is not a meaningful indicator of the gravity of an infringement in the industrial tube market. The Commission's discretion in choosing those factors cannot extend to relying on elements that, in the light of the special features of the economic context, have no bearing on the gravity of the infringement. In its judgment the General Court failed to scrutinise whether the criteria used by the Commission were pertinent and adequate.

39 — Cited in paragraph 91 of the judgment under appeal.

Commission's response

131. The Commission submits that KME's assertions about how copper prices are determined and the way in which industrial tubes are sold are not established facts for the purpose of the appeal. The General Court did not need to rule on those details. Its findings do not support KME's characterisation of the cartel members as purchasing agents of the metal and the Commission specifically argued at first instance that, for the reasons ultimately adopted in the judgment under appeal, KME's assertions that it often acted as agent for its customers were irrelevant. As the Commission explained, wherever the customer actually bought the copper and asked KME to convert it, the metal price would not

be included in KME's turnover. In any event, the General Court's findings on the size of the industrial tubes market are incompatible with the suggestion that industrial tube manufacturers simultaneously made sales on a competitive copper market and a cartelised conversion market; there is only one market – for industrial tubes.

132. The General Court rejected KME's claim that the industrial tubes market is unique by reason of a lack of control over input prices, without needing to make findings on KME's detailed allegations. It held at paragraph 91 of its judgment that there was no valid reason to require market turnover to exclude certain production costs, and found as a fact that all industries have costs inherent in the final product which the manufacturer cannot control but which are nevertheless an essential element of its business as a whole. Those costs cannot be excluded from turnover when fixing the starting amount of a fine. The fact that the price of copper forms an important part of the final price of industrial tubes or that the risk of fluctuation in copper prices is higher than for other raw materials does not invalidate that conclusion.

133. This ground of appeal merely asks the Court of Justice to make a different appraisal of whether the industrial tubes industry is unique. KME repeats its allegations at first instance about the contractual rights of customers in relation to the copper price, the size of the copper price relative to the overall price of the tube, and the volatility of copper prices. Not only is such an argument inadmissible, but nothing in fact distinguishes industrial tube manufacturers from other manufacturers buying raw materials, utilities or equipment. No non-dominant undertaking can control the price of input products. Any contracts are the result of the manufacturers' own choice – with here the benefit of passing the risk of copper price fluctuations on to the customer.

134. At paragraph 93, the General Court recognised that, as a factor for assessing the seriousness of the infringement, the turnover of an undertaking on a market is necessarily vague and imperfect. It accepted that turnover does not distinguish between sectors with high or low added value or between

undertakings which are more or less profitable. Its appraisal was none the less that turnover is an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned. KME's arguments, by contrast, merely invite the Court of Justice to disagree with the General Court's appraisal in this respect. That appraisal was balanced, after much debate in the written pleadings and at the hearing, and preferred the objectivity of turnover to the potential for endless controversy, subjectivity and unpredictability that would be implied by KME's proposal for the deduction of costs that cartelists do not control.

135. The General Court's appraisal was correct. In particular, the Court of Justice should resist KME's suggestion that it should reassess the fine on the basis of figures relating to either 2002 or 2003. Such arguments have their place only before the General Court.

excluding production costs', that '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', and that '[t]he 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'. At paragraph 93, it affirmatively concluded that 'despite its approximate nature, turnover is currently considered, by the Community legislature, the Commission and the Court [of Justice], as an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned'. Finally, at paragraph 94, the General Court stated: 'Having regard to all of the above, the Court finds that the Commission was right...'.

Assessment

136. As regards the adequacy of the General Court's scrutiny, the Commission notes that (in the context of its fifth ground of appeal, but with reference to the treatment of its second plea in law at first instance) KME cites paragraph 92 of the judgment under appeal, in which the General Court referred to the Commission's discretion. However, at paragraph 91, that Court found affirmatively that 'there is no valid reason to require that the turnover of a relevant market be calculated

137. The underlying issue here is whether, when using market size (that is to say, volume of sales rather than geographical extent) as one of the criteria by which it assesses the gravity of an infringement, the Commission

should refer in every case to full prices or whether it may refer only to that part of the price on which the offenders could exercise an influence.

138. KME's submission is not that market size should never be taken into account, nor that it is always wrong to refer to full prices, but that the copper tubes market has specific features which make it wrong to do so in this case. It therefore considers that the General Court erred in law and gave an inadequate statement of reasons in finding that gross turnover was a valid yardstick of market size.

