JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

6 May 2009 *

In Case T-127/04,

KME Germany AG, formerly KM Europa Metal AG, established in Osnabruck (Germany),

KME France SAS, formerly Tréfimétaux SA, established in Courbevoie (France),

KME Italy SpA, formerly Europa Metalli SpA, established in Florence (Italy),

represented by M. Siragusa, A. Winckler, G.C. Rizza, T. Graf and M. Piergiovanni, lawyers,

applicants,

* Language of the case: English.

Commission of the European Communities, represented by É. Gippini Fournier, acting as Agent, assisted by C. Thomas, Solicitor,

defendant,

CONCERNING: (1) an application for the annulment of, or reduction in the amount of, the fines imposed on the applicants under Article 2(c), (d) and (e) of Commission Decision C(2003) 4820 final of 16 December 2003, relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 — Industrial tubes); and (2) a counter-claim by the Commission that the amount of that fine be increased,

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

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

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2008,

gives the following

Judgment

Background

1 KME Germany AG (formerly KM Europa Metal AG), KME France SAS (formerly Tréfimétaux SA) and KME Italy SpA (formerly Europa Metalli SpA) form part of a publicly-quoted European industrial group, with a worldwide presence. The group is one of the world's largest producers of semi-finished products in copper and copper alloys. Until June 1995, KME France and KME Italy jointly constituted an undertaking distinct from KME Germany. Since that date, KME Germany, KME Italy and KME France have constituted a single group and are hereinafter referred to as 'the applicants' or 'the KME Group'.

2 In March 2001, following the communication of information from Mueller Industries Inc., the Commission carried out unannounced inspections at the premises of Outokumpu Oyj and Luvata Oy (formerly Outokumpu Copper Products Oy) (hereinafter collectively referred to as 'Outokumpu'), of Wieland-Werke AG ('Wieland') and of the applicants, pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87).

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

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

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

6 After carrying out an inquiry, including additional investigations at the premises of Outokumpu and the KME group and meetings with representatives of the undertakings concerned and, under Article 11 of Regulation No 17, requests for information, in July 2003 the Commission initiated an infringement procedure and issued a statement of objections against the KME Group, Wieland and Outokumpu. The undertakings concerned did not request an oral hearing on the case and therefore no hearing was held.

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

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

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

10 The contested decision includes the following provisions:

'*Article 1*

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

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

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

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

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

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

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

Article 2

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

(a) [Wieland]: EUR 20.79 million;

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

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

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

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

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

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

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

market shares of the cartel participants remained relatively stable during the whole duration of the infringement, even if the customers of the participants had sometimes changed (recital 312).

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

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

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

1 — Confidential data removed.

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).

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).

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 1 April 2004, the applicants brought the present action.

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

25 In its rejoinder, the Commission asked that the amount of the fine imposed on the applicants be increased, on the ground that the latter were calling back into question, in the reply, certain facts that were undisputed in the administrative procedure. The Court of First Instance invited the applicants to submit their observations on that cross-claim, which they did within the prescribed time-limit.

26 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the Court of First Instance, invited the parties to lodge certain documents and put to them written questions, to which they replied within the prescribed time-limit.

27 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 27 February 2008. On that occasion, in support of one of their pleas, the applicants used documents containing, in particular, statistics and graphs relating to the price evolution of industrial tubes, on the one hand, and the copper price on the other. The Commission objected to the use of those documents, stating that it had not had the opportunity to verify the authenticity of the information contained therein, and that, in any event, that information concerned a period other than that relating to the facts in dispute.

28 The documents lodged by the applicants during the hearing were not placed on the court's file.

29 The applicants claim that the Court should:

— substantially reduce the fine imposed on the KME Group;

— order the Commission to pay the costs;

— order the Commission to pay the costs incurred by them in providing a bank guarantee in lieu of payment of the fine, pending the judgment of the Court;

— take such other measures as the Court might consider appropriate.

30 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs;

— increase the amount of the fine imposed on the applicants.

Law

31 In support of this action, the applicants make five pleas in law, all concerning the determination of the amount of the fine imposed upon them. They allege, respectively, failure to take sufficient account of the actual impact of the cartel for the purposes of calculating the starting amount of the fine, inadequate assessment of the size of the

relevant market, an erroneous increase in the fine by reason of the duration of the infringement, failure to take account of attenuating circumstances, and misapplication of the 1996 Leniency Notice.

