JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

19 May 2010 *

In Case T-19/05,

Boliden AB, established in Stockholm (Sweden),

Outokumpu Copper Fabrication AB, formerly Boliden Fabrication AB, established in Västerås (Sweden),

Outokumpu Copper BCZ SA, formerly Boliden Cuivre & Zinc SA, established in Liège (Belgium),

represented initially by C. Wetter and O. Rislund, and subsequently by C. Wetter and M. Johansson, lawyers,

applicants,

v

European Commission, represented by É. Gippini Fournier and S. Noë, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION (i) for annulment of Article 1(a) to (c) of Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 — Copper plumbing tubes) in so far as it was thereby found that the applicants participated in an infringement between 1 July 1995 and 27 August 1998 and between 10 December 1998 and 7 October 1999; (ii) for reduction of the fine imposed on the applicants by that decision; and (iii) by way of counterclaim by the Commission, for the amount of that fine to be increased,

THE GENERAL COURT (Eighth Chamber),

composed of M.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 4 November 2008,

gives the following

Judgment

Background

1 The applicants, Outokumpu Copper Fabrication AB (formerly Boliden Fabrication AB), Outokumpu Copper BCZ SA (formerly Boliden Cuivre & Zinc SA) and Boliden AB are part of the Boliden group, the parent company of which, Boliden, is a company incorporated under Swedish law, quoted on the Stockholm stock exchange (Sweden), with operations in Europe and Canada. The group specialises, inter alia, in the mining, processing and sale of metals and mineral products, principally copper and zinc.

1. *Administrative procedure*

2 Following the communication of information by Mueller Industries Inc. ('Mueller') in January 2001, the Commission of the European Communities carried out unannounced inspections at the premises of several undertakings in the copper tubes industry in March 2001, 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 1959-1962, p. 87).

3 On 9 and 10 April 2001, further inspections were carried out at the premises of KME Germany AG (formerly KM Europa Metal AG), Outokumpu Oyj and Luvata Oy (formerly Outokumpu Copper Products Oy) (together 'the Outokumpu group'). 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') with regard both to industrial tubes and to plumbing tubes. Following further investigations, the Commission divided its inquiry in relation to copper tubes into three separate proceedings, namely Case COMP/E-1/38.069 (Copper plumbing tubes), Case COMP/E-1/38.121 (Fittings) and Case COMP/E-1/38.240 (Industrial tubes).

4 By letter of 30 May 2001, the Outokumpu group sent the Commission a memorandum together with a number of annexes describing the copper tube industry and the collusive agreements relating to it.

5 On 5 June 2002, in Case COMP/E-1/38.240 (Industrial tubes), interviews concerning the Outokumpu group's offer of cooperation took place, at the Commission's initiative, with representatives of the group. The Outokumpu group also indicated its willingness for the Commission to conduct interviews with employees who were involved in the arrangements in Case COMP/E-1/38.069 (Copper plumbing tubes).

6 In July 2002, in Case COMP/E-1/38.240 (Industrial tubes), the Commission sent requests for information under Article 11 of Regulation No 17 to Wieland-Werke AG

('Wieland') and to the KME group (comprising KME Germany, KME France SAS (formerly Tréfimétaux SA) and KME Italy SpA (formerly Europa Metalli SpA)), and also invited the Outokumpu group to disclose further information. On 15 October 2002, the KME group replied to the request for information. Its reply included a statement and a request for application of the 1996 Leniency Notice in Case COMP/E-1/38.069 (Copper plumbing tubes). In addition, the KME group gave the Commission permission to use all the information provided in the context of Case COMP/E-1/38.240 (Industrial tubes) in Case COMP/E-1/38.069 (Copper plumbing tubes).

7 On 23 January 2003, Wieland submitted to the Commission a statement including a request for application of the 1996 Leniency Notice in Case COMP/E-1/38.069 (Copper plumbing tubes).

8 On 3 March 2003, the Commission sent requests for information in relation to Case COMP/E-1/38.069 (Copper plumbing tubes) to the Boliden group, to HME Nederland BV ('HME') and to Chalkor AE Epexergasias Metallon ('Chalkor'), as well as, on 20 March 2003, to the IMI group (comprising IMI plc, IMI Kynoch Ltd and Yorkshire Copper Tube).

9 On 9 April 2003, Chalkor's representatives met Commission staff and requested application of the 1996 Leniency Notice in Case COMP/E-1/38.069 (Copper plumbing tubes).

10 On 29 August 2003, the Commission adopted a statement of objections in Case COMP/E-1/38.069 (Copper plumbing tubes) against the companies concerned. After

those companies had been given access to the file electronically and had submitted written observations, they took part — with the exception of HME — in a hearing on 28 November 2003.

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

2. *The contested decision*

12 On 3 September 2004, the Commission adopted Decision C(2004) 2826 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 — Copper plumbing tubes) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* on 13 July 2006 (OJ 2006 L 192, p. 21).

