JUDGMENT OF THE COURT (Third Chamber)

3 September 2009 *

In Joined Cases C-322/07 P, C-327/07 P and C-338/07 P,

THREE APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 9, 11 and 16 July 2007 respectively,

Papierfabrik August Koehler AG, established in Oberkirch (Germany), represented by I. Brinker and S. Hirsbrunner, Rechtsanwälte, and by J. Schwarze, professeur,

Bolloré SA, established in Ergue Gaberic (France), represented by C. Momège and P. Gassenbach, avocats, with an address for service in Luxembourg,

Distribuidora Vizcaína de Papeles SL, established in Derio (Spain), represented by E. Pérez Medrano and T. Díaz Utrilla, abogados,

appellants,

* Languages of the case: German, French and Spanish.

the other party to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre and W. Mölls, acting as Agents, assisted by H.-J. Freund, Rechtsanwalt, and N. Coutrelis, avocat, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, A. Ó Caoimh, J. Klučka (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: Y. Bot,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 25 September 2008,

after hearing the Opinion of the Advocate General at the sitting on 2 April 2009,

gives the following

Judgment

1 By their appeals, Papierfabrik August Koehler AG ('Koehler') (C-322/07 P), Bolloré SA ('Bolloré') (C-327/07 P) and Distribuidora Vizcaína de Papeles SL, ('Divipa') (C-338/07 P) request the Court to set aside the judgment of the Court of First Instance of the European Communities of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947 ('the judgment under appeal'), in which the Court of First Instance dismissed the actions brought by, amongst others, Koehler, Bolloré and Divipa, seeking annulment of Commission Decision 2004/337/EC of 20 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) (OJ 2004 L 115, p. 1,'the contested decision'). By that decision the Commission of the European Communities imposed fines of EUR 33.07 million on Koehler, EUR 22.68 million on Bolloré and EUR 1.75 million on Divipa.

Background to the dispute

2 The facts of the dispute, as they were set out in paragraphs 1 to 13 of the judgment under appeal, can be summarised as follows.

3 In autumn 1996, the Sappi paper group, whose parent company is Sappi Ltd ('Sappi'), provided the Commission with information and documents which gave the Commission grounds for suspecting that a secret cartel existed or had existed for fixing prices in the carbonless paper sector, in which Sappi operated as a producer.

4 In light of the information provided by Sappi, the Commission carried out investigations at the premises of a number of carbonless paper producers pursuant to Article 14(2) and (3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ English Special Edition 1959-1962, p. 87). Accordingly, inspections provided for under Article 14(3) of Regulation No 17 were carried out on 18 and 19 February 1997 at the premises of several undertakings including Papeteries Mougeot SA ('Mougeot'), as well as, between July and December 1997, at the premises of Sappi and other undertakings, including Koehler and Arjo Wiggins Appleton plc ('AWA').

5 In 1999 the Commission also sent requests for information pursuant to Article 11 of Regulation No 17 to a number of undertakings, including AWA, Mougeot, Divipa, Koehler and Copigraph SA ('Copigraph'), the latter being a subsidiary of Bolloré. In those requests, the undertakings concerned were asked to give particulars of their announcements of price rises, their sales volumes, customers, turnover and meetings with competitors.

6 In response to those requests for information, AWA, Copigraph and one other undertaking admitted their participation in multilateral cartel meetings held between carbonless paper producers. They provided the Commission with various documents and information.

7 Mougeot, for its part, contacted the Commission on 14 April 1999 stating that it was prepared to cooperate in the investigation pursuant to the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). It accepted that there was a cartel for fixing prices in the carbonless paper sector and provided the Commission with information on the structure of the cartel, and in particular on the various meetings attended by its representatives.

8 On 26 July 2000 the Commission initiated the procedure in the cases giving rise to the contested decision and adopted a statement of objections ('the statement of objections'), which it addressed to 17 undertakings, including Copigraph, Bolloré, in its capacity as Copigraph's parent company, AWA, Divipa, Mougeot, Koehler and Sappi.

9 All the undertakings to which the statement of objections was addressed, save three of them, submitted written observations in response to the objections raised by the Commission.

10 A hearing took place on 8 and 9 March 2001 and, on 20 December 2001, the Commission adopted the contested decision.

11 In the first paragraph of Article 1 of that decision, the Commission found that 11 undertakings had infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) by participating in a complex of agreements and concerted practices in the carbonless paper sector.

12 In the second paragraph of Article 1 of the contested decision, the Commission found *inter alia* that AWA, Bolloré, Koehler, Sappi and three other undertakings had participated in the infringement from January 1992 to September 1995, Divipa from March 1992 to January 1995 and Mougeot from May 1992 to September 1995.

13 Article 2 of the contested decision ordered the undertakings mentioned in Article 1 thereof to bring to an end the infringement referred to in Article 1, if they had not already done so, and to refrain from any agreements or concerted practices in relation to their activities in carbonless paper which might have the same or a similar object or effect to that of the infringement.

14 Under the first paragraph of Article 3 of the contested decision, the following fines, in particular, were imposed on the undertakings concerned:

— AWA: EUR 184.27 million;

— Bolloré: EUR 22.68 million;

— Divipa: EUR 1.75 million;

— Mougeot: EUR 3.64 million;

— Koehler: EUR 33.07 million;

— Sappi: EUR 0.

The proceedings before the Court of First Instance and the judgment under appeal

15 By separate applications lodged at the Registry of the Court of First Instance in the course of April 2002, Bolloré, AWA, Koehler, Divipa and five other undertakings brought actions against the contested decision.

16 By the judgment under appeal, the Court of First Instance dismissed inter alia the actions brought by Bolloré, Koehler and Divipa.

Forms of order sought and proceedings before the Court of Justice

17 Koehler requests that the Court of Justice:

— set aside the judgment under appeal and annul the contested decision;

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

— in the further alternative, refer the case back to the Court of First Instance for determination in accordance with the judgment of the Court of Justice as to points of law, and, in any event,

— order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

18 Bolloré requests that the Court:

— set aside the judgment under appeal;

— give final judgment and annul the contested decision or, in any event, reduce the fine imposed on it;

— in the event that the Court itself does not decide on the case, reserve the costs and refer the case back to the Court of First Instance for reconsideration in accordance with the Court's judgment, and

— order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

19 Divipa requests that the Court:

— set aside in whole or in part the judgment under appeal and give judgment expressly on the substance or refer the case back to the Court of First Instance;

— cancel or reduce the fine imposed on it, and

— order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

20 The Commission contends that the Court should dismiss the appeals and order the appellants to pay the costs.

21 By order of the President of the Court of 24 June 2008, Cases C-322/07 P, C-327/07 P and C-338/07 P were joined for the purposes of the oral procedure and the judgment.