32 By way of preliminary observation, 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 on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3,'the Guidelines'), it is undisputed that it determined the amount of the fines by applying the methodology defined in those guidelines.

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).

The first plea, alleging failure to take sufficient account of the actual impact of the cartel

Arguments of the parties

38 In their first plea, the applicants argue that, for the purposes of determining the amount of the fines in this case, the Commission had an obligation to take account of the actual

impact of the cartel on the market. In their submission, the contested decision is vitiated by error, since the Commission failed to fulfil that obligation. By so doing, it also infringed the principles of equal treatment and proportionality and the Guidelines. Moreover, the reasoning and the conclusion contained in the contested decision concerning the actual impact of the cartel were erroneous, uncorroborated and contradictory in character.

39 Moreover, the applicants argue that, in this case, the Commission was all the more under a duty sufficiently to establish the actual impact of the cartel by reason of the grounds given by the latter for the imposition on the applicants of a starting amount for the fine three times higher than those applied to Wieland and Outokumpu. The applicants point out that the justification given by the Commission to explain that difference is the need to take account of the specific weight of each undertaking, and thus the actual effect of their unlawful conduct on competition. The applicants consider it obvious that that reasoning is based on the premiss of the existence of an actual impact of the cartel. The imposition of different fines according to the effect of the individual conduct of the companies involved does not, they submit, make sense unless the infringement as a whole had an actual effect on the market.

40 Thus the Commission's position, that the nature of the cartel was sufficient to justify the starting amount of the fine imposed on the KME Group by reason of its seriousness, is, they submit, unfounded and untenable.

41 The applicants point out that, in reply to the statement of objections, they submitted a report established by a consultancy firm ('the initial report'), which demonstrated that the infringement did not have any actual impact on prices. Moreover, during the present proceedings, the applicants submitted two further reports (the 'first additional report' and the 'second additional report') annexed, respectively, to the application and the reply. Those two additional reports were drafted by two of the authors of the initial report and confirmed its findings.

42 Referring to recitals 299, 300 and 314 of the contested decision, the applicants maintain that the Commission's approach is contradictory in so far as it is illogical for the Commission to state, on the one hand, that it was impossible to determine the impact of the cartel on prices, and, on the other, to conclude that it did in fact have an impact on prices.

43 The applicants argue that, having regard to the coincidence between price increases and increase in demand observed by the Commission, the latter should have carried out an empirical analysis. In the absence of an adequate econometric study, the Commission should have concluded that it was impossible, a priori, to determine whether the price increases were the result of a coordination between undertakings or whether they were entirely due to the increase in demand.

44 Moreover, the applicants claim that the Commission's statements concerning the initial report are incorrect. They refer primarily to the two additional reports and argue that the analysis contained in the initial report indicated, rightly, that the cartel had no actual impact on price fluctuations.

45 Finally, the applicants argue, with reference to the arguments put forward in their fourth plea, that the file contains examples of non-compliance with the collusive agreements and that they implemented the cartel in a limited manner.

46 The applicants thus conclude that the starting amount of their fine should have been fixed at the extreme lower limit of the scale of fines appropriate for cartel infringements, and should have been less than three times the starting amount of the fines fixed for Wieland and Outokumpu.

47 The Commission contends that the plea should be dismissed.

48 It argues that the applicants have not challenged, either in their reply to the statement of objections or in their application, three of the four aspects of the market impact of the cartel found by the Commission, namely the influence on price and volume offers made to customers, the implementation of the agreed price increases and the stabilisation of market shares.

49 The Commission emphasises that these three aspects were challenged for the first time in their reply, which therefore constitutes a new pleading inadmissible under Article 48(2) of the Rules of Procedure. It also argues that the abovementioned facts were cited in the statement of objections amongst the factors constituting the infringement. The Commission points out that, in granting the applicants a 30% reduction in the amount of the fine, it took account in particular of the fact that they had not challenged those facts during the administrative procedure. It emphasises that it would not have granted that reduction if the applicants had challenged them in their reply to the statement of objections. Therefore, the Commission requests that the Court increase the amount of the fine imposed on the applicants.