13 The contested decision includes, in particular, the following provisions:

'*Article 1*

The following undertakings infringed 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 copper plumbing tubes sector:

(a) Boliden …, together with [Outokumpu Copper Fabrication] and [Outokumpu Copper BCZ], from 3 June 1988 until 22 March 2001;

(b) [Outokumpu Copper Fabrication], together with Boliden … and [Outokumpu Copper BCZ], from 3 June 1988 until 22 March 2001;

(c) [Outokumpu Copper BCZ], together with Boliden … and [Outokumpu Copper Fabrication], from 3 June 1988 until 22 March 2001;

(d) Austria Buntmetall AG:

(i) together with Buntmetall Amstetten [GmbH], from 29 August 1998 at the latest until 8 July 1999, and

(ii) together with [Wieland] and Buntmetall Amstetten …, from 9 July 1999 until 22 March 2001;

(e) Buntmetall Amstetten …:

(i) together with Austria Buntmetall …, from 29 August 1998 at the latest, until 8 July 1999, and

(ii) together with [Wieland] and Austria Buntmetall …, from 9 July 1999 until 22 March 2001;

(f) [Chalkor] from 29 August 1998 at the latest, until at least beginning of September 1999;

(g) [HME] from 29 August 1998 at the latest, until 22 March 2001;

(h) IMI … together with IMI Kynoch … and Yorkshire Copper Tube …, from 29 September 1989 until 22 March 2001;

(i) IMI Kynoch … together with IMI … and Yorkshire Copper Tube …, from 29 September 1989 until 22 March 2001;

(j) Yorkshire Copper Tube … together with IMI … and IMI Kynoch …, from 29 September 1989 until 22 March 2001;

(k) [KME Germany]:

(i) individually, from 3 June 1988 until 19 June 1995, and

(ii) together with [KME France] and [KME Italy], from 20 June 1995 to 22 March 2001;

(l) [KME Italy]:

(i) together with [KME France], from 29 September 1989 to 19 June 1995, and

(ii) together with [KME Germany] and [KME France], from 20 June 1995 to 22 March 2001;

(m) [KME France]:

(i) together with [KME Italy], from 29 September 1989 to 19 June 1995, and

(ii) together with [KME Germany] and [KME Italy], from 20 June 1995 to 22 March 2001;

…

(s) Outokumpu … together with [Luvata], from 29 September 1989 until 22 March 2001;

(t) [Luvata], together with Outokumpu …, from 29 September 1989 until 22 March 2001;

(u) [Wieland]:

(i) individually from 29 September 1989 until 8 July 1999, and

(ii) together with Austria Buntmetall … and Buntmetall Amstetten …, from 9 July 1999 until 22 March 2001.

Article 2

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

(a) Boliden …, [Outokumpu Copper Fabrication] and [Outokumpu Copper BCZ] jointly and severally: EUR 32.6 million;

(b) Austria Buntmetall … and Buntmetall Amstetten … jointly and severally: EUR 0.6695 million;

(c) Austria Buntmetall …, Buntmetall Amstetten … and [Wieland] jointly and severally: EUR 2.43 million;

(d) [Chalkor]: EUR 9.16 million;

(e) [HME]: EUR 4.49 million;

(f) IMI …, IMI Kynoch … and Yorkshire Copper Tube … jointly and severally: EUR 44.98 million;

(g) [KME Germany]: EUR 17.96 million;

(h) [KME Germany], [KME France] and [KME Italy] jointly and severally: EUR 32.75 million;

(i) [KME Italy] and [KME France] jointly and severally: EUR 16.37 million;

(j) Outokumpu … and [Luvata] jointly and severally: EUR 36.14 million;

(k) [Wieland] individually: EUR 24.7416 million.

…'

14 The Commission took the view that the undertakings concerned had participated in a single, continuous, complex and, in the case of the Boliden group, the KME group and Wieland, multiform infringement ('the cartel' or 'the infringement at issue'). The Commission stated that national arrangements were not, as such, covered by the contested decision (recitals 2 and 106 of the contested decision).

Relevant products and markets

15 The industry concerned — copper tube manufacturing — encompasses two product groups: (i) industrial tubes, which are divided into various sub-groups based on their end use (air-conditioning and refrigeration, fittings, gas heaters, filter dryers and telecommunications), and (ii) plumbing tubes, also called 'sanitary tubes', 'water tubes' or 'installation tubes', which are used for water, oil, gas and heating installations in the construction industry (recital 3 of the contested decision).

16 The Commission took the view that Cases COMP/E-1/38.069 (Copper plumbing tubes) and COMP/E-1/38.240 (Industrial tubes) concerned two separate infringements. It relied in that regard mainly on the fact that 'the arrangements pertaining to plumbing tubes on the one hand and those relating to industrial tubes on the other hand involved different companies (and employees), and were organised in a different way'. The Commission also took the view that the plumbing tube industry differed from the industrial tube industry as regards end consumers, end use and technical specifications for the products (recitals 4 and 5 of the contested decision).

17 With regard to copper plumbing tubes, the Commission stated in the contested decision that this product group comprised two 'sub-families' of products: plain copper plumbing tubes and plastic-insulated copper plumbing tubes. It noted that 'plain copper plumbing tubes and plastic-insulated copper plumbing tubes are not necessarily substitutable and might constitute distinct product markets when assessed under the Commission Notice on the definition of relevant market for the purposes of Community competition law' (OJ 1997 C 372, p. 5). However, for the purposes of the contested decision, the Commission took the view that those two 'sub-families' of products were to be regarded as 'one product group … because the arrangements

pertaining to both sub-families of products involved essentially the same companies (and employees) and were organised in a similar way' (recitals 13 and 459 of the contested decision).