139. The Commission is in my view right to argue that KME is to a considerable extent asking this Court to make findings of fact as to the characteristics of the market, which it is not competent to do in an appeal. The General Court found as facts only that 'the price of copper constitutes an important part of the final price of industrial tubes' and 'the risk of fluctuations of copper prices is far higher than for other raw materials'. KME has not alleged that, in so finding, that Court distorted the clear sense of the evidence. It is therefore on that factual basis that it must be assessed whether the General Court erred in law or gave inadequate reasoning.

140. The General Court made, essentially, four findings to underpin its conclusion in law: the size of any market, measured in terms of volume of sales, will include some costs which manufacturers cannot control; the features of the industrial copper tubes market are not exceptional in that regard; the Commission has a certain freedom to choose the factors which it takes into account; and gross turnover is an accepted, albeit imperfect, guide to the size and economic power of undertakings.

141. I can find no shortcomings in that reasoning. It is true that the *Cimenteries CBR* case, to which the General Court referred, involved ancillary costs which were no doubt less significant than the price of copper in the present case, but the difference in degree does not preclude a development of the existing case-law to cover more significant costs. It seems, moreover, inevitable that the proportion of turnover accounted for by raw materials will vary significantly from one sector to another. If it were permissible to take gross turnover into account in some cases but not permissible to do so in others, it would be necessary to establish some threshold, probably in the form of a ratio between net and gross turnover, which would trigger the difference in treatment. Yet such a threshold

would be very difficult to apply and would give scope for endless and insoluble disputes, including allegations of unequal treatment. It must be remembered, moreover, that no direct, mathematical link between the size of the market and the overall starting amount of the fines is apparent from the decision at issue, and the General Court itself found that market size was only one of the factors used by the Commission. In those circumstances, it does not seem unreasonable to accept that the Commission can rely on an 'approximate' – but readily usable – yardstick to measure market size, as one of a combination of criteria used to determine the gravity of an infringement. In any event, KME has put forward no adequate reason for concluding that the General Court *erred in law* in reaching the view that the Commission could do so.

142. I turn now to the question whether the General Court's scrutiny of the second plea at first instance was adequate in the light of the case-law of the European Court of Human Rights.

143. First of all, it is true that the General Court stated, in its reasoning, that 'the seriousness of the infringement is determined by reference to several factors, in respect of which the Commission has a discretion' and that 'it is not for the Community Court but for the Commission to choose, within the framework of its discretion … the factors and the detailed figures which it will take into account'. KME has relied on at least the first of those passages to allege, in the context of its fifth ground of appeal, that the General Court showed 'excessive deference' to the Commission's discretion.

144. However, it is clear from the second ground of appeal, in which KME asserts that "the Commission's discretion in choosing the factors to use to determine the gravity of a cartel cannot extend to the point of relying on elements that, in light of the special features of the economic context, do not have any bearing on the gravity of the infringement', that KME in fact accepts the existence of that discretion, merely disagreeing with the General Court as to its extent. That, it seems to me, cannot form an adequate basis on which to claim that the General Court failed to exercise full jurisdiction in reviewing the decision at issue.

145. It is also true that the General Court's relevant findings, in paragraphs 91 to 93 of its judgment, are brief. That does not necessarily imply, however, that they reflect a failure to examine the arguments carefully. On the contrary, it is clear from the lengthy exposition of KME's arguments (paragraphs 75 to 82), and from the dismissal (at paragraph 88) of the Commission's argument that the size of the market was of no relevance to the amount of

the fine, that the second plea in law was carefully scrutinised. The General Court's findings are fully consistent with the conclusion that it reached its own view on the appropriateness of including copper prices when assessing market size for the purpose of determining the gravity of the infringement, and KME has not, in my view, put forward any convincing argument to call such a conclusion into question.

Third ground of appeal: percentage increase on account of duration

Relevant passages of the judgment under appeal

146. At first instance, KME argued in its third plea that, if the Guidelines allow an increase of *up to* 10% per year (thus, between 0% and 10%) on account of the duration of the infringement, the Commission should have adjusted that increase to take account of the variable intensity of the cartel throughout its duration and its lack of impact on prices, rather than applying a flat-rate increase of the maximum of '10% for every year of the duration, i.e. by a total of 125%'. The General Court dismissed that plea as unfounded. It found, at paragraphs 100 to 104 of the judgment under appeal, that:

'100 … an increase in the amount of the fine by reference to duration is not limited to the hypothesis in which there is a direct relation between the duration and [increased [40]] damage to the Community objectives pursued by the competition rules (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 278 and case-law cited).

101 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.

102 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

40 — See footnote 43 below.

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.

103 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 36 above), the uplift which it intends to apply in respect of the duration of the infringement.

104 In this case the Commission stated, notably in recitals 335 and 340 of the contested decision, that the KME Group 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.'