The appeals

22 In the interests of clarity, some of the grounds of appeal put forward by the appellants are considered separately and others are considered together.

Bolloré's first ground of appeal: infringement of the rights of the defence on account of inconsistency between the statement of objections and the contested decision

23 Before the Court of First Instance, Bolloré maintained that, by not offering it the opportunity to comment, at the time of the administrative procedure, on the objection

alleging its personal and independent involvement in the cartel, the Commission infringed its rights of defence.

24 After setting out, in paragraphs 66 to 68 of the judgment under appeal, the case-law relating to observance of the rights of the defence and the content of the statement of objections, the Court of First Instance held, in paragraph 79 of that judgment, that the statement of objections sent to Bolloré had not allowed the latter to acquaint itself with the objection alleging its direct involvement in the infringement, or even with the facts established by the Commission in the contested decision in support of that objection, so that Bolloré was unable, as is clear from reading its reply to the statement of objections, properly to defend itself during the administrative procedure vis-à-vis that objection and the facts in question.

25 The Court of First Instance continued as follows, in paragraphs 80 and 81 of the judgment under appeal:

'80 However, even if the [contested] decision contains new allegations of fact or law on which the undertakings concerned have not been given the opportunity to comment, the defect will only entail the annulment of [that] decision in that respect if the allegations concerned cannot be substantiated to the requisite legal standard on the basis of other evidence in [that] decision on which the undertakings concerned were given the opportunity to comment …. Moreover, infringement of Bolloré's rights of defence is only capable of affecting the validity of the [contested] decision relating to Bolloré if [that] decision is based purely on the fact of Bolloré's direct involvement in the infringement …. In that case, since the new objection in the [contested] decision relating to Bolloré's direct involvement in the cartel activities could not be upheld, Bolloré could not be held liable for the infringement.

81 Conversely, if it transpires, when examining the substance …, that the Commission was correct to hold Bolloré liable for the participation of its subsidiary Copigraph in the cartel, the fact that the Commission erred in law cannot be sufficient to justify annulment of the [contested] decision because it could not have had a decisive

effect on the operative part adopted by the Commission …. According to settled case-law, in so far as certain grounds of a decision in themselves provide a sufficient legal basis for that decision, any errors in other grounds of the decision have no effect in any event on its operative part ….'

Arguments of the parties

26 In its appeal, Bolloré challenges paragraphs 79 to 81 of the judgment under appeal, structuring its first ground of appeal in two parts.

27 In the first part, Bolloré maintains that the Court of First Instance infringed the rights of the defence in refusing to endorse — by annulment of the contested decision — the finding that the statement of objections was incomplete. Bolloré relies in particular on a number of judgments of the Court of Justice and the Court of First Instance in the field of anti-competitive practices (Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307; Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365; Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687; Joined Cases T-39/92 et T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49) and in the field of concentrations (Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071).

28 The Commission contends that the basis of the contested decision so far as Bolloré is concerned is, as confirmed by the Court of First Instance, only its liability for the activities of its subsidiary. Bolloré could have sought annulment of the contested decision only if it had not been made aware in the statement of objections that the Commission intended to attribute to it the acts of its subsidiary.

29 The Commission adds that the case-law invoked by Bolloré either is irrelevant (*Ahlström Osakeyhtiö and Others* v *Commission* and *CB and Europay* v *Commission*) or shows that the Court of First Instance acted on a proper basis in the judgment under appeal (*Compagnie maritime belge transports and Others* v *Commission* and *ARBED* v *Commission*).

30 With regard to the second part of its first ground of appeal, Bolloré maintains that the Court of First Instance infringed the fundamental principle of observance of the rights of the defence in holding that the irregularity found had not affected the operative part of the contested decision. According to Bolloré, the case-law on which the Court of First Instance relied is not applicable here. The first set of judgments cited in paragraph 80 of the judgment under appeal concern a different situation from that in the present dispute in so far as it concerns Bolloré. In those judgments, the lack of precision in the statement of objections did not concern the determination and precise identification of liabilities but only the activities complained of. The second set of judgments (also referred to in paragraph 80) are of even less relevance to the debate, since those judgments concern merger control and State aid and, accordingly, an assessment on the merits of the compatibility of a transaction in the context of ex ante control, whilst this case concerns ex post facto control of whether a procedure was properly conducted.

31 Bolloré also challenges the 'end-result approach' to the rights of the defence which it claims the Court of First Instance adopted. In law, an approach whereby, in a case of infringement of a procedural rule, a decision is annulled only if the infringement has actually prejudiced the interests of the party concerned is not appropriate for all procedural infringements and, in particular, cannot be adopted in the present case. In fact, since Bolloré was not informed of the objections alleged against it personally, its rights were actually affected and in a practical way.

32 The Commission argues that the distinction drawn by Bolloré between ex ante control and ex post facto control is unclear. The case-law concerning merger control and State aid further shows that infringement of procedural rules does not automatically vitiate a decision. The Court of First Instance merely applied Community case-law in the traditional way.

33 As to the question whether the infringement of the rights of the defence had an impact on the operative part of the contested decision and, in this instance, on the amount of the fine imposed on Bolloré, the Commission contends that that argument is inadmissible inasmuch as it repeats an argument already made before the Court of First Instance and, in any event, is unfounded inasmuch as the activities of Bolloré's subsidiary (Copigraph) were imputed to it and such imputation is not in dispute.

Findings of the Court

34 It is settled case-law that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 9, and *ARBED* v *Commission*, paragraph 19).

35 To that end, Regulation No 17 provides that the parties are to receive a statement of objections which must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. That statement of objections constitutes the procedural safeguard applying the fundamental principle of Community law which requires observance of the rights of defence in all proceedings (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10).

36 That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the

administrative procedure brought against it (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 26; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 29; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 135; and *ARBED* v *Commission*, paragraph 20).

37 It follows from that principle that a competition decision in which the Commission imposes a fine on an undertaking without first having informed it of the objections relied on against it cannot be held to be lawful.

38 Given its importance, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person (*Compagnie maritime belge transports and Others* v *Commission*, paragraphs 143 and 146, and *ARBED* v *Commission*, paragraph 21).

39 It is also necessary that the statement of objections indicate in which capacity an undertaking is called upon to answer the allegations.