50 The Commission also pleads that the second additional report be struck from the proceedings. In its submission, that report is inadmissible under Article 48(1) of the Rules of Procedure. Having failed to refute the criticisms made by the Commission in its defence concerning the previous calculations, the authors of the second additional report sought to have recourse to a series of fresh calculations designed to replace those in the first additional report. It pleads that the second additional report should also be set aside pursuant to Article 44(1)(c) of the Rules of Procedure, on the ground that, although being an annex, it contains arguments which reply on the substance to those submitted by the Commission in its defence.

Findings of the Court

51 The Court must first rule on the Commission's pleas of inadmissibility and its cross-claim.

52 First, as regards the challenge to 'three of the four aspects of the impact of the cartel', it should be noted that the applicants have, in their application, called into question the Commission's conclusion that the infringement had an actual and global effect on the market. They argued that the cartel had no significant impact on prices and maintained that the stabilisation of market shares and the implementation of price increases cannot be relevant for demonstrating an actual impact of the infringement.

53 The Court finds that the applicants developed that line of argument in their reply in response to the argument by the Commission, in its defence, that the application had not called into question three of the four aspects of the cartel's impact. Therefore, the plea of inadmissibility raised by the Commission in that context is clearly unfounded and its cross-claim therefore inadmissible.

54 As for whether the second additional report constitutes an admissible offer of evidence, it should be noted that, pursuant to Article 48(1) of the Rules of Procedure of the Court of First Instance, the parties may offer further evidence in support of their arguments in reply or rejoinder, but must give reasons for the delay in offering it. However, that provision concerns offers of fresh evidence and must be read in the light of Article 66(2), which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 72; judgment of 12 September 2007 in Case T-448/04 *Commission* v *Trends*, not published in the ECR, paragraph 52).

55 In this case, two economic studies, namely the initial report and the first additional report have been joined to the application in support of the applicants' argument that the infringement had no impact on the market. In its defence, the Commission put forward arguments to show that the methodology and the height gauges used in the first additional report were defective and their reliability uncertain and that, in any event, the results of those reports did not prevent the finding that the cartel had an impact on prices.

56 Therefore, the second additional report, which is designed to refute the abovementioned claims of the Commission, cannot constitute an offer of new evidence, as the Commission claims, but represents an amplification of evidence, concerning the absence of an impact by the cartel on prices, which had already been submitted by the applicants at the application stage.

57 As for the Commission's complaint that the second additional report, although being an annex, contains arguments which reply on the substance to those submitted by the Commission in its defence, it must be recalled that it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 94 and case-law cited).

58 In this case, the applicants have, in their reply, rejected as partly inoperative and partly unfounded the Commission's objections concerning the two reports joined to the application. In that context, the applicants have claimed in their reply that, even taking into account the Commission's objections of a methodological nature, the results of those reports remained the same, namely that the cartel had no impact on prices. They have also argued that the Commission's interpretation of some of the data contained in the abovementioned reports was incorrect at the statistical level.

59 The Court finds that the second additional report does not contain new legal arguments, but supports, by means of new calculation methods and econometric references, the arguments formulated in the reply. It follows that all the offers of evidence made and arguments put forward by the applicants in the context of the first plea must be declared admissible.

60 As for whether the present plea is well founded, it should be noted that, by that plea, 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 (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.

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

Arguments of the parties

75 In this second plea, the applicants argue that, by holding the value of the market concerned to be EUR 288 million, the Commission exaggerated its size, and thereby exaggerated the seriousness of the infringement, giving rise to an excessive fine. The applicants also argue that the Commission's approach infringes the principle of equal treatment.

76 The applicants note, as a preliminary observation, that, in the industrial tubes sector, the overall price of products normally comprises the copper price, based on the quotation on the London Metal Exchange ('the LME'), and the cost of processing, which corresponds to the value added by the manufacturer ('the processing margin'). The raw material necessary for the manufacture of industrial tubes is provided either by the customer or by the tube manufacturer itself, which then invoices it in the overall price.

77 According to the applicants, the size of the market concerned is a relevant factor in fixing the starting amount of the fine. At the very least, the applicants claim that, in this case, the Commission determined the starting amount by reference to the size of the market concerned.