Summary of the submissions

KME's appeal

147. KME submits that the General Court's reasoning is obscure, illogical and inadequate, as it lays down no clear rule.

148. The interpretation and application of Section 1 B of the Guidelines have often been discussed in the case-law – which, however, fails to articulate the criteria on the basis of which, for an infringement of over 5 years, the Commission must adjust the starting amount of the fine within a range of 0% to 10% per year of infringement. It seems merely to say that an increase on account of duration is not limited to cases showing a direct relationship between the duration and more

serious damage to the Community objectives pursued by the competition rules – in other words, the starting amount can be increased on account of duration even where damage to the objectives pursued by the competition rules, is not aggravated as a direct effect of this factor, or is missing altogether. That approach must be wrong.

149. First, it contradicts the clear language of Section 1 B, which speaks of imposing effective sanctions on restrictions 'which have had a harmful impact on consumers over a long period'. The Commission itself thus established the requirement of a direct link between duration and harmful effect, the existence of which has long been recognised in the case-law. The General Court has held that, where the Commission determines the starting amount according to gravity having regard to actual market impact, that impact must be 'fully demonstrated throughout the period of the cartel', failing which the starting amount must be reduced. [41]

150. Secondly, by stating that the Commission has not established any overlap or interdependence between assessment of the gravity and that of the duration of the infringement in the Guidelines, the General Court accepted the Commission's argument that the amount of the increase on account of duration reflects only the duration of the infringement, not its gravity, so that any relevant factors concerning the intensity of the infringement are already taken into account when its gravity is assessed. However, the General Court failed to enquire whether the Commission, in assessing gravity, did give proper weight to the fact that the cartel varied in intensity and effectiveness over time and that there were significant periods of tension and deviation. Instead of accepting the Commission's statement that it wished to avoid counting the same factors twice to the cartel members' benefit, the General Court should have scrutinised whether that was really the case in the decision at issue. In fact the Commission twice failed to take account of the variations in intensity, including two periods of dormancy: once when determining the starting amount on account of gravity and again when determining the increase on account of duration.

151. Thirdly, the General Court was logically wrong in concluding that the 10 % per year increase was consistent with the principles set out in the Guidelines, simply because the Guidelines provide for an increase of up to 10 % per year. That would have been correct if they had envisaged an increase *of*

41 — Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 247 and 254.

(rather than *up to*) 10 %. However, the Commission's discretion to fix sanctions between a maximum and a minimum value is not unfettered, so that it must explain its choice by reference to the features of each case, subject to review by the Courts. Application of the maximum increase should not have been approved by the General Court without assessing first how the Commission exercised its discretion.

152. Finally, the General Court was also wrong in finding the increase of 125 % in the starting amount not to be manifestly disproportionate. The Commission admitted in the decision at issue that the cartel varied in intensity and effectiveness and that there were significant periods of tension and deviation, yet applied the maximum increase on account of duration. KME would thus have been treated in the same way even if the cartel had maintained full intensity and effectiveness throughout. By failing to recognise and give weight to that reality, and to correct the Commission's determination of the increase, the General Court violated the principles of proportionality and equal treatment.

153. KME therefore considers that the judgment under appeal should be set aside in that regard and that the Court of Justice should exercise its unlimited jurisdiction to fix an appropriate lower percentage increase on account of duration, redetermining the starting amount, and thus the total amount, of the fine.

Commission's response

154. The Commission contends that the General Court determined that it was not obliged to fix the increase on account of duration by reference to the intensity or effects of the cartel, or the seriousness of the infringement. KME's ground of appeal merely disagrees with that appraisal and asks the Court of Justice to substitute its own appraisal; it is thus inadmissible.

155. The General Court provided a clear and logical explanation for its appraisal, which responded to all KME's legal arguments. It held that an increase on account of duration is not limited to cases in which there is a direct relation between the duration and increased damage to the Community objectives pursued by the competition rules. It then explained that the Guidelines do not establish any overlap or interdependence between the assessments of

gravity and of duration. Rather, they establish four distinct steps. The Commission must:

(a) assess the seriousness of the infringement as such in order to fix the starting amount;

(b) analyse the seriousness of the infringement in relation to the characteristics of each undertaking, which may give rise to a weighting of the starting amount;

(c) take account of the duration of the infringement for fixing the basic amount; and

(d) consider aggravating and attenuating circumstances allowing the fine to be adjusted.

156. Thus the seriousness of the infringement or the intensity or effects of the cartel are not necessarily part of the uplift for duration in the third step. Since KME's arguments that the uplift should have been lower than 10 % per year were based entirely on those elements, they were unfounded. None the less, the General Court judged that the resulting 125 % increase was not obviously disproportionate.