40 In the present case, however, as the Court of First Instance stated in paragraphs 72 and 77 of the judgment under appeal, the Commission intended, in the statement of objections, to hold Bolloré liable for the infringement on account of its responsibility, as the parent company owning all the shares in Copigraph at the time of the infringement, for Copigraph's participation in the cartel. Bolloré could not foresee, from the wording of the statement of objections, that it was the Commission's intention to hold it liable, in the contested decision, for the infringement on account of its direct and personal involvement in the cartel activities as well.

41 The Court of First Instance was thus correct in holding, in paragraph 79 of the judgment under appeal, that the statement of objections had not enabled Bolloré to acquaint itself with the objection based on that involvement or even with the facts established by the Commission in the decision in support of that objection, so that Bolloré had been unable properly to defend itself during the administrative procedure vis-à-vis the objection and the facts in question.

42 However, in paragraphs 80 and 81 of the judgment under appeal, the Court of First Instance held that the defect would entail the annulment of the contested decision only if the allegations concerned could not be substantiated to the requisite legal standard on the basis of other evidence in the decision on which the undertakings concerned had been given the opportunity to comment. It added that if it were to transpire, upon examination of the substance, that the Commission had been correct to hold Bolloré liable for the participation of its subsidiary Copigraph in the cartel, the fact that the Commission had erred in law would not be sufficient to justify annulment of the decision because the error could not have had a decisive effect on the operative part thereof.

43 Those considerations led the Court of First Instance, following its examination of the substance, to hold, in paragraph 150 of the judgment under appeal, that Bolloré was liable for the infringement of its subsidiary Copigraph irrespective of the direct involvement of the parent company and to uphold, in that judgment, the contested decision in so far as it ordered Bolloré to pay the fine imposed by the Commission, even though, on one essential point, Bolloré's rights of defence had been infringed.

44 However, the fact that in the contested decision Bolloré was held liable on the ground that it was involved in its capacity as Copigraph's parent company, as well as on the ground of its direct involvement, does not preclude the decision possibly having been based on conduct in respect of which Bolloré was not able to defend itself.

45 The Court of First Instance thus erred in law in failing to draw any legal conclusion from its finding that Bolloré's rights of defence had not been observed. Bolloré's first ground of appeal must therefore be declared well founded.

46 Since that ground of appeal is well founded, the judgment under appeal must be set aside in so far as it concerns Bolloré and it is not necessary to examine the other pleas put forward by it.

47 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded and the Court of Justice quashes the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is the case here.

48 It follows from paragraphs 34 to 46 of this judgment that the action is well founded and that the contested decision must be annulled in so far as it concerns Bolloré.

Divipa's first ground of appeal, concerning its participation in the infringement

49 Divipa denies that it attended the meetings of 5 March 1992 and 19 October 1994 relating to the Spanish market and also denies that it participated in the cartel on the European market. It structures this ground of appeal in three parts, which it is appropriate to consider in turn.

Divipa's first ground of appeal: first part, concerning its participation in the meeting of 5 March 1992

50 Divipa claims, in particular, that the Court of First Instance distorted the clear sense of the note from the Sappi employee of 9 March 1992 in that it failed to take into account or cite in the judgment under appeal a part of that note which stated that it was through customers and not directly that Sappi learnt about Divipa's prices. In Divipa's view, it is not logical that an undertaking which has allegedly taken part in a cartel meeting at which the issue of prices was discussed did not itself supply its prices directly at that meeting. Divipa's participation in the meeting of 5 March 1992 is therefore not established.

51 The Commission responds that any document must be examined in conjunction with the other items in the case-file. Since the Commission and the Court of First Instance are required to carry out an overall examination, the argument that one particular document does not prove a given fact is bound to fail if there are other documents in the file which may furnish such proof. Divipa casts no doubt on the probative value of the statements made by AWA and Sappi or on their interpretation by the Court of First Instance. In any event, the Commission points out, in particular, that in the note the Sappi employee merely confirms that Divipa had not increased its prices and that he knows that because a customer had sent him a price list. It is not surprising that an undertaking which does not keep to the prices agreed in the cartel does not inform the other members of the cartel but that does not mean that it is not participating in the cartel. Moreover, it is logical that undertakings which participate in a cartel should monitor the cartel and take issue with those participants who have not abided by jointly agreed decisions.

52 In this connection it should be recalled that the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 52; judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission*, paragraph 73; and Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others* v *Commission* [2008] ECR I-10193, paragraph 59).

53 A distortion of the facts and evidence before the Court of First Instance must be obvious from the documents on the Court's file without there being any need to carry out a new assessment of those elements (see, inter alia, *General Motors* v *Commission*, paragraph 54, *Evonik Degussa* v *Commission*, paragraph 74, and *Coop de France bétail et viande and Others* v *Commission,* paragraph 60).

54 The Court of First Instance accepted that Divipa had taken part in the meeting of 5 March 1992, after having made, in paragraphs 162 to 164, 171, 192, 194 and 197 of the judgment under appeal, the following findings:

'162 In the first place, Sappi admitted having participated in the cartel meetings concerning the Spanish market from February 1992 and supplied various pieces of information in that regard. In its reply of 18 May 1999 to the Commission …, Sappi refers to various collusive meetings concerning the Spanish market held on 17 and 27 February 1992, 30 September and 19 October 1993, and 3 May and 29 June 1994. In relation to the period from 1993 to 1995, an employee of Sappi stated … that it had attended six or seven meetings in Barcelona [Spain] with other suppliers. Those meetings took place around four or five times per year. He thought he first attended on 19 October 1993 and for the last time in 1995. According to him, the aim of those meetings was to fix prices for the Spanish market. The meetings lasted around two hours and generally ended in a decision to raise prices by a given percentage. The participants were Copigraph, … Koehler, … and Divipa. The extracts of Sappi's statements contained in the various documents are part of the documents attached to the [statement of objections], so that all the applicants had access to them. The Commission also produced them before the Court.

163 Secondly, AWA admitted participating in multilateral cartel meetings between the carbonless paper producers and gave the Commission a list of meetings between competitors held between 1992 and 1998. Document No 7828, which is an extract of the reply of 30 April 1999 sent by AWA to the Commission, includes a general statement by AWA as to the organisation of several meetings, inter alia, in Lisbon [Portugal] and Barcelona between 1992 and 1994, which it thinks were attended by representatives of … Divipa or by some … undertakings ….