18 In the contested decision, the Commission also stated that the relevant geographic market was the European Economic Area (EEA). It took the view that, in 2000, the value of the EEA market in plain copper plumbing tubes was approximately EUR 970.1 million, and that in plastic-coated copper plumbing tubes EUR 180.9 million. The aggregate value of those two markets was therefore assessed as EUR 1 151 million in 2000 in the EEA (recitals 17 and 23 of the contested decision).

Components of the infringement at issue

19 The Commission observed that the infringement at issue manifested itself in three separate but interconnected forms (recitals 458 and 459 of the contested decision). The first branch of the cartel, namely the SANCO arrangements, consisted in the arrangements entered into between the 'SANCO producers', SANCO being the trade mark for plain copper plumbing tubes produced by the KME group, Wieland and the Boliden group (recitals 115 to 118, 125 to 146 and 456 of the contested decision).

20 The second branch of the infringement at issue, namely the WICU and Cuprotherm arrangements, comprised the arrangements concluded between the 'WICU and Cuprotherm producers', WICU and Cuprotherm being trade marks for plastic-coated copper plumbing tubes produced by the KME group and Wieland (recitals 121 and 149 of the contested decision).

21 The third branch of the cartel, namely the broader European arrangements, involved the arrangements entered into within a wider group of plain copper plumbing tube

producers. It involved the undertakings referred to in paragraphs 19 and 20 above, and also the Buntmetall group (comprising Austria Buntmetall and Buntmetall Amstetten), Chalkor, HME, the IMI group, Mueller and the Outokumpu group (recitals 147, 148, 192 and 459 to 462 of the contested decision).

Duration and continuous nature of the infringement at issue

22 The Commission noted in the contested decision that the infringement at issue had started on 3 June 1988 in the case of the KME group and the Boliden group, on 29 September 1989 in the case of the IMI group, the Outokumpu group and Wieland, on 21 October 1997 in the case of Mueller, and on 29 August 1998 at the latest in the case of Chalkor, the Buntmetall group and HME. As regards the date on which the infringement came to an end, the Commission found that this was 22 March 2001, except in the case of Mueller and Chalkor which, according to the Commission, ceased to participate in the cartel on 8 January 2001 and in September 1999 respectively (recital 597 of the contested decision).

23 As regards the continuous nature of the infringement at issue, in the case of the Boliden group, the IMI group, the KME group, the Outokumpu group and Wieland, the Commission observed in the contested decision that, although there were periods of reduced cartel activity between 1990 and December 1992, and between July 1994 and July 1997, the unlawful activity was never entirely interrupted, so that the infringement at issue effectively constituted a single infringement that was not time-barred (recitals 466, 471, 476, 477 and 592 of the contested decision).

Determination of the amount of the fines

24 In the contested decision, the Commission imposed fines, pursuant to Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and Article 15(2) of Regulation No 17, on the Boliden group, the Buntmetall group, Chalkor, HME, the IMI group, the KME group, the Outokumpu group and Wieland (recital 842 and Article 2 of the contested decision).

25 The amounts of the fines were fixed by the Commission in accordance with the gravity and duration of the infringement at issue, those being the two criteria explicitly mentioned in Article 23(3) of Regulation No 1/2003 and Article 15(2) of Regulation No 17, which, according to the contested decision, was applicable at the time of the infringement at issue (recitals 601 to 603 of the contested decision).

26 In fixing the amount of the fine imposed on each undertaking, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'), even if it did not systematically refer to them. In the contested decision, the Commission also assessed whether, and to what extent, the undertakings concerned met the requirements laid down in the 1996 Leniency Notice.

Starting amount of the fines

— Gravity

27 In assessing the gravity of the infringement at issue, the Commission took account of the nature of the infringement, its actual impact on the market and the extent and size of the relevant geographic market (recitals 605 and 678 of the contested decision).

28 It stated that, by their nature, market-sharing and price-fixing practices of the kind at issue in the present case constituted a very serious infringement, and found that the geographic market affected by the cartel corresponded to the territory of the EEA. The Commission also took account of the fact that the copper plumbing tubes market was a very important industrial sector, with an estimated market value in the EEA of EUR 1 151 million in 2000, the last full year of the cartel (recitals 606 and 674 to 678 of the contested decision).

29 As regards the actual impact on the market, the Commission observed that there was sufficient proof that the cartel had overall had an impact on the relevant market, particularly on prices, although it was not possible to quantify it precisely (recitals 670 and 673 of the contested decision). It based that finding on a number of factors. First of all, it relied on the implementation of the cartel, referring to the fact that the participants had exchanged information on sales volumes and price levels (recitals 629 and 630 of the contested decision).

30 Second, it took into account the fact that the members of the cartel held a significant share — 84.6% — of the EEA market (recital 635 of the contested decision).

31 Third, the Commission relied on tables, memoranda and notes drawn up by members of the cartel in connection with its meetings. These documents showed that prices had increased during certain periods of the cartel and that its members had achieved additional earnings compared with earlier periods. Some of the documents indicated that the people involved in the cartel took the view that it had enabled the undertakings concerned to achieve their price targets. The Commission also relied on the statements made by Mr M, a former director of one of the companies in the Boliden group, and by Wieland, by the Boliden group and by Mueller in the context of their respective cooperation (recitals 637 to 654 of the contested decision).

32 Finally, the Commission found that the respective market shares of the cartel participants had remained relatively stable throughout the period of the infringement, although customers had fluctuated between the participants (recital 671 of the contested decision).