157. KME now argues that that appraisal was unfair and that the Court of Justice should substitute its own appraisal. However, '... in an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the [General Court] took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct... and, second, to consider whether the [General Court] responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced... Concerning the allegedly disproportionate nature of the fine, … it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the [General Court] exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of [EU] law'. [42]

158. KME's third ground of appeal is therefore inadmissible. Moreover, for the reasons given by the General Court, it is unfounded.

42 — Case C-359/01 P *British Sugar* v *Commission* [2004] ECR 1-4933, paragraphs 47 and 48.

159. As regards the adequacy of the General Court's scrutiny, the Commission notes that (in the context of its fifth ground of appeal, but with reference to the treatment of its third plea in law at first instance) KME cites paragraph 103 of the judgment, in which the General Court refers, in the context of the Guidelines, to the Commission's discretion regarding the uplift to apply in respect of the duration of an infringement. However, at paragraph 100, the General Court had already made the affirmative finding of principle that 'an increase in the amount of the fine by reference to duration is not limited to the hypothesis in which there is a direct relation between the duration and [increased [43]] damage to the Community objectives pursued by the competition rules'. With respect to KME's argument that the Commission had limited itself in this respect by adopting the Guidelines, in paragraph 102 the General Court explained the system of those Guidelines and, in paragraph 103, it made the affirmative conclusion that '[i]t 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 … the uplift which it intends to apply in respect of the duration of the infringement'. Thus the General Court considered KME's argument that the Commission had bound itself in a particular way by adopting the Guidelines and affirmatively concluded that it had not.

Assessment

160. An unexpected feature of the present ground of appeal (and of the corresponding plea at first instance, and even of the relevant part of the decision at issue) is that the whole issue turns out to be based entirely on an elementary arithmetical error which is apparent from the judgment under appeal, even though it appears to have escaped the attention of all concerned.

161. KME's complaint from the outset has been that its fine was increased by 125 %, a proportion which it considers excessive, on account of the duration of the infringement. The Commission has not challenged that premiss in any way (which is no doubt why it was accepted without question by the General Court) and seems even to have been under the impression that it did increase KME's fine by 125 % in the decision at issue. Yet it did not.

162. The fact that the increase was considerably less is apparent without recourse to complex calculation. If a sum is increased by 100 %, it is doubled; therefore, if it is increased by 125 %, it is more than doubled. However, if we compare the overall figures given for the

43 — The English version of the judgment under appeal reads "acute" here, but the French version (in which the judgment was originally drafted) reads "accru" – that is to say, "increased". In previous case-law, "accru" has been translated as "serious". Perhaps "aggravated" would be a better translation.

whole KME group in paragraphs 17 and 19 of the judgment under appeal (EUR 35 million and EUR 56.88 million respectively), [44] we can see that the increase detailed in paragraph 19 led to the starting amount being less than doubled. In fact, the true increase was 62.5 %, [45] just half that which has been asserted, assumed or accepted throughout the proceedings. In effect, the Commission treated KME's conduct as participation in two separate infringements, one of seven years and one of five and a half years, leading to a lower overall increase for duration than in the case of Outokumpu and Wieland, even though the conduct lasted for at least 12 years and 10 months for all the participants. [46]

163. It is a matter for concern that such a discrepancy of nearly EUR 22 million [47] should go unnoticed. Perhaps KME's accountants did not check the calculations in the decision at issue, or saw no occasion to draw attention to the matter, and its lawyers may have lacked the relevant numeracy skills or have omitted to check the orders of magnitude involved in the way that I have described in the preceding point. Perhaps also the figures were never checked by the Commission, whether at the stage of calculating the fine or during the Court proceedings. If (as seems unlikely) the intention was indeed to apply an overall increase of 62.5 %, it would seem at least that there was no communication within the Commission between those responsible for setting the fine and those responsible for defending the case brought by KME.

44 — See point 26 above.

45 — More accurately, it was very slightly over 62.5 % because, after performing its calculations, the Commission rounded the resulting figure up from EUR 56.875 million to EUR 56.88 million; however, there was a compensatory rounding down at a later stage when a 30 % reduction was applied. The amounts with which the Commission worked in the decision at issue appear to be all rounded to the nearest EUR 10 000.

46 — Because the KME Group was formed as such only in 1995 (although its constituent entities participated in the cartel throughout the whole period), the Commission divided the overall fine into two equal parts: one, for the period from 1988 to 1995, further subdivided among the various entities; the other, for the period from 1995 to 2001, for the group as a whole. To the first part the Commission applied an increase of 70 % and to the second part an increase of 55 % – making, it appears to have believed, a total of 125 %, which was the increase it did apply to the starting amounts for Outokumpu and Wieland (see footnote 16 above). In fact, however, when half of an amount is increased by one percentage and the other half by a different percentage, the total amount is increased not by the sum, but by the average, of the two percentages. This becomes more clearly apparent if we imagine each half being increased by the same percentage – say 55 % in each case; the overall increase clearly remains 55 %, not 110 %.