164 AWA then supplied, in its reply to the [statement of objections], a list of "improper meetings between competitors the existence of which AWA claims it helped to prove. That list includes, for the Spanish market alone, the meetings of 17 February and 5 March 1992, 30 September 1993, 3 May, 29 June and 19 October 1994. That list … does not show which undertakings attended those meetings. Neither Divipa

… nor any other applicant identified that list as being an inculpatory document to which they did not have access or for which they did not make a request for access.

…

171 The note of 9 March 1992 … from Sappi's Spanish agent to Sappi Europe, while not being a complete account of the meeting, is very precise as to the conduct of the undertakings referred to, including Divipa. The parties discussed the matter of a price increase of 10 Spanish pesetas (ESP), being the objective set by the distributors but which was not fully achieved. The author of that note states that Divipa did not raise its prices at all. According to him, it is obvious that Sappi Europe cannot increase its prices if the other suppliers do not follow suit. …

…

192 … [A]ccording to AWA's statements referred to in paragraph 163 above, Divipa participated in the meetings on the Spanish market which were held between 1992 and 1994, or, at the very least, at some of those meetings. …

…

197 The fact, argued by Divipa in its reply of 18 May 1999, that Sappi does not mention that a meeting concerning the Spanish market was held on 19 October 1994 is explained by the fact that Sappi did not attend that meeting, as is proved by the list

of participants at the meeting drawn up by Mougeot. In any event, that fact cannot invalidate the bundle of consistent evidence proving that that meeting was held and attended by Divipa.

…

197 Divipa's participation in the cartel from March 1992 onwards is clear, first of all, from AWA's statements referred to in paragraphs 163 and 192 above. Those statements are further supported by Divipa's words in the note of 9 March 1992 referred to in paragraph 171 above. …'

55 From those paragraphs of the judgment under appeal, it is apparent that the findings made by the Court of First Instance were based on a number of facts and indicia, including AWA's statement and the note of 9 March 1992 from Sappi's agent, and a review of the documents does not reveal any substantive inaccuracy in the Court's findings.

56 Nor does any such inaccuracy arise from the fact that the Court of First Instance did not mention that the details concerning Divipa's pricing provided at the meeting concerned came from information given not by that undertaking but by its customers. As the Advocate General has pointed out in point 165 of his Opinion, that omission is not such as to establish that the Court of First Instance made an error of assessment in relation to Divipa's attendance at the meeting of 5 March 1992.

57 The first part of Divipa's first ground of appeal must therefore be declared unfounded.

Divipa's first ground of appeal: second part, concerning its participation in the meeting of 19 October 1994

58 Divipa submits that the statements made by Mougeot, which the Court of First Instance treated as proof of Divipa's alleged attendance at the meeting of 19 October 1994, were made after the material time and were made so that Mougeot would be able to invoke the Leniency Notice. However, according to the case-law, an admission by one undertaking which is being investigated for having participated in a cartel, the accuracy of which is contested by several other undertakings which are also under investigation for such participation, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.

59 Divipa argues that the Court of First Instance distorted the clear sense of the evidence by relying principally on its case-law for the purpose of establishing Divipa's participation in that meeting, which constitutes a manifest infringement of the principle of fair legal process and a flagrant error in the assessment of the facts.

60 The Commission contends that, in response to a request for information, AWA also placed Divipa among the cartel members in 1994. Since Divipa does not consider the Court of First Instance to have made an error in its assessment of that response, the part of the ground of appeal relating to the meeting of 19 October 1994 is inoperative. In any event, there is no allegation that the Court of First Instance misinterpreted Mougeot's statements. In addition, the Court took account of the fact that the statements were made after the material events in this case.

61 In that regard, it is not apparent here either that the Court of First Instance distorted the facts so far as Divipa's attendance at the meeting of 19 October 1994 is concerned.

62 As with the assessment it carried out in relation to the meeting of 5 March 1992, the Court of First Instance made findings on the basis of a number of items of evidence before concluding that Divipa had taken part in the meeting of 19 October.

63 It took into account, as is shown in paragraphs 163, 164 and 192 of the judgment under appeal, the statements of AWA, with which Divipa does not take issue. It also found as follows in paragraphs 165 and 166 of the judgment under appeal:

> '165 … [I]n its statements of 14 April 1999 …, Mougeot, which also admitted its participation in multilateral cartel meetings between carbonless paper producers, lists a number of meetings, indicating for each one, its object, content and the persons who were present. Those meetings include, in respect of the Spanish market, the one of 19 October 1994, to which Copigraph, … Divipa, … Koehler, AWA and Mougeot, according to the latter, sent a representative. …
>
> 166 Admittedly, Mougeot gave its statements after the material events and for the purpose of application of the Leniency Notice. They cannot however be regarded as devoid of probative value. Statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence …'

64 In the exercise of its exclusive jurisdiction, the Court of First Instance assessed the facts as a whole, taking into account the probative value of the various items of evidence available to it (which does not fall to be reviewed by the Court of Justice) and it does not appear that that assessment was made on the basis of an obvious misinterpretation of the documentary evidence.

65 The second part of the first ground of appeal put forward by Divipa must therefore be declared to be unfounded.

Divipa's first ground of appeal: third part, concerning its participation in the cartel on the European market

66 Divipa submits that the Court of First Instance distorted or omitted certain evidence. It stresses that it is not a producer of carbonless paper, that it sold only on the national market, that it was the only non-producer company criticised for allegedly attending certain meetings on the national market and that it does not belong to any distribution network, in Spain, of major European carbonless paper producers. There is no document establishing that there was any mention, at the meetings which it is said to have attended, of the existence of a plan for wider collusion.

67 The Commission responds, in the first place, that it was not required to show that Divipa knew of the existence of a wider cartel but only that it 'ought to have known of it'. In the second place, Divipa did not specify the points in the Court of First Instance's reasoning where the Court was alleged to have distorted the facts. In the third place, the fact that Divipa is present only on the national market does not preclude a situation in which it 'ought to have known' that there was a wider cartel. In the fourth place, since there was circumstantial evidence showing that Divipa could have been aware of the European dimension of the cartel, the Court of First Instance could not ignore it. Last, the note drafted by Mougeot after the meeting of 19 October 1994 states that the 'AEMCP (Association of European Manufacturers of Carbonless Paper) volumes announced in respect of Spain' were mentioned in the course of the meeting, which shows that those attending the meeting were aware of the European dimension of the cartel.

68 As has already been observed in paragraph 52 of this judgment, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts, save where the clear sense of the evidence has been distorted.

69 The Court therefore has no jurisdiction to examine the third part of the first ground of appeal advanced by Divipa since it does not seek to establish a distortion of the facts on the part of the Court of First Instance but rather to prove that the latter — incorrectly — omitted to take into account certain facts which showed that Divipa did not participate in the cartel on the European market.