78 The applicants argue that, as manufacturers of industrial tubes, they have no influence on the price of the main raw material, namely copper, which represents about two thirds of the final price paid by their customers. In that regard, the applicants point out that the price of the metal is determined by daily quotations of the LME and that, in procuring that metal, they merely follow the instructions given by the buyers of industrial tubes. It

is therefore the customers themselves who determine the price of the metal. Consequently, the price of the metal is only an element to be passed on to customers. The volatility of the metal price does not affect the profitability of the applicants. Thus, the real economic weight of the market was limited to the processing margin.

79 Moreover, the applicants submit, the concept of overall turnover having to be taken into account for the purposes of determining the 10% ceiling pursuant to Article 15(2) of Regulation No 17 is not necessarily relevant in this case, since the Commission and the Community Courts are free to interpret the concept of turnover differently when calculating the size of the market concerned. Turnover is an imprecise indicator of the size of a product market. In certain cases, other factors may thus allow the Commission to carry out a better assessment of market size.

80 On the strength of the above, the applicants argue that the Commission should have deducted about two thirds of the overall price of the products in question when assessing the size of the market concerned, which would have led to the determination of a lower starting amount for the fine. The applicants argue that, by failing to deduct the price of copper from the turnover of the market concerned, the Commission ignored the economic reality of the market and determined a starting amount for the fine which was exaggerated in relation to the seriousness of the infringement, thereby infringing Article 15 of Regulation No 17 and the Guidelines.

81 According to the applicants, the fact that the cartel, besides the collusion concerning the processing margin and other commercial conditions, also included the sharing of the market and of customers, and an unlawful exchange of information, cannot affect the validity of their argument that the size of the market in question should, in the context of the assessment of the starting amount of the fine, be assessed solely by reference to the turnover corresponding to the processing margin.

82 The applicants further argue that, in order to have deterrent effect, a penalty should be linked to the profits generated by the cartel, and that, in this case, the profits obtained by the cartel members did not depend on the metal price but solely on the processing margin of the tubes. Moreover, the Commission's formalistic approach led to more severe treatment of economic operators who were active downstream in production terms compared with those operating upstream. The same applied to operators processing costly raw materials compared with those processing cheap ones.

83 The Commission contends that the applicants' plea should be dismissed. Moreover, it argues in its rejoinder that the applicants have challenged for the first time in their reply certain conclusions contained in the contested decision concerning the extension of the agreement on prices to methods of payment and delivery and consignment stocks. The Commission also argues that, in granting the KME Group a 30% reduction in the amount of the fine pursuant to the Leniency Notice, it took particular account of the fact that the latter had not challenged those conclusions. The Commission therefore requests the Court to declare the abovementioned arguments inadmissible and, in the exercise of its unlimited jurisdiction, to increase the amount of the fine imposed on the KME Group in any event.

Findings of the Court

84 As a preliminary observation, it should be noted that there is no need to adjudicate either on the plea of inadmissibility or the cross-claim formulated by the Commission. In replying to the Court's questions at the hearing, the applicants expressly admitted that the cartel in question extended to payment and delivery methods and consignment stocks. In any event, the plea of inadmissibility is unfounded and the cross-claim is inadmissible, since the documents before the Court show that the argument that the infringement affected only the processing margin was maintained by the applicants both during the administrative procedure and in the application.

85 As regards the substance, it should be noted at the outset that the methodology set out in the Guidelines, which has been applied by the Commission in the contested decision (see paragraph 32 above), follows a flat-rate logic, whereby the starting amount of the fine, determined by reference to the seriousness of the infringement, is calculated by reference to the nature of the infringement, its actual impact on the market where that is measurable and the extent of the geographic market concerned (Section 1 A, first paragraph, of the Guidelines). Thereafter, the general starting amount of the fine is individualised for each participant by reference, in particular, to its size.

86 Moreover, for the purposes of determining the starting amount of the fine, the Commission may have regard to the size of the market affected but is not obliged to do so (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 134; *Roquette Frères*, cited in paragraph 68 above, at paragraphs 149 and 150).