33 The Commission concluded from this that the undertakings concerned had committed a very serious infringement (recital 680 of the contested decision).

— Differential treatment

34 In the contested decision the Commission identified four groups which it regarded as being representative of the relative importance of the undertakings involved in the infringement at issue. The Commission's division of the members of the cartel into

several categories was based on the respective market shares of the cartel members in the sales of the relevant products in the EEA in 2000. Consequently, the KME group was regarded as being the main player in the relevant market and was placed in the first category. The Wieland group (comprising Wieland and the Buntmetall group, of which Wieland took control in July 1999) and the IMI and Outokumpu groups were regarded as medium-sized operators in that market and were placed in the second category. The Boliden group was placed in the third category. HME and Chalkor were placed in the fourth category (recitals 681 to 692 of the contested decision).

35 Market shares were determined on the basis of the turnover achieved by each offending undertaking from sales of plumbing tubes in the combined market for plain and plastic-coated copper plumbing tubes. Therefore, the market shares of the undertakings which did not sell WICU and Cuprotherm tubes were calculated by dividing their turnover of plain copper plumbing tubes by the overall size of the combined market for plain and plastic-coated copper plumbing tubes (recitals 683 and 692 of the contested decision).

36 The Commission therefore set the starting amount of the fines at EUR 70 million for the KME group, EUR 23.8 million for the Wieland, IMI and Outokumpu groups, EUR 16.1 million for the Boliden group and EUR 9.8 million for Chalkor and for HME (recital 693 of the contested decision).

37 In view of the fact that Wieland and the Buntmetall group formed a single undertaking after July 1999 and that, until June 1995, KME France and KME Italy jointly formed an undertaking separate from KME Germany, the starting amounts of the fines imposed on each of them were fixed as follows: EUR 35 million for the KME group (KME Germany, KME France and KME Italy jointly and severally); EUR 17.5 million for KME Germany; EUR 17.5 million for KME Italy and KME France jointly and severally; EUR 3.25 million for the Wieland group; EUR 19.52 million for Wieland

and EUR 1.03 million for the Buntmetall group (recitals 694 to 696 of the contested decision).

38 In order to take account of the need to set the fine at a level that would ensure its deterrent effect, the Commission increased the starting amount of the fine imposed on the Outokumpu group by 50%, thus taking it to EUR 35.7 million, on the basis that its worldwide turnover — in excess of EUR 5 billion — indicated that its size and economic power were such as to justify such an increase (recital 703 of the contested decision).

Basic amount of the fines

39 It is apparent from the contested decision that the Commission increased the starting amounts of the fines by 10% per full year of infringement and by 5% for any additional period of six months or more but less than a year. Accordingly, the Commission found that:

— since the IMI group had participated in the cartel for 11 years and 5 months, the starting amount of the fine of EUR 23.8 million should be increased by 110%;

— since the Outokumpu group had participated in the cartel for 11 years and 5 months, the starting amount of the fine of EUR 35.7 million fixed following the increase for deterrence purposes should be increased by 110%;

— since the Boliden group had participated in the cartel for 12 years and 9 months, the starting amount of the fine of EUR 16.1 million should be increased by 125%;

— since Chalkor had participated in the cartel for 12 months, the starting amount of the fine of EUR 9.8 million should be increased by 10%;

— since HME had participated in the cartel for 2 years and 6 months, the starting amount of the fine of EUR 9.8 million should be increased by 25%;

— since the KME group had participated in the cartel for 5 years and 7 months, the starting amount of the fine of EUR 35 million should be increased by 55%;

— since KME Germany had participated in the cartel for 7 years and 2 months, the starting amount of the fine of EUR 17.5 million should be increased by 70%;

— since KME France and KME Italy had participated in the cartel for 5 years and 10 months, the starting amount of the fine of EUR 17.5 million should be increased by 55%;

— since Wieland was held to be individually liable for a period of 9 years and 9 months, and jointly and severally liable with the Buntmetall group for an additional period of 1 year and 8 months, the starting amount of the fine of EUR 19.52 million for

which Wieland was solely liable should be increased by 95%, and the starting amount of the fine of EUR 3.25 million for which Wieland and the Buntmetall group were jointly and severally liable should be increased by 15% (recitals 706 to 714 of the contested decision).

40 Therefore, the basic amounts of the fines imposed on the undertakings involved are as follows:

— the KME group: EUR 54.25 million;

— KME Germany: EUR 29.75 million;

— KME France and KME Italy (jointly and severally): EUR 27.13 million;

— the Buntmetall group: EUR 1.03 million;

— the Wieland group: EUR 3.74 million;

— Wieland: EUR 38.06 million;

— the IMI group: EUR 49.98 million;

— the Outokumpu group: EUR 74.97 million;

— Chalkor: EUR 10.78 million;

— HME: EUR 12.25 million;

— the Boliden group: EUR 36.225 million (recital 719 of the contested decision).

Aggravating and attenuating circumstances

41 The basic amount of the fine imposed on the Outokumpu group was increased by 50% on the ground that it was responsible for a repeat infringement, having been the 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) (recitals 720 to 726 of the contested decision).

42 In respect of attenuating circumstances, the Commission took into account the fact that the KME and Outokumpu groups had provided it with information when each cooperated to an extent not covered by the 1996 Leniency Notice.