47 — If the starting amount of EUR 35 million had been increased by 125 %, the result would have been EUR 78.75 million, EUR 21.87 million more than the actual total of EUR 56.88 million.

164. In any event, the net result seems to be that, while the fines for Outokumpu and Wieland were indeed increased by 125 % (a cumulative total of slightly under 10 % per year of infringement) at that stage of the calculation, the fines for KME were increased only by 62.5 % (slightly under 5 % per year), even though it had participated in the cartel, either as a group or as different companies, for the same length of time. [48] That exposes what appears to be a defect in the decision at issue which, if it had been noticed, could have been challenged by Outokumpu or Wieland or might have led the General Court to increase the fine on KME.

165. The question is, however: how does this affect the present ground of appeal?

166. It appears, in my view, to render the ground inoperative. Indeed, it seems to render the original plea at first instance inoperative, and the Commission's arguments, together with the findings of the General Court, irrelevant. KME's argument is that the Commission should not have applied the maximum increase of 10 % per year of infringement in respect of a presumed duration of (rather over) 12 and a half years, resulting in an overall increase of 125 %. The Commission did not do so, and there the matter should rest.

167. In theory, it is true, it would be possible to address separately the question whether the Commission should have applied the maximum increase of 10 % per year in the way that it did, resulting in an overall increase of 62.5 %. However, both the General Court's reasoning and KME's argument on appeal are predicated on the assumption that the overall increase was 125 %. It would be pure speculation to address the issue in the light of what that reasoning and that argument might have been if the true increase had been considered.

168. It might be said that the General Court's failure to notice the discrepancy supported KME's contention that the level of judicial review was inadequate. However, the General Court did no more than base its judgment on a premiss which was accepted by both parties. If, moreover, that Court had ascertained that the premiss was erroneous, the result could not have been favourable to KME – which

48 — By my calculation, if KME's fine had undergone the same increase, its total fine after the subsequent reduction of 30 % would have amounted to EUR 55.125 million (35 + 125 % = 78.75; 78.75 – 30 % = 55.125) rather than EUR 39.81 million. That total could then have been apportioned, to the extent necessary, according to the ratio 7:5.5, representing the two periods from 1988 to 1995 and 1995 to 2001.

cannot, therefore, claim that its rights were in any way adversely affected.

Fourth ground of appeal: reduction of the fine on account of cooperation

Relevant passages of the judgment under appeal

169. In the decision at issue, the Commission reduced Outokumpu's fine to take account of the fact that it had provided evidence enabling the duration of the infringement to be established as 12 years and 10 months, rather than just four years. The reduction put Outokumpu in the same position as if the increase for duration had been only 40 % rather than 125 %.

170. In the fourth limb of its fourth plea in law at first instance, KME argued that, contrary to the Guidelines and the principles of fairness and equal treatment, the Commission did not take adequate account of its contribution to establishing the overall duration of the infringement. Having been the first to provide the Commission with decisive evidence (as opposed to mere information) for two periods of the infringement (May 1988 to November 1992 and May 1998 to the end of 1999), KME should have benefited from a reduction in its fine for those periods, in the same way as Outokumpu's fine was reduced.

171. The General Court dismissed that argument at paragraphs 123 to 133 of its judgment:

'123 … it should first be noted that, pursuant to the 1996 Leniency Notice, neither Outokumpu nor the applicants could benefit from a reduction higher than 50 % of the final amount of the fines imposed upon them, since they did not denounce the infringement to the Commission before the latter carried out checks giving it sufficient reason to initiate the infringement proceedings which led to the contested decision.

124 It is also undisputed that it was by a memorandum of Outokumpu dated 30 May 2001 that the Commission was informed, for the first time, of the total duration of the cartel. On the strength of information previously provided by Mueller Industries, the Commission was able to prove only the existence of an infringement from May 1994 to May

1998. Nevertheless, the applicants maintain that it was thanks to the information which they communicated to the Commission in October 2002 that the latter was definitively able to prove the existence of the cartel for the periods from May 1988 to November 1992 and from May 1998 until the end of 1999.

125 In establishing the additional duration of the infringement, the Commission was able to increase the starting amounts of the fines imposed on the offenders by 125 % instead of 40 %, pursuant to Section 1 B of the Guidelines. Therefore, the undertakings which supplied the Commission with the information on the additional duration of the cartel ran the risk of seeing the starting amount of their fines increased by 85 additional percentage points.