70 This part of Divipa's first ground of appeal must therefore be rejected as inadmissible.

71 It follows from the foregoing considerations that Divipa's first ground of appeal concerning its participation in the infringement must be rejected.

Divipa's second ground of appeal, alleging that the Court of First Instance relied on circumstantial evidence

Arguments of the parties

72 Divipa invokes Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') as well as failure to respect the principle of the presumption of innocence. It claims that there is no direct evidence such as to substantiate its attendance at the meetings of 5 March 1992 and 19 October 1994 or its participation in the cartel at European level. The Court of First Instance failed to observe two fundamental conditions in that respect. First, the reasoning concerning the causal link between the circumstantial evidence and the facts comprising the infringement is inadequate and, second, where any doubts remain, they should be looked into and, if they cannot be dispelled, should operate in favour of the person concerned.

73 The Commission contends inter alia that Divipa's second ground of appeal is clearly inadmissible, since it fails to specify either the points on which the judgment under appeal is contested or which evidence, presumption or facts are concerned.

Findings of the Court

74 In maintaining that the Court of First Instance acted incorrectly in failing to take into account its observations, supported by its documentary evidence, when explaining the significance to be attached to the evidence on which it relied, Divipa is in reality asking the Court of Justice to carry out a fresh appraisal of the Court of First Instance's assessment of the facts, circumstantial evidence and other elements placed before it.

75 As has been observed in paragraph 52 of this judgment, the Court of Justice has no jurisdiction to carry out such an examination, since the assessment of the facts falls exclusively within the jurisdiction of the Court of First Instance, save where the clear sense of the facts has been distorted.

76 The second ground of appeal put forward by Divipa is therefore inadmissible.

Koehler's second ground of appeal, concerning the duration of the infringement

Arguments of the parties

— Koehler's arguments

77 Koehler submits that the examination of the evidence carried out by the Court of First Instance was inadequate and that the Court distorted the clear sense of the evidence. The conclusions drawn by the Court were incorrect so far as they concerned the duration of Koehler's participation in the infringement. Koehler structures this ground of appeal in two parts, each of which includes a number of arguments.

78 With regard to the first part of the second ground of appeal, concerning the alleged cartel meetings within the framework of the AEMCP before September or October 1993, the Commission relied on three categories of evidence, Mougeot's statements, the testimony of the Sappi employee and the evidence demonstrating that national or regional cartel meetings were organised.

79 Koehler submits first of all that Mougeot's letter of 14 April 1991 does not contain any admission that cartel meetings took place in the period before October 1993. The Court of First Instance stated moreover, in paragraph 279 of the judgment under appeal, that it had not been established that there was collusion on prices from January 1992, thus prior to October 1993. The arguments of the Court of First Instance concerning the alleged price agreements within the framework of official AEMCP meetings before October 1993 are inadequate and contain contradictory reasoning, amounting to an error of law. Nor did the Court of First Instance observe the principle of presumption of innocence when it sought to interpret Mougeot's statements as an admission of an infringement in respect of the period before October 1993.

80 Koehler also argues that the Sappi employee's testimony gives no information regarding the period during which the cartel meetings took place. The Court of First Instance was not entitled to conclude that by failing to make any 'assertions to the contrary' that employee wished to confirm implicitly that the infringement had begun before September 1993. The Court of First Instance thus distorted that employee's testimony. That infringes the right to a fair hearing contained in Article 6 of the ECHR and in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

81 Lastly, Koehler considers that no credence can be given to statements by a repentant witness unless they are corroborated by other evidence. In the present case there is no evidence to substantiate those statements.

82 As regards the second part of Koehler's second ground of appeal concerning its attendance at national or regional cartel meetings before October 1993, the Court of First Instance, according to Koehler, distorted the evidence that was supposed to establish its attendance.

83 With regard to the meeting of 17 February 1992 concerning the Spanish market, the Court of First Instance had no grounds for concluding that Koehler attended that meeting, since the Sappi employee, in his note of 17 February 1992, refers only to a meeting of 'interested parties' without naming those parties. The Court of First Instance does not give a precise explanation of the reasons why Koehler was believed to have been a participant in the agreement.

84 With regard to the meeting of 5 March 1992 concerning the Spanish market, the Court of First Instance relied above all, in concluding that Koehler attended that meeting, on the observations submitted by AWA in response to the statement of objections addressed to it. Those observations were not, however, sent to Koehler, which claims that the Court of First Instance thus infringed its rights of defence.

85 As regards the meetings relating to the French market, which took place in the spring of 1992 and 1993, Koehler submits that there is no proof that one of its employees went to Paris to attend a cartel meeting in spring 1993. The reasoning of the Court of First Instance on this point is so imprecise that it does not satisfy the obligation to state reasons. In any event, the Court of First Instance makes no finding that Koehler took part in a meeting on the French market in the spring of 1992.

86 Koehler submits that its participation in the meeting of 16 July 1992 concerning the Spanish market has not been proved, contrary to the Court of First Instance's finding, since AWA did not expressly confirm such participation.

— The Commission's response

87 The Commission contends that Koehler is not pleading distortion of the evidence but is seeking to reopen the Court of First Instance's assessment of the facts. The plea is therefore inadmissible.

88 As regards the first part of the ground of appeal, concerning cartel meetings within the framework of the AEMCP before October 1993, the question whether Mougeot's letter is clear or ambiguous is a question of interpretation and assessment of the evidence, which falls within the exclusive jurisdiction of the Court of First Instance. The latter did not state that Mougeot had admitted there was an infringement in respect of the period before 1 October 1993.

89 Moreover, the judgment under appeal is not vitiated by inconsistency or a failure to state adequate reasons. In paragraph 279 of that judgment, the Court of First Instance did not say that 'it has not been established' that collusive price agreements were concluded from January 1992 in the framework of AEMCP meetings but merely explained that Sapphi's statements alone were not sufficient to determine the exact

point at which those meetings could be regarded as cartel meetings. Paragraph 308 of the judgment under appeal is supported by a body of evidence, most of which is not called in question by Koehler, and the fact that the Court of First Instance does not state which meetings served as a framework for collusive price agreements at European level does not render its reasoning inadequate. Furthermore, since Koehler attended all the AEMCP meetings which were held during the period in question, it is of no consequence in its case to ascertain during which precise meetings the collusive nature of the system became apparent.