43 Therefore, the Commission reduced the basic amount of the fine imposed on the Outokumpu group by EUR 40.17 million, corresponding to the fine that would have been imposed on it for the period of the infringement from September 1989 to July 1997,

the finding in respect of which had been made possible by the information which had been provided to the Commission (recitals 758 and 759 of the contested decision).

44 As regards the KME group, the basic amount of the fine which was imposed on it was reduced by EUR 7.93 million for its cooperation, which had enabled the Commission to establish that the infringement at issue extended to plastic-coated copper plumbing tubes (recitals 760 and 761 of the contested decision).

Application of the 1996 Leniency Notice

45 Under Section D of the 1996 Leniency Notice, the Commission granted reductions of fines of 50% to the Outokumpu group, 35% to the Wieland group, 15% to Chalkor, 10% to the Boliden group and to the IMI group and 35% to the KME group. HME was not granted any reduction under that notice (recital 815 of the contested decision).

Final amount of the fines

46 Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission set the amounts of the fines to be imposed on the addressees of the contested decision as follows:

— the Boliden group: EUR 32.6 million;

— the Buntmetall group: EUR 0.6695 million;

— Chalkor: EUR 9.16 million;

— HME: EUR 4.49 million;

— the IMI group: EUR 44.98 million;

— the KME group: EUR 32.75 million;

— KME Germany: EUR 17.96 million;

— KME France and KME Italy (jointly and severally): EUR 16.37 million;

— the Outokumpu group: EUR 36.14 million;

— the Wieland group: EUR 2.43 million;

— Wieland: EUR 24.7416 million (recital 842 of the contested decision).

Procedure and forms of order sought

47 By application lodged at the Registry of the Court on 20 January 2005, the applicants brought the present action.

48 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber to which, in consequence, the present case was assigned.

49 The applicants claim that the Court should:

— annul Article 1(a) to (c) of the contested decision in so far as it relates to the periods between 1 July 1995 and 27 August 1998 and between 10 December 1998 and 7 October 1999;

— reduce the fine imposed on them;

— order the Commission to pay the costs.

50 The Commission contends that the Court should:

— dismiss the application;

— increase the fine imposed on the applicants;

— order the applicants to pay the costs.

Law

51 By their action, the applicants seek, first, the annulment in part of the contested decision and, second, a reduction of the fine imposed on them.

1. *The claim for annulment in part of the contested decision*

Arguments of the parties

52 The applicants put forward a single plea in law in support of their claim, alleging an error of law that vitiates the finding that they participated in a single and continuous infringement.

53 The applicants take the view that the Commission has failed to establish to the requisite legal standard and in accordance with the case-law that, in the periods between 1 July 1995 and 27 August 1998, and between 10 December 1998 and 7 October 1999, they intended to contribute by their conduct to the common objectives pursued by all the cartel participants and that they were aware of the actual conduct planned or put into effect by other offending undertakings in pursuit of those objectives or that they could reasonably have foreseen them and that they were prepared to take the risk.

54 With regard to the period from 1 July 1995 to 27 August 1998, the applicants submit, in essence, that the SANCO arrangements no longer constituted a branch of the cartel from 1 July 1995. Accordingly, the cartel was, from then on, formed of only two branches, the WICU and Cuprotherm arrangements and the broader European arrangements.

55 In light of the fact that it is undisputed that the applicants never participated in the WICU and Cuprotherm arrangements and that they did not participate in meetings

held in connection with the broader European arrangements between 1 July 1995 and 27 August 1998, the infringement of which the applicants are accused was interrupted, not continuous.

56 According to the applicants, the fact that they continued to participate in an information exchange network of the 'SANCO producers' after 1 July 1995 is of no consequence as regards the question whether their participation in the cartel was interrupted or not. From the time Mr M, one of their managing directors at the time, left in the middle of 1995 until 21 November 1997 they were not aware that there were meetings of the cartel or even of the existence of the cartel as such. The applicants did not become aware of the existence of broader European arrangements until 21 November 1997, when they were invited by the KME group to participate in that cartel, which they declined to do.

57 Furthermore, the information exchange system that had existed between the 'SANCO producers' since 1988 was the result of the implementation of legitimate licence agreements. Consequently, the original and principal objective of that system was lawful. The applicants nevertheless admitted during the course of the hearing that, between 1988 and the middle of 1995, that information exchange system had also served as a tool within the cartel. They maintain that, since they were unaware of the continuous nature of the meetings and of the collusive contacts within the cartel after mid-1995, their participation in the information exchange system after that date no longer amounted to participation in the cartel but merely in the implementation of legitimate licence agreements.

58 With regard to the period from 10 December 1998 to 7 October 1999, the applicants claim that, at the meeting on 10 December 1998, they clearly and explicitly announced their withdrawal from cooperation in the broader European arrangements. The applicants did not participate in the cartel again until a meeting held on 8 October 1999.

59 The Commission contends that the plea should be dismissed.

Findings of the Court

60 As a preliminary point, it should be recalled that the Court of Justice has held that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazion*i [1999] ECR I-4125, paragraph 81). When the different actions form part of an overall plan because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 258).

61 Similarly, an undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of the constituent elements of that cartel if it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 773, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 231).

62 In the present case, it is undisputed that the applicants participated in the broader European arrangements from 3 June 1988 to 30 June 1995, from 27 August 1998 to 10 December 1998 and from 8 October 1999 to 22 March 2001. It is also undisputed that they frequently and constantly exchanged detailed information with the KME group and with Wieland about sales volumes in respect of plumbing tubes under the SANCO trade mark throughout the entire period of the cartel, that is to say from 3 June 1988 to 22 March 2001.