126 That is a paradox inherent in the 1996 Leniency Notice, in the sense that an undertaking falling under Section D of that notice which supplies new information to the Commission runs the risk of being fined more severely than in a case where it does not send that information to the Commission. The sixth indent of Section 3 of the Guidelines, according to which "effective cooperation by the undertaking in the proceedings, outside the scope of [the 1996 Leniency Notice]" may constitute an attenuating circumstance, allows a remedy for that paradox.

127 In this case, by applying, without mentioning it, the sixth indent of Section 3 of the Guidelines, the Commission, de facto, granted immunity to Outokumpu as regards the additional duration of the cartel, of which it was unaware before receiving its memorandum of 30 May 2001 (recital 386 of the contested decision).

128 It therefore needs to be verified whether the Commission was required, either pursuant to the sixth indent of Section 3 of the Guidelines, or in accordance with the principle of equal treatment, also to grant a reduction to the applicants for the information which they supplied to the Commission, more than 16 months after Outokumpu, concerning the periods from 1988 to 1992 and from 1998 to 1999.

129 In that regard, it should be noted at the outset that the Commission has a discretion as regards the application of attenuating circumstances (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 307).

130 Moreover, it is inherent in the logic of immunity from fines that only one of the cartel members can have the benefit, given that the effect being sought is to create a climate of uncertainty within cartels by encouraging their denunciation to the Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from being fined by denouncing the other participants in the infringement, thereby exposing them to the risk that they face more severe fines.

131 In a situation such as that in this case, in which the Commission knows that a cartel exists but does not have certain essential information capable of establishing the total duration of that infringement, it is particularly desirable to have recourse to such a mechanism, particularly in order to prevent the offenders from coming to an agreement to hide that information.

132 Such a situation is distinct from that in which the Commission is already aware of evidence, but is seeking to complete it. In that latter case, the granting of a fine reduction to the offenders rather than immunity from fining to a single undertaking, is justified by the fact that the aim is no longer to reveal a fact likely to lead to an increase in the fine imposed, but to assemble as much evidence as possible in order to reinforce the Commission's ability to establish the facts in question.

133 As regards the alleged unequal treatment between Outokumpu and the applicants, it is sufficient to note that they were not in a comparable position, given that the former supplied to the Commission, more than a year before the applicants, the information relating to the additional eight and a half years' duration of the cartel.'

Summary of the submissions

KME's appeal

172. KME remarks that the attenuating circumstance of 'cooperation outside the Leniency Notice' fills a gap in the 1996 Leniency Notice – remedied in 2002 – by ensuring that a company which provides the Commission with evidence of facts previously unknown to

it, relating to the gravity and/or duration of the infringement, is not fined more severely than if it had not done so. Such a company is granted partial immunity in relation to aspects of the infringement previously unknown to the Commission, which it allowed the Commission to establish. By definition, only one company can benefit. Since KME did not call that principle into question, it was on the basis of a misinterpretation of its claim that the General Court verified whether the Commission was required 'also to grant a reduction to the applicants for the information which they supplied to the Commission, more than 16 months after Outokumpu, concerning the periods from 1988 to 1992 and from 1998 to 1999'.

173. KME submits that there are two possible alternative tests for the application of this attenuating circumstance: it applies to the first company which provides the Commission (a) with *information* or (b) with *evidence* previously unknown to it having a bearing on the gravity or duration of an infringement. It considers that the second test is the correct one, and that the General Court wrongly applied the first test in assessing which of the two cooperating cartel members – KME or Outokumpu – qualified to benefit. It bases its view on the following considerations:

(i) the corresponding provisions of the 2002 and 2006 Leniency Notices [49] both clearly indicate that only an undertaking which submits evidence (and not merely information) to the Commission can benefit from partial immunity;

(ii) the Commission did not innovate in its fining policy following the 2002 and 2006 Leniency Notices, and should thus not interpret 'cooperation outside the Leniency Notice' in the 1996 Notice in a manner inconsistent with the 2006 Notice;

(iii) according to the 2002 and 2006 Leniency Notices, the fact that the Commission may have some knowledge of cartel activity does not prevent a leniency applicant from being granted full immunity from fines even where such knowledge is sufficient to carry out an on-site inspection (but insufficient to establish an infringement); similarly, the fact that the Commission may have some knowledge of anticompetitive conduct over a certain period – including as a result of unsubstantiated *information* provided by a cartel participant – should not prevent a leniency applicant from being granted

49 — See footnote 13 above.

partial immunity if it subsequently provides adequate *evidence* of such conduct allowing the Commission to establish the cartel for that period;

(iv) finally, undertakings would be much more reluctant to cooperate with the Commission if they feared being fined for periods in relation to which they were the only ones to provide the necessary evidence; without KME's cooperation, the Commission could not have established the continuous infringement from 1988 to 2001; the rationale that warranted the application of the relevant attenuating circumstance to Outokumpu for the periods 1988 to 1993 and 1999 to 2001 also applied to KME for those periods; it was thus unfair for KME, having provided the Commission with previously unknown evidence relating to both the duration and the gravity of the infringement, to be sanctioned for a longer infringement, which the Commission could establish (and not merely suspect) only because of KME's cooperation.