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

88 Even if, for the purposes of assessing the seriousness of the infringement and the general starting amount of the fine, the size of the market concerned constituted only one of the factors used by the Commission in the contested decision, the fact remains that the Commission did actually fix the amount taking account of it. Therefore, the Commission's argument that the starting amount of the fine imposed on the applicants would not necessarily have been less than EUR 35 million if the copper price had been deducted from the market turnover must be rejected.

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

90 The applicants argue in that regard, first, that the price of copper is outside the control of industrial tube manufacturers, since it is fixed in accordance with the LME and, secondly, that it is the buyers of industrial tubes themselves who decide at what price the metal is bought. The applicants further emphasise that fluctuations in the metal price have no impact on their profit.

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

92 Finally, 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 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.

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

Arguments of the parties

95 The applicants argue, essentially, that, by increasing the starting amount of the fine imposed on them by 10% for each year of participation in the infringement, the Commission infringed the Guidelines and the principles of equal treatment and proportionality, since it did not take account of the variable intensity of the cartel throughout its duration.

96 In that regard, they note that the increase of 10% per year of infringement constitutes the maximum increase which the Commission can impose, in relation to infringements of long duration, pursuant to the Guidelines. Thus, the increase of the starting amount of the fine for duration was not mechanical in character, but should be proportionate to the actual and objective impact of the infringement on consumers.

97 The applicants emphasise that the fact that the Commission can use the concept of a 'singe and continuous infringement' for complex cartels, in order to extend the responsibility to undertakings which did not directly participate in all the elements which constituted the global cartel, makes it indispensable to adapt the increase of the fine for duration by reference to possible periods of reduced activity by the cartel.

98 In this case, the applicants argue, the facts do not justify the application of the increase of 10% per year, since, first, the cartel in question had no significant impact on prices, and, second, the intensity of the activities of the cartel varied over the infringement period, as the Commission indicated, moreover, in various recitals of the contested decision.

99 The Commission contends that this plea should be dismissed.

Findings of the Court

100 It should be noted 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 acute 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 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.

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

The fourth plea, alleging failure to take certain attenuating circumstances into account

Arguments of the parties

106 In the fourth plea, the applicants make four claims, arguing that the Commission infringed Section 3 of the Guidelines by refusing to take account of certain attenuating circumstances.

107 First, the applicants argue that, although they did not systematically abstain from implementing the agreements in question, they implemented them in a limited manner, which should constitute an attenuating circumstance.

108 Second, the applicants argue that the Commission was wrong not to take account of the fact that they ended the infringement, immediately and voluntarily, after the checks carried out by the latter.

109 Third, the applicants argue that the Commission was wrong to refuse to regard the economically difficult situation of the industrial tubes sector as an attenuating circumstance. By so doing, it infringed the principle of equal treatment and widely overstepped the bounds of its discretion, since, in this case, it applied stricter criteria than those applied to comparable situations. In that respect, the applicants refer to

previous decisions of the Commission in which difficult economic circumstances justified reductions in the basic amounts of the fines.

110 Fourth, the applicants argue that, contrary to the sixth indent of Section 3 of the Guidelines and the principles of fairness and equal treatment, the Commission has not taken adequate account of their contribution towards establishing the overall duration of the infringement. It follows from Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44) that a company which provides the Commission with information which is decisive or completes evidence held by the Commission as regards certain periods of an infringement should not be fined for those periods.

111 In this case, by granting such a reduction in the basic amount of the fine to Outokumpu only, the Commission ignored the fact that the applicants were the first to provide decisive evidence concerning the periods of infringement from May 1988 to November 1992 and from May 1998 until the end of 1999. The Commission thereby infringed the principle of equal treatment and committed an error in taking those periods into account for calculating the fine imposed on the applicants.

112 The applicants challenge the Commission's interpretation that the application of Section 3 of the Guidelines is reserved for the undertaking which is the first to reveal the duration of the infringement, which means that only one undertaking can benefit from the diminution in the basic amount granted on that basis. To reward cooperation on the basis of a temporal classification, irrespective of the quality and scope of the information and documents provided by the cooperating undertaking, would be contrary to the objective pursued by the Commission in this area, namely to ensure that

cartels are detected and prohibited by complete access to documents which have high probative value and to decisive information.