63 It is therefore necessary to determine whether that exchange of information was one of the constituent elements of the overall plan of the cartel, and whether the applicants should have been aware of the existence of the cartel and of the fact that it was operating in the periods between 1 July 1995 and 27 August 1998, and between 10 December 1998 and 7 October 1999.

64 In the contested decision (recitals 449 to 457), the Commission stated that the elements of the cartel's overall plan consisted of:

— the stabilisation of their respective market shares by the allocation of sales volumes by country;

— an agreement on price increases or coordinated prices and the implementation of those increases or coordinated prices;

— the implementation of market allocation and price coordination by a monitoring system consisting of a market leader arrangement for various European territories, as well as the regular exchange of confidential information on commercial strategies, sales volumes and targets and, occasionally, on prices and rebates.

65 As regards, more specifically, the exchange of information concerning SANCO tubes, the Commission noted, in recital 143 of the contested decision, that it allowed sales volumes to be monitored. It must also be borne in mind that, in recital 138 of the contested decision, the Commission stated that the volume allocations were regularly coordinated between 'SANCO producers' and the members of the broader European arrangements. Lastly, in recital 486 of the contested decision, the Commission stated that the 'main part of the [cartel] was the exchange of sales volumes data and, on its basis, the allocation of volume quotas'.

66 The applicants did not dispute those findings in respect of the period from 3 June 1988 to 1 July 1995. With regard to the period from 1 July 1995 to 22 March 2001, they submit that they could not reasonably have foreseen that their participation in the information exchange system after the middle of 1995 would have contributed to the operation of the cartel.

67 The applicants' arguments are unconvincing, however. Having participated for a number of years both in the SANCO arrangements and in the broader European arrangements, which consisted of the allocation of production and monitoring of the implementation of that allocation by means of frequent and detailed exchanges in relation to sales volumes, the applicants cannot claim that Mr M's departure in the middle of 1995 gave rise to acute amnesia within the undertaking as regards the existence of the cartel or its modus operandi.

68 In fact, the applicants do not claim that Mr M was the only employee or director aware of their participation in the cartel between 1988 and 1995.

69 It must be noted that, throughout the entire period of their participation in the information exchange system, the applicants supported the anti-competitive arrangement

agreed within the cartel. Their involvement in that information exchange system therefore constituted the continuation of their participation in the cartel (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 60 above, paragraph 281). For the reasons referred to in paragraphs 64 to 68 above, the applicants must necessarily have known that their participation in the information exchange system formed part of the overall plan of the cartel.

70 Lastly, it must be noted that the applicants' argument that the SANCO arrangements no longer constituted a branch of the cartel after the middle of July 1995 is ineffective. As stated in paragraph 69 above, the applicants' continuous participation in the cartel is demonstrated by the fact that they participated without interruption in an information exchange system and must necessarily have known that that system was part of the overall plan of the infringement concerned.

71 It follows from this that the applicants' claim for partial annulment must be dismissed.

2. *The claim for reduction of the fine*

72 The applicants put forward three pleas in law in support of this claim, alleging an error of law in the application of the rules on limitation periods, an erroneous increase in the starting amount of the fine by reason of the duration of the infringement and the erroneous application of the 1996 Leniency Notice, respectively.

73 Before examining the pleas raised by the applicants, it should be pointed out that it is clear from recitals 601 and 842 of the contested decision that the fines which the Commission imposed for the infringement were imposed by virtue of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. Furthermore, the Commission fixed the amount of the fines by applying the method set out in the Guidelines and the 1996 Leniency Notice (see paragraph 26 above).

74 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 (see Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91 and the case-law cited).

75 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, second, of the general 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 to 267, 312 and 313).

76 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 Regulations No 17 and No 1/2003, as interpreted by the Court of Justice (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 75 above, paragraph 267).

77 Therefore, in areas where the Commission has maintained a discretion, for example as regards the starting amount or 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).

78 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 Court 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, and Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).

Plea alleging an error of law in the application of the rules on limitation periods

Arguments of the parties

79 The applicants submit that, since they did not participate in a single and continuous infringement, the Commission infringed the rules that apply to limitation periods by imposing a fine in respect of the period before 22 March 1996, as its investigation only started on 22 March 2001. In that regard, the applicants state that the exchange of information relating to sales volumes pursuant to the SANCO licences after the middle of 1995 was not part of the cartel, and that the cartel which they joined on

27 August 1998 was not the same as the cartel which they had left in the middle of 1995.

80 The applicants also submit that they should have been treated in the same way as HME, Mueller, the Buntmetall group and Chalkor with regard to limitation periods, in accordance with the principle of equal treatment.

81 The Commission contends that this plea should be dismissed.

Findings of the Court

82 As a preliminary point, it is apparent from paragraphs 60 to 71 above that the Commission was entitled to find in the contested decision that the applicants had participated in a single and continuous infringement between 3 June 1988 and 22 March 2001. Their uninterrupted participation in an information exchange system was sufficient to establish their continuous participation in the cartel.

83 It follows that, irrespective of the Commission's findings in respect of HME, Mueller, the Buntmetall group and Chalkor, the limitation period referred to in Article 25 of Regulation No 1/2003 does not apply with regard to the applicants.