174. KME therefore asks the Court to set aside the judgment under appeal to the extent that the General Court failed to hold that KME should benefit from a reduction of the duration multiplier applied to the starting amount of the fine for the periods from May 1988 to November 1992 and from May 1998 to the end of 1999, should annul the relevant part of the decision at issue and should recalculate the fine accordingly in the exercise of its unlimited jurisdiction.

Commission's response

175. The Commission submits that, for its appraisal of when partial immunity – as opposed to a reduction in the fine for cooperation – should be available, the General Court provided a clear and logical explanation answering all of KME's legal arguments. At paragraphs 123 to 127 of its judgment, it explained that, by revealing the full duration of the cartel to the Commission, Outokumpu enabled the Commission to raise the starting amount on its fine by 85 %, while the maximum fine reduction for cooperation was 50 %. The Commission addressed that paradox by granting Outokumpu a fine reduction equivalent to partial immunity for the additional duration that it revealed. At paragraphs 131 and 132, the General Court explained how such a situation differs from that of undertakings merely providing evidence

in relation to a period of the cartel already known to the Commission.

176. KME asks the Court of Justice to replace the General Court's appraisal by KME's preferred test. Not only is that inadmissible but the General Court's appraisal is obviously correct and KME obviously wrong. When Outokumpu provided information unknown to the Commission, it disclosed the full duration of the cartel and the Commission was for the first time able to investigate and seek evidence that would prove that full duration. Without that disclosure, there would have been no possibility of an infringement decision in relation to the unknown years. KME merely provided evidence which, while not itself already in the Commission's possession, related to elements of the infringement that were already known (within the duration already revealed by Outokumpu) and therefore did not have such a fundamental impact on the investigation. The Commission was already investigating and seeking evidence to prove the duration of the cartel, and might have obtained it even without KME's assistance. KME made the Commission's task easier, but that is all.

177. KME's distinction between information and evidence is not decisive. In reality, the 'information' provided by Outokumpu was also evidence. Outokumpu's memorandum of 30 May 2001, referred to at paragraph 124 of the judgment under appeal, was used as evidence in the decision at issue. Conversely, the 'evidence' provided by KME clearly gave the Commission information about certain details of the cartel. The decisive factor is whether any 'information' or 'evidence' reveals for the first time an element of the cartel affecting its gravity or duration that could not have been investigated without the contribution of the undertaking concerned.

178. Moreover, KME would not have been granted partial immunity under the 2002 Leniency Notice, which it cites. That notice offers partial immunity to an undertaking that 'provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel'. The evidence provided by KME related to facts previously known to the Commission, namely the full duration of the cartel.

179. KME's alternative test would duplicate – and render unworkable – the test for granting a reduction for cooperation in Section D of the 1996 Leniency Notice, under which a company supplying 'information, documents or other evidence which materially contributes to establishing the existence of the infringement' will benefit from a reduction of 10 % to 50 %. KME's test would grant

immunity when the Leniency Notice explicitly provides for a maximum 50 % reduction, and would thus destroy the system created by the Leniency Notice. KME was adequately rewarded for its cooperation with a 30 % reduction of the fine, which was upheld by the General Court and has not been challenged on appeal.

180. As regards the adequacy of the General Court's scrutiny, the Commission notes that (in the context of its fifth ground of appeal, but with reference to the treatment of its fourth plea in law at first instance), KME cites paragraph 115 of the judgment under appeal, in which the General Court stated that, in the absence of any binding indication in the Guidelines, the Commission had retained a degree of latitude as to mitigating circumstances, and paragraph 129, where it again noted that the Commission had a discretion in that regard. However, those remarks were made in the context of arguments by KME that the Commission had infringed Section 3 of the Guidelines by refusing to take account of certain attenuating circumstances. The issue for the General Court was whether those arguments concerned matters in which the Commission had bound itself in the Guidelines or in which it retained its discretion. That does not indicate a failure to provide adequate judicial review, but simply reflects the nature of the arguments that KME presented at first instance. In relation to the complaint that KME should have received partial immunity rather than 'merely' a reduction in the fine for cooperation, the General Court in any event found affirmatively that that would have been wrong, stating, for example, at paragraph 132, that 'the granting of a fine reduction to the offenders rather than immunity from fining to a single undertaking, is justified by the fact that the aim is no longer to reveal a fact likely to lead to an increase in the fine imposed'.