90 In the Commission's view, the Court of First Instance took full account of the presumption of innocence, since it considered whether a finding could be made in respect of the conduct complained of on the basis of a single piece of evidence or whether that evidence was merely circumstantial and needed to be completed and corroborated by other evidence.

91 The Commission denies that the sense of the statements of the Sappi employee was distorted. The Court of First Instance found, in paragraph 270 of the judgment under appeal, that the employee gave no indication of the time to which his recollections related and, if the Court concluded that those recollections covered periods before and after October 1993, that is the result of an assessment of the evidence, which is within its jurisdiction. Sappi's statements are also corroborated by other items of evidence referred to in paragraphs 261 to 307 of the judgment under appeal.

92 With regard to the second part of Koehler's second ground of appeal, concerning the national or regional cartel meetings before October 1993, the Commission submits first of all that Koehler's arguments will be redundant if its arguments concerning the AEMCP meetings are rejected by the Court of Justice. The findings on that point are sufficient for the undertakings to be held liable for the infringement for the period in question. Further, since Koehler does not challenge the findings of the Court of First Instance relating to its attendance at other cartel meetings, namely those on 14 January 1993 concerning the United Kingdom and Irish markets and on 30 September 1993

concerning the Spanish market, Koehler's participation in the cartel is established as of January 1993. Finally, Koehler's arguments are inadmissible and, in any event, unfounded.

93 With regard to the meeting of 17 February 1992, the Commission refers to paragraph 321 of the judgment under appeal in order to deny that there was any distortion of the clear sense of the evidence and submits that that paragraph satisfies the obligation to state reasons in relation to that meeting.

94 So far as the meeting of 5 March 1992 is concerned, the Commission points out inter alia that Koehler has not challenged paragraph 284 of the judgment under appeal and adds that the reference in that paragraph to the statements of AWA is made only for the sake of completeness. The Court of First Instance turned to AWA's response only in second place. The Commission relies in that regard on paragraph 323 of the judgment under appeal.

95 In relation to the meetings which took place in the spring of 1992 and 1993, the Commission maintains inter alia that, in paragraph 285 to 293 of the judgment under appeal, the Court of First Instance established that the competitors held meetings in those periods and that the meetings had an anti-competitive purpose; that has not been challenged on appeal.

96 The Commission points out that, with regard to the meeting of 16 July 1992, the Court of First Instance, in paragraph 332 of the judgment under appeal, based its findings on the statements of Mr B.G. The Court took account of AWA's statement only for the purpose of corroboration. The Commission refers in that regard to paragraphs 333 to 335 of the judgment under appeal.

Findings of the Court

— Cartel meetings in the framework of the AEMCP in the period before September or October 1993

97 In paragraphs 261 to 280 of the judgment under appeal, the Court of First Instance analysed the pleas put forward by the applicants at first instance, including Koehler, relating to their participation in the AEMCP meetings before September or October 1993.

98 It is clear from those paragraphs that the Court of First Instance upheld the findings which the Commission had made on the basis of a body of evidence formed of a number of testimonies and statements, including the note from the Sappi employee dated 9 March 1992 and the statements of AWA and Mougeot on the case file.

99 In proceeding in that way, the Court of First Instance, in the exercise of its exclusive jurisdiction, assessed the probative value of that evidence and drew conclusions which it is not for the Court of Justice to review.

100 As a consequence, the first part of Koehler's second ground of appeal must be declared to be in part unfounded and in part inadmissible.

— National or regional cartel meetings before October 1993

101 With regard to the meeting of 17 February 1992, it is not apparent from paragraph 321 of the judgment under appeal that the Court of First Instance infringed the obligation incumbent upon it under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice to state reasons (see Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 42). The Court of First Instance states in that paragraph that, in order to find that Koehler had participated in the meeting of 17 February 1992, the Commission relied on Sappi's internal note of the same date, describing a meeting of the 'interested parties' and that that reference — read in conjunction with those contained in that same note relating to the uncertainties caused by the conduct of, among others, Koehler on the Spanish market — enabled the Commission to conclude that Koehler was among the 'interested parties' attending that meeting, the purpose of which was to examine the problems connected with the failure of Koehler and another undertaking to comply with the agreement to which it was party, as is clear from the note of the Sappi employee of 9 March 1992. The Court of First Instance thus sets out sufficiently clearly the reasoning which the Commission followed in order to conclude from the various items of evidence available to it that Koehler had participated in the meeting of 17 February 1992.

102 Nor is it apparent from paragraph 321 of the judgment under appeal that the Court of First Instance distorted the facts in any way. Such distortion is not obvious and it is for the Court of First Instance alone to assess the facts and the various items of evidence available to the Commission when reaching its finding that Koehler participated in the meeting of 17 February 1992. The Court of Justice does not have jurisdiction to review an assessment of that kind.

103 Koehler's arguments on that point must therefore be rejected as partly unfounded and partly inadmissible.

104 With regard to the meeting of 5 March 1992, it should be noted that, even assuming that Koehler's argument alleging infringement of the rights of the defence were well founded on the ground that, in concluding that Koehler attended the meeting, the Court of First Instance relied, in paragraph 324 of the judgment under appeal, on the observations submitted by AWA in response to a request for information from the Commission

while Koehler had no knowledge of those observations, that argument alone does not suffice to rebut the finding that Koehler participated in the infringement throughout the period from January 1992 to September 1995, as is stated in the second paragraph of Article 1 of the contested decision. It should be observed in this connection that Koehler was not in a position to deny that it attended the meeting of 17 February 1992, as is clear from paragraphs 101 and 102 of this judgment.

105 Koehler's argument on this point must therefore be rejected as inoperative.

106 As regards the meetings which took place in spring 1992 and spring 1993 concerning the French market and the meeting of 16 July 1992, the Court of First Instance, in paragraphs 285 to 293 and 332 to 334 of the judgment under appeal, referred to the various facts and indicia on which the Commission relied to establish that the undertakings involved, which included Koehler, had participated in the meetings concerned. It is not apparent from such a reference that the Court of First Instance distorted the facts in any way.

107 Koehler's argument on this point must therefore be rejected as unfounded and, consequently, its second ground of appeal cannot succeed.

Koehler's first ground of appeal and Divipa's third ground of appeal, concerning the setting and the amount of the fines

108 Koehler and Divipa structure their pleas relating to the setting and the amount of the fines in a number of parts which it is appropriate to analyse in turn.

Koehler's first ground of appeal: first part, concerning the principle of equal treatment

109 As a preliminary point, it should be noted that the Court of First Instance considered (i) in paragraphs 473 to 478 of the judgment under appeal, whether the Commission had taken into account an incorrect turnover figure for Koehler in comparison with its treatment of other undertakings and (ii) in paragraphs 505 to 522 of that judgment, whether the Commission's classification of Koehler and other undertakings concerned into categories, for the purpose of setting the amount of the fines, observed the principle of equal treatment.

110 In its appeal, Koehler criticises paragraphs 477, 478 and 496 of the judgment under appeal. It submits that it was treated differently from larger undertakings which belonged to a group and stresses that it is a medium-sized family business which is run by its owners. Its share capital is EUR 43.2 million and its turnover was approximately EUR 447 000 for the year 2000. It points to the cases of AWA, M-real Zanders GmbH and Mitsubishi HiTec Paper Bielefeld GmbH to try to show that it was treated differently so far as the taking into account of its turnover was concerned.

111 The Commission points out that it has a broad discretion in relation to the method of calculating fines. Consequently the Court of First Instance did not infringe the principle of equal treatment in finding no error of law in the method applied when the undertakings were placed in five categories on the basis of product turnover in the European Economic Area.

112 In that regard, it is the case, as is clear from settled case-law, that the Commission enjoys a broad discretion as regards the method for calculating fines. That 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) of the ECSC Treaty (OJ 1998 C 9, p. 3), displays flexibility in a number of ways, enabling the Commission to exercise its discretion in

accordance with Article 15(2) of Regulation No 17 (see, to that effect, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraphs 46 and 47, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 133).

113 Within that framework, it is for the Court of Justice to verify whether the Court of First Instance has correctly assessed the Commission's exercise of that discretion (*SGL Carbon* v *Commission*, paragraph 48, and *Dalmine* v *Commission*, paragraph 134).

114 It should be added that it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. It follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure (see *Musique Diffusion française and Others* v *Commission*, paragraph 121; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111; and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 243).

115 In the present case, it is not apparent that the Court of First Instance made an error of law in rejecting Koehler's argument concerning the taking into account of its total turnover.

116 As the Court of First Instance rightly found in paragraph 476 of the judgment under appeal, the Commission, in the contested decision, drew a distinction between the undertakings concerned by reference to their relative importance in the market

concerned, taking as the basis for that distinction product turnover in the European Economic Area. Such a method is intended to prevent fines being set on the basis of a simple calculation based on the total turnover of each undertaking and thus giving rise to differences in treatment.

117 The Commission did not therefore exceed its discretion and the principle of equal treatment was not infringed by the Court of First Instance.

118 Suffice it to say that Koehler's arguments in respect of paragraphs 477 and 478 of the judgment under appeal are complaints directed against grounds stated purely for the sake of completeness and they must therefore be rejected.

119 Indeed, it is settled case-law that the Court of Justice rejects outright such complaints, since a challenge directed solely against grounds included purely for the sake of completeness cannot result in the judgment under appeal being set aside (see, to that effect, order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 47, and judgments in Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 23, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 106).

120 The first part of Koehler's first ground of appeal must therefore be declared unfounded.

The part of Koehler and Divipa's grounds of appeal concerning the principle of proportionality

121 Koehler submits in essence that, given that it is structured as a family business which is not quoted on a stock exchange, the Commission's calculation of the fine imposed on it was in breach of the principle of proportionality.

122 The Commission contends inter alia that, in accordance with its settled practice, it took into account the relative importance of each of the undertakings on the market concerned by the infringement then adjusted upwards the original amount of the fine thus set, taking into account the size and the worldwide resources of the various undertakings, and that it accordingly considered whether the amount originally set should be adjusted in order to achieve the necessary deterrent effect.

123 Divipa also maintains that the Court of First Instance infringed the principle of proportionality since it did not take into account Divipa's economic situation or the fact that it is not a producer of carbonless paper, unlike the other undertakings concerned. The actual turnover to be taken into account for the purpose of calculating fines is an amount corresponding to the difference between sales of finished carbonless paper to final customers and purchases of such paper from producers.

124 The Commission contends that the argument concerning the principle of proportionality is inadmissible on the ground that neither Divipa's economic situation nor the matters which ought to have been taken into account for the purpose of calculating the fines were ever raised by Divipa before the Court of First Instance. The argument relating to the nature of the undertaking is not admissible either, since Divipa does not challenge the relevant points of the judgment under appeal. In any event, it is clear from the case-law that the Commission is not obliged, when it sets the fine, to take account of an undertaking's financial situation.

125 In that regard, it must be observed that in the context of an appeal the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 81 EC and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, in particular, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 128; Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 47; and *Dansk Rørindustri and Others* v *Commission*, paragraph 244).

126 It is clear that in the cases before it the Court of First Instance correctly took into consideration all the essential factors to assess the gravity of the conduct of both Koehler and Divipa and that it responded to a sufficient legal standard to all the arguments raised by them.

127 With regard to Koehler, since the fixing of a fine cannot be the result of a simple calculation based on total turnover (as has been recalled in paragraph 114 of this judgment), the Court of First Instance was correct in finding, in paragraph 494 of the judgment under appeal, that a comparison of the percentage that the fines imposed by the Commission represented in relation to the overall turnover of the undertakings concerned was not sufficient to establish the disproportionate nature of Koehler's fine. Nor did the Court of First Instance fail to take into consideration the structural and financial differences between Koehler and the other undertakings fined, as the Advocate General has noted in point 277 of his Opinion.

128 With regard to Divipa, the Court of First Instance rightly took into consideration its participation in the various cartels and no infringement of the principle of proportionality can be established in that connection. Furthermore, Divipa's argument concerning the failure to take into account its financial capacity is not admissible since it is raised for the first time before the Court of Justice (see, to that effect, Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114 and case-law cited).

129 The parts of Koehler and Divipa's grounds of appeal concerning the principle of proportionality must therefore be held to be unfounded and, in the case of Divipa, also inadmissible in part.

130 Divipa further submits that, in relation to the classification of the infringement, the Court of First Instance also infringed the principle of proportionality, since, first, Divipa did not participate in a European cartel and that, as a result, the infringement cannot be regarded as very serious and, second, it did not attend all the meetings concerning the Spanish market, as it participated in the cartel for less than a year.

131 In response to that point, the Commission submits that the argument is unfounded, since a cartel, including one of purely national dimensions, is generally regarded as very serious whilst the original amount of the fine is rather low for an infringement of that kind. In addition, the duration of the infringement is wholly unrelated to the gravity thereof.

132 In that regard, it should be noted that the Court of First Instance approved the criteria used by the Commission for calculating the fines and it is not apparent that it made any error of law in that regard, as the Commission exercised its discretion consistently with the guidelines referred to in paragraph 112 of this judgment and in the way described in that paragraph.

133 The part of Divipa's third ground of appeal concerning the classification of the infringement must therefore be held to be unfounded.

The part of Divipa's third ground of appeal concerning the obligation to state reasons

134 Divipa submits that in paragraph 629 of the judgment under appeal the Court of first Instance infringed the obligation to state reasons in holding as follows:

'… [T]he mere fact that [Divipa] may not have complied fully with the agreements entered into — if established — is not sufficient to oblige the Commission to make a finding of attenuating circumstances in its favour. [Divipa] could, through its more or less independent policy on the market, simply be trying to exploit the cartel for its own benefit …'

135 According to Divipa, those two sentences in paragraph 629 are not a sufficient statement of reasons. Whilst Divipa produced evidence in support of its request that attenuating circumstances should be found in its favour, the Court of First Instance did not show that Divipa had obtained any benefit, which would have given the Court grounds for refusing its request.

136 The Commission contends in particular that the argument is inoperative, since the sentences of paragraph 629 of the judgment under appeal which are criticised merely set out the elements on which the Court of First Instance relied. In addition, the mere fact that Divipa may, on occasion, have acted in a way which did not fully comply with the agreements concluded within the framework of the cartel is not sufficient to oblige the Commission to acknowledge that there are attenuating circumstances in Divipa's favour. The Court of First Instance merely reproduced, in paragraph 629, a line of reasoning used on numerous occasions by the Community judicature.

137 In that regard, as the Advocate General has pointed out in points 287 and 288 of his Opinion, the sentences in paragraph 629 of the judgment under appeal which are criticised by Divipa are included purely for the sake of completeness and Divipa has not challenged the other grounds on which the Court of First Instance relied in order to justify the fact that Divipa did not benefit from attenuating circumstances.

138 The part of Divipa's third ground of appeal concerning the obligation to state reasons must therefore be held to be unfounded.

139 It follows from the foregoing considerations that the grounds of appeal put forward by Koehler and Divipa concerning the setting of the fines must be rejected.

Divipa's fourth ground of appeal: infringement of the right to a fair hearing in view of the duration of the proceedings before the Court of First Instance

Arguments of the parties

140 Divipa submits that the right that proceedings concerning an infringement should be completed within a reasonable period is applicable in competition matters to administrative procedures and judicial proceedings. That right was infringed because the proceedings before the Court of First Instance lasted five years from commencement of the action on 18 April 2002 until delivery of the judgment under appeal on 26 April 2007.

141 The Commission contends that the reasonableness of a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case, its complexity and the conduct of both the applicant and the competent authorities.

142 With regard to the proceedings before the Court of First Instance, the Commission points out that 10 undertakings challenged the contested decision and that there were 4 languages of the case, that a great many facts were disputed and that it was necessary to assess the probative value of the statements and documents concerning the applicants at first instance in order to ascertain their veracity, that the pleas put forward by the

applicants, as well as having some similarities, also differed, that they concerned questions of substance and procedure as well as questions concerning the amount of the fine. The length of the proceedings is therefore not excessive. In any event, the Commission contends that a procedural irregularity such as the one complained of, even assuming it were established, cannot result in the judgment under appeal being set aside in full.

Findings of the Court

143 It must be borne in mind that the general principle of Community law that everyone is entitled to a fair hearing, which is inspired by Article 6(1) of the ECHR, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law (*Baustahlgewebe* v *Commission*, paragraphs 20 and 21; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2003] ECR I-8375, paragraph 179; Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 154; and *Sumitomo Metal Industries and Nippon Steel* v *Commission*, paragraph 115).

144 The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (*Baustahlgewebe* v *Commission*, paragraph 29; *Thyssen Stahl* v *Commission*, paragraph 155; and *Sumitomo Metal Industries and Nippon Steel* v *Commission*, paragraph 116).

145 The Court has held in that regard that that list of criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the

case may be deemed to justify a duration which is prima facie too long (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 188; *Thyssen Stahl* v *Commission*, paragraph 156; and *Sumitomo Metal Industries and Nippon Steel* v *Commission*, paragraph 117).

146 In the present case, the proceedings before the Court of First Instance lasted five years, from the lodging by nine undertakings of their applications (between 11 and 18 April 2002) until 26 April 2007, the date on which the judgment under appeal was delivered.

147 It is necessary to consider the duration of the proceedings in the light of the circumstances of the case. As the Advocate General has pointed out in points 145 to 148 of his Opinion, that period can be justified in view of the complexity of the case and of, in particular, the fact that virtually all the facts forming the basis of the contested decision were disputed before the Court of First Instance and had to be verified. Furthermore, nine undertakings brought actions against the contested decision in four languages of the case and one Member State, namely the Kingdom of Belgium, applied for leave to intervene. Following the joinder of the actions, the judgment under appeal was delivered in respect of the nine actions.

148 Those various circumstances necessitated a parallel examination of the nine actions and the duration of the proceedings can easily be explained by the thorough investigation of the case carried out by the Court of First Instance and by the language constraints imposed by the Rules of Procedure applicable before that Court.

149 In view of the foregoing, it must be found that the proceedings before the Court of First Instance satisfied the requirements concerning completion within a reasonable period.

150 It follows from paragraphs 49 to 149 of this judgment that none of the grounds of appeal put forward by Koehler and Divipa can be accepted and that their appeals must accordingly be dismissed.

Costs

151 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is required to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

152 The Commission has been unsuccessful in its defence with regard to the appeal brought by Bolloré, which has applied for costs against it. The Commission must therefore be ordered to pay the costs of the proceedings before the Court of First Instance and on appeal so far as they concern Bolloré.

153 Since Koehler and Divipa have been unsuccessful and the Commission has applied for costs against them, Koehler and Divipa must be ordered to pay the costs of these proceedings so far as their respective appeals are concerned.

On those grounds, the Court (Third Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* in so far as it concerns Bolloré SA.**

2. **Annuls Commission Decision 2004/337/EC of 20 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) in so far as it relates to Bolloré SA.**

3. Dismisses the appeals brought by Papierfabrik August Koehler AG and Distribuidora Vizcaína de Papeles SL.

4. Orders the Commission of the European Communities to pay the costs at first instance and on appeal in Case C-327/07 P.

5. Orders Papierfabrik August Koehler AG to pay the costs in Case C-322/07 P and Distribuidora Vizcaína de Papeles SL to pay the costs in Case C-338/07 P.

[Signatures]