84 In any event, for the sake of completeness, it must be noted that it follows from recitals 216, 449 and 450 of the contested decision and from Article 1 thereof that HME,

Mueller, the Buntmetall group and Chalkor were held liable for their respective participation in the cartel from 1997 or 1998, whereas the applicants were held liable from 1988.

85 The present plea must therefore be dismissed as unfounded.

Plea alleging infringement of the principle of proportionality

Arguments of the parties

86 The applicants submit that the Commission infringed the principle of proportionality when it increased the starting amount of the fine for duration without taking into account their reduced participation in the cartel over a substantial period. The applicants claim that, during the two periods in which their participation in the cartel was interrupted, they merely submitted and received sales volume figures pursuant to the SANCO licensing arrangement.

87 In their reply, the applicants allege that, in setting the amount of the fine, the Commission focused only on the gravity of the infringement as such and failed fully to take into account their role in the infringement at issue. The applicants maintain in that regard, referring to the case-law, that the gravity of an infringement is assessed

not only on the basis of its particular characteristics, but also on the basis of the individual circumstances of the undertaking concerned.

88 Therefore, even if the Commission were to be under no obligation to take the reduced intensity of the applicants' participation into consideration when increasing the starting amount of the fine imposed for duration, it would nevertheless be under such an obligation when setting the amount of the fine for gravity.

89 The Commission contends that the present plea should be dismissed and puts forward a plea of inadmissibility as regards the complaint that it failed to take account of the applicants' role in the cartel in its assessment of the gravity of the infringement. According to the Commission, that complaint constitutes a new plea in law which does not appear in the application and which should, therefore, be dismissed as inadmissible.

Findings of the Court

90 As regards the plea of inadmissibility raised by the Commission, it must be borne in mind that it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure of the Court that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission which may be regarded as amplifying a submission made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-207/95

Ibarra Gil v *Commission* [1997] ECR-SC I-A-13 and II-31, paragraph 51; see also, to that effect, Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraphs 9 and 10). The same applies to a complaint made in support of a plea in law (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156, and Case T-345/05 *Mote* v *Parliament* [2008] ECR II-2849, paragraph 85).

91 It must be noted that, in their application, the applicants drew attention to the fact that the Commission did not take into account their allegedly short participation in the cartel when calculating the amount of the fine imposed on them. It follows from the application that their plea relates to the alleged disproportionality of the fine imposed. However, the complaint which the applicants put forward there applies only to the increase in the starting amount of the fine for duration.

92 In their reply, the applicants do not refer to new matters of fact but seek to expand the scope of their plea to include a complaint relating to the assessment of the gravity of their participation in the cartel. However, this latest complaint cannot be regarded as amplifying the submission made in respect of the alleged disproportionality of the fine imposed, as set out in the application, and as being closely connected therewith. If an essential element of a decision — such as, in the present case, the assessment of the gravity of the infringement at issue — is to be challenged, this must be specifically stated before the Court at the stage of the application.

93 Consequently, the applicants' complaint concerning the assessment of the gravity of their participation in the cartel must be dismissed as inadmissible.

94 As regards the merits of the plea, it must be held that it relates to a matter in respect of which the Commission has maintained a discretion under the Guidelines.

Therefore, that plea can succeed only if the Court finds that there has been a manifest error of assessment on the part of the Commission (see paragraph 77 above).

95 In that regard, it should be noted that an increase in the starting amount of the fine by reference to duration is not limited to a situation in which there is a direct relation between the duration and serious harm caused to the objectives referred to in the competition rules (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 278 and the case-law cited).

96 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.

97 On the contrary, in the first place, it is clear from the Guidelines that they prescribe assessment of the gravity of the infringement as such for the purposes of fixing a general starting amount for the fine. In the second place, the gravity 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. In the third place, the duration of the infringement is taken into account for fixing the basic amount, and, in the fourth place, the Guidelines require account 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.

98 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 gravity 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 gravity of the infringement. It is for the Commission

to choose, in the context of its broad discretion (see paragraph 77 above), the uplift which it intends to apply in respect of the duration of the infringement.

99 In this case, the Commission stated, notably in recital 706 of the contested decision, that the applicants had participated in the cartel for a period of 12 years and 9 months (see, in that regard, paragraphs 60 to 71 above), which is a long period for the purposes of the Guidelines. Accordingly, it increased the starting amount of the fine imposed on them by 125%. In so doing, the Commission did not depart from the rules which it imposed upon itself in the Guidelines.

100 Moreover, the Court considers that, in the light of the duration of the infringement at issue, that uplift of 125% is not manifestly disproportionate in the present case.

Plea alleging an insufficient reduction of the fine in the light of the applicants' cooperation pursuant to the 1996 Leniency Notice

Arguments of the parties

101 The applicants submit that their cooperation merited a more substantial reduction in the amount of their fine, since they confirmed the accuracy of the information provided by Mr M and, in their reply to the statement of objections, provided the Commission with a detailed description of the SANCO arrangements.

102 They also state that the Commission infringed the principle of equal treatment by granting them the same reduction in the amount of the fine as the IMI group, even though they cooperated with the Commission to a greater extent than the IMI group. The reduction of the fine imposed on the IMI group appeared to be based solely on the fact that it admitted the infringement and did not contest the facts on which the Commission relied. Moreover, the applicants provided the Commission with information and clarified or confirmed important facts which facilitated the investigation and on which the Commission relied in the contested decision.