Assessment

181. I note that, if KME's fine had been reduced in the decision at issue so as, in effect, to negate the increase on account of duration for the periods totalling six years and one month in respect of which it claims to have provided the Commission with 'decisive evidence', the result should have been equivalent to applying an increase in respect of the remaining six years and nine months of the infringement only. If the yearly rate had been maintained at 10 %, as for the other participants, that would have implied an increase of 67.5 % – that is to say, 5 % higher than the overall increase actually (and perhaps inadvertently) applied.[50] Thus, again, it would

50 — See point 161 et seq. above.

seem plausible that, if the General Court had taken full cognisance of the situation, the result might not have been beneficial to KME even if it had succeeded in this particular argument.

182. That being so, it might be thought possible to take the same approach as I have suggested for the third ground of appeal, and find this ground (together with the argument at first instance) inoperative. Here, however, it seems to me that the question whether KME should have been treated as if it had not participated in the cartel during periods in respect of which it had provided the Commission with evidence is not inseparably intertwined with the question of the percentage of increase, and can thus be addressed separately.

183. KME's argument rests, essentially, on three propositions, all of which must in principle be established for the argument to succeed: (a) information which discloses a period of infringement should be distinguished from evidence which proves that the infringement took place during that period; (b) where information is provided by one party first and evidence by another party later, it is the latter alone who should benefit from any immunity in respect of the period concerned; and (c) in respect of the periods from May 1988 to November 1992 and from May 1998 to the end of 1999, KME provided evidence while Outokumpu had previously provided only information.

184. As regards (a), I agree with the Commission that no valid distinction can be drawn between information (by which KME appears to mean statements based on recollection) and evidence (by which it appears to mean documentary or other tangible items from which conclusions can be drawn). In fact, information provides evidence (or there would never be any scope for hearing witnesses in legal proceedings) and evidence provides information (without which it would have no value). The General Court was therefore not wrong to treat Outokumpu's and KME's contributions on the same level as regards the nature of their usefulness to the Commission's investigation.

185. As regards (b), even if, in general, information and evidence cannot be distinguished by their nature in terms of their usefulness to an investigation, it is quite possible for different contributions, whether of 'information' or of 'evidence', to differ greatly in usefulness in the context of a specific investigation. It is thus possible for one cartel participant to provide information or evidence of a period of infringement which is so vague and inconclusive as to be of no practical use to the Commission, and for another subsequently to provide detailed information or evidence which is of decisive importance in

establishing that the infringement took place during the period in question. In such a case, it would not seem inappropriate for the Commission, if it granted any reduction in the fine in that respect, to favour the latter; and if it were instead to favour the former, the latter could quite justifiably ask the General Court to review the approach in the context of its unlimited jurisdiction, although the outcome would be dependent on that Court's assessment of the facts. In any event, it is undisputed that the 'logic of immunity from fines' to which the General Court refers in paragraph 130 of its judgment militates in favour of rewarding only the first participant who provides adequate information or evidence.

186. As regards (c), the question whether KME's 'evidence' was of decisive importance in enabling the Commission to conclude that the cartel was functioning during the periods in question, whereas Outokumpu's earlier 'information' had not been such as to enable any conclusion to be drawn, is an issue of fact which cannot be the subject-matter of an appeal. It is clear, moreover, from paragraphs 128 and 131 to 133 of the judgment under appeal, that the General Court found in that regard that Outokumpu provided essential information capable of establishing the total duration of the infringement, which KME completed, more than 16 months later, with evidence reinforcing the Commission's ability to establish the facts. On the basis of such a factual assessment, there can be no doubt that the General Court did not err in law in dismissing the fourth limb of KME's fourth plea in law.

187. Finally, with regard to the question of the adequacy of the review carried out by the General Court, it is clear that the statements which that Court made as regards the Commission's discretion when deciding to take account of mitigating factors in no way prevented it from correctly examining and responding to KME's arguments, and that its conclusion was reached on the basis of a real appraisal of the facts and arguments before it.

Costs

188. Under Article 122 of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, I consider that the appeal should be dismissed. The Commission has applied for costs. KME should therefore be ordered to pay the Commission's costs.

Conclusion

189. Having regard to all the foregoing considerations, I am of the opinion that the Court should:

'— dismiss the appeal; and

— order KME Germany AG, KME France SAS and KME Italy SpA to pay the costs of the Commission.'