113 The Commission contends that the plea should be dismissed

Findings of the Court

114 As a preliminary observation, it should be noted that the Commission must, in principle, comply with the terms of its own Guidelines when determining the amount of fines (see paragraph 33 above). However, the Guidelines do not state that the Commission must always take account separately of each of the mitigating circumstances listed in Section 3 of the Guidelines and it is not obliged to grant an additional reduction on such grounds automatically; the appropriateness of any reduction of the fine in respect of mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances.

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.

116 Concerning the applicants' first complaint, this cannot succeed because the case-law clearly shows that, in order to benefit from the second indent of Section 3 of the Guidelines, the offenders must show that they adopted competitive conduct or, at the very least, that they clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation and did not give the appearance of complying with the agreement, thereby encouraging other undertakings to implement the cartel in question (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 292; Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113).

117 In this case, the applicants do not claim to have clearly and substantially opposed the implementation of the cartel to the point of disrupting its very operation. Therefore, the first complaint is unfounded.

118 As for the second complaint, it should be noted that, under the third indent of Section 3 of the Guidelines, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is a mitigating circumstance. However, a reduction of the fine by reason of the termination of an infringement as soon as the Commission intervenes cannot be automatic but depends on an appraisal of the circumstances of the case by the Commission, in the context of its discretion.

119 In the present case, the infringement in question relates to a secret cartel whose object is price fixing and market sharing. That type of cartel is expressly forbidden by Article 81(1)(a) and (c) EC, and constitutes a particularly serious infringement. The parties must therefore have been aware of the unlawful nature of their conduct. The secret nature of the cartel confirms the fact that the parties were aware of the unlawful nature of their actions. Consequently, the Court finds that there can be no doubt that the infringement was committed intentionally by the parties in question. The Court of

First Instance has already held that the fact that an intentional infringement was terminated cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention (Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 498).

120 In the light of the above, the applicants' complaint must be dismissed as unfounded.

121 Moreover, the Court considers, in the exercise of its unlimited jurisdiction, that the fact that the applicants terminated the infringement in question following the Commission's first intervention does not, in any event, justify a reduction in the amount of their fine. That termination constituted an appropriate and normal reaction to the Commission's intervention, and cannot be assimilated to the merits flowing from an independent initiative on the part of the applicants. Similarly, that termination merely constituted a return to lawful conduct and did not contribute to making the Commission's investigations more effective.

122 As for the third complaint, the case-law shows that the Commission is not required to treat the poor financial health of the sector in question as a mitigating circumstance. The fact that in previous cases the Commission took account of the economic situation in the sector as a mitigating circumstance does not mean that it must necessarily continue to follow that practice. Indeed, as a general rule, cartels come into being when a sector is experiencing difficulties (*Tokai Carbon*, cited in paragraph 62 above, at paragraph 345, and case-law cited). Therefore, the third complaint must be dismissed.

123 Concerning the fourth complaint, 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.

134 Having regard to the above, the fourth complaint must be dismissed.

135 The present plea must therefore be dismissed in its entirety.

The fifth plea, alleging insufficient reduction of the fine pursuant to the 1996 Leniency Notice

Arguments of the parties

136 First, the applicants compare their cooperation and the 30% reduction which was granted to them with the treatment enjoyed by third parties in earlier cases. They argue in that respect that they have suffered unfavourable treatment.

137 Secondly, the applicants consider that, given the benefit conferred by their cooperation in the conduct of the investigation, they should have benefited from a reduction of over 30% pursuant to Section D of the 1996 Leniency Notice. In that respect, they argue, first, that they voluntarily supplied the Commission with information which went beyond what they were obliged to divulge pursuant to Article 11 of Regulation No 17, secondly, that that information described the functioning of the cartel in detail, and, finally, that some of that information was decisive in proving the existence of the infringement during the period from May 1988 to November 1992 and from May 1998 until the end of 1999.

138 Thirdly, the applicants claim that the Commission infringed the equal treatment principle by granting a 50% reduction in the fine imposed on Outokumpu. The Commission also infringed that principle by taking Outokumpu's cooperation into account both for the purposes of granting a 50% fine reduction pursuant to Section D of the 1996 Leniency Notice and for the purposes of taking account of an attenuating circumstance pursuant to the Guidelines.

139 The Commission contends that this plea should be dismissed.

Findings of the Court

140 As regards a comparison between the present case and the Commission's previous practice, the case-law shows that the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it

is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 239 and case-law cited). The applicants cannot therefore plead in aid reductions in the amount of fines granted in other cases.

141 Regarding the other complaints, it should also be noted that, in assessing the cooperation provided by members of a cartel, only an obvious error of assessment by the Commission is capable of being censured, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88). In making that assessment, however, it cannot ignore the equal treatment principle.

142 In that context, the Court finds that, in the contested decision, the Commission acknowledged that the information supplied by the applicants went beyond that which could be required to be produced under Article 11 of Regulation No 17. The Commission also acknowledged that the applicants had produced new evidence and confirmed existing evidence for the whole duration of the infringement, namely the period from 1988 to 2001. In particular, it took account of the fact that the applicants had helped it to assess the scope of the cartel during the period from 1997 to 1999. Nevertheless, the Commission stated that the applicants were neither the first nor the main undertakings to supply decisive evidence concerning the periods from May 1988 to November 1992 and from 1997 to 1999. The Commission also took account of the fact that the applicants started to cooperate with it only in reply to a letter sent to them in July 2002 pursuant to Article 11 of Regulation No 17 (recitals 415 to 417, 419, 420 and 423 of the contested decision).

143 It should be emphasised at the outset that the Commission cannot be blamed for taking account of the spontaneity with which information was supplied to it pursuant to Section D of the 1996 Leniency Notice (*ABB Asea Brown Boveri*, cited in paragraph 140 above, at paragraphs 237 and 238). In the context of a leniency policy, it is permissible

for the Commission to grant larger fine reductions to undertakings which cooperate with it spontaneously than to undertakings which do not. In this case, it is undisputed that, unlike in the case of Outokumpu, the Commission had to send a request for information before the applicants cooperated.

144 As regards the period from May 1988 until November 1992, the documents before the Court show that the Commission, rightly, found that the description provided by the applicants concerning that period was neither fuller nor more detailed than that provided by Outokumpu, and that, at the date on which the applicants started to cooperate, it had for about 16 months been in possession of decisive evidence from other sources which proved the existence of the infringement during those years. Both the previous cooperation of Outokumpu and two documents found during checks referred to the fact that the infringement in question dated from 1988.

145 As regards the period from May 1998 until the end of 1999, it should be noted that there is no evidence in the documents before the Court that the Commission ignored the applicants' cooperation. On the contrary, in recital 419 of the contested decision, the Commission refers to the fact that the applicants' cooperation was to some extent useful to it in relation to the period from 1997 to 1999. The Commission cannot be blamed for also stating in that recital that, before the applicants' cooperation, it had in its possession evidence concerning a certain number of meetings and exchanges of confidential information which took place during that period, since that statement is confirmed by the information contained on the Court file.

146 It follows, moreover, from the above that the applicants have not demonstrated that the Commission made an obvious error in assessing their cooperation.

147 As regards the argument that the applicants suffered discriminatory treatment, it is sufficient to note that the applicants and Outokumpu were not in a comparable

situation, Outokumpu having collaborated with the Commission well before the applicants, and the latter having begun to cooperate with the Commission only after receiving a request for information.

148 Moreover, the fact that Outokumpu enjoyed a fine reduction, by virtue of both the 1996 Leniency Notice and the Guidelines, for cooperating with the Commission well before the other undertakings cannot constitute discrimination against the applicants. The fact that Outokumpu enjoyed a reduction under the sixth indent of Section 3 of the Guidelines has to do with the interaction between those Guidelines and the 1996 Leniency Notice. Had the applicants been the first undertakings to cooperate with the Commission, they would have been able to benefit from the application of both the 1996 Leniency Notice and the Guidelines.

149 In the light of the whole of the above, this plea must be dismissed.

The application for payment of costs for establishing the bank guarantee

150 The applicants have not put forward any argument in support of this application. It follows that, in that respect, they have not satisfied the minimum requirements laid down by Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure for an action to be admissible. It must therefore be dismissed as inadmissible.

Costs

151 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, as pleaded by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. **Dismisses the action.**

2. **Orders KME Germany AG, KME France SAS and KME Italy SpA to pay the costs.**

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 6 May 2009.

[Signatures]