103 The Commission contends that the plea should be dismissed.

Findings of the Court

104 As a preliminary point, it must be noted that it has been consistently held that a reduction in the fine on grounds of cooperation during the administrative procedure is based on the consideration that such cooperation facilitates the Commission's task of identifying an infringement (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 325, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363).

105 It should also be remembered that, in assessing the cooperation given by members of a cartel, only a manifest error of assessment by the Commission is open to censure, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (Case C-328/05 P *SGL Carbon* v *Commission*

[2007] ECR I-3921, paragraph 88). In exercising that discretion the Commission cannot, however, disregard the principle of equal treatment.

106 Furthermore, it must be observed that it follows from Section D 2 of the 1996 Leniency Notice that that notice may be applied to an undertaking if, before the statement of objections is sent, it provides the Commission with information which materially contributes to establishing the existence of the infringement committed, or if, after receiving the statement of objections, it informs the Commission that it does not substantially contest the facts on which the Commission has based its allegations.

107 In the present case, both the IMI group and the applicants began to cooperate after the statement of objections was sent. Consequently, the applicants cannot claim a greater reduction than that which was allowed to the IMI group, unless, for the purposes of establishing the infringement, their cooperation facilitated the Commission's task to a greater extent than the cooperation of the IMI group did.

108 In that regard, it must be noted that it is apparent from the contested decision that the cooperation provided by the applicants differs from that of the IMI group only in so far as only the applicants 'clarified certain factual details' (recitals 809 and 812 of the contested decision). It follows, moreover, implicitly from the contested decision that, in the Commission's view, the cooperation of the IMI group and that of the applicants were similarly useful, since both began to cooperate at a stage when the Commission was already in a position, notably because of the cooperation of Mueller, the Outokumpu and KME groups, Wieland and Chalkor, to establish the existence of the whole of the infringement at issue. Furthermore, the applicants are not claiming that the Commission was not in a position to establish the existence of the full cartel at the time of their cooperation.

109 It must also be pointed out that a statement such as that referred to in paragraph 102 above, which merely confirms information communicated to the Commission by another undertaking at an earlier stage of the investigation, does not facilitate the Commission's task significantly and, therefore, sufficiently to justify a reduction of the fine for cooperation (see, to that effect, Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 301, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 455).

110 In the light of the foregoing, it must be held that the Commission did not make a manifest error of assessment with regard to the usefulness of the applicants' cooperation and did not infringe the principle of equal treatment by granting an equal reduction to the applicants and to the IMI group pursuant to the 1996 Leniency Notice. Accordingly, the present plea is also unfounded.

111 The action must therefore be dismissed.

3. *Counterclaim based on the potentially favourable treatment of the applicants in comparison with Chalkor and the IMI group*

Arguments of the parties

112 The Commission observes that the IMI group and Chalkor submitted in their respective applications in Cases T-18/05 and T-21/05 that, in determining the amount of the fines, the Commission failed to take into consideration the fact that they had not been

involved in the SANCO arrangements and the WICU and Cuprotherm arrangements and that they had therefore committed a less serious infringement than that committed by the applicants, Wieland and the KME group. The submissions of the IMI group and Chalkor raise the issue of alleged discrimination between the participants of the cartel in relation to what has been deemed to be a single infringement.

113 The Commission maintains that, if the Court were to accept the submissions of the IMI group and of Chalkor on that point, it should, in the exercise of its unlimited jurisdiction, raise the amount of the fines imposed on the KME group, the applicants and Wieland, rather than reduce the fines imposed on the IMI group and Chalkor.

114 The applicants contend that this application should be dismissed.

Findings of the Court

115 It must be noted that, in its judgments of today's date in Case T-18/05 *IMI and Others* v *Commission* [2010] ECR II-1769 and Case T-21/05 *Chalkor* v *Commission* [2010] ECR II-1895, the Court held that the IMI group and Chalkor committed a less serious infringement than that committed by the Boliden group, the KME group and Wieland, and that the Commission erred in failing to take that aspect into consideration when calculating the amounts of the fines.

116 The Court, exercising its unlimited jurisdiction, also ruled that the starting amount of the fines set by the Commission was appropriate to the gravity represented by the three branches of the cartel as a whole, and that it was necessary to reduce the starting

amounts of the fines imposed on the IMI group and on Chalkor in order to take account of the fact that the Commission did not hold them liable with regard to the SANCO arrangements (*IMI and Others* v *Commission*, cited in paragraph 115 above, paragraphs 166, 167 and 189, and *Chalkor* v *Commission*, cited in paragraph 115 above, paragraphs 104, 105 and 185).

117 It follows from this that the Commission's application must be dismissed.

Costs

118 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, pursuant to the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads or where the circumstances are exceptional.

119 In the present case, the applicant's application has been unsuccessful, and the Commission has not succeeded in its counterclaim. However, it must be held that it is the applicants who have, in essence, been unsuccessful. In those circumstances, the applicants should bear their own costs and pay 90% of the costs incurred by the Commission, and the Commission should bear 10% of its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Dismisses the European Commission's counterclaim;**

3. **Orders Boliden AB, Outokumpu Copper Fabrication AB and Outokumpu Copper BCZ SA to bear their own costs and to pay 90% of the costs incurred by the Commission;**

4. **Orders the Commission to bear 10% of its own costs.**

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 19 May 2010.

[Signatures